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Severe ESI-Spoliation Sanctions -- Rimkus Response to Pension Committee

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John K. Rabiej on the Rimkus Response to Pension Committee, Which Highlights Wide Divergence in Case Law Governing Imposition of Severe ESI-Spoliation Sanctions

By John K. Rabiej

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SUMMARY: A party's conduct in losing or deleting ESI may be sufficiently egregious in itself to warrant an adverse inference instruction under certain circumstances. The topic was extensively addressed in *Pension Committee of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, and *Rimkus Consulting Group, Inc. v. Cammarata*.

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ARTICLE: John K. Rabiej on the *Rimkus Response to Pension Committee*, Which Highlights Wide Divergence in Case Law Governing Imposition of Severe ESI-Spoliation Sanctions

Introduction

Proving that ESI - which was lost or allegedly deleted after preservation obligations have arisen but months before the filing of a case - is relevant and essential to a party's claims or defenses can be difficult and sometimes virtually impossible. Ordinarily, the party alleging ESI loss or deletion has the burden to prove by direct or circumstantial evidence that the lost or deleted ESI is relevant and essential to its underlying claim as a predicate justifying an ESI adverse inference instruction, which shifts the burden of proof from the "blameless" party to the party responsible for losing or deleting the ESI. Unless the party demonstrates both relevance and prejudicial effect, however, no adverse inference instruction is warranted. Nonetheless, a party's conduct in losing or deleting ESI may be sufficiently egregious in itself to warrant an adverse inference instruction under certain circumstances. The topic was extensively addressed in *Pension Committee of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010) and *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598 (S.D. Tex. 2010). Designating which party has the burden to demonstrate whether lost or deleted ESI is relevant and essential to a party's underlying claim (or the opposite) can have outcome determinative consequences.

Pension Committee and *Rimkus* based their rulings on their respective circuit case law. These cases apply different standards in evaluating the extent of a party's culpability in losing or deleting ESI sufficient to warrant an adverse inference instruction, which shifts the burden of proof. Their holdings highlight the wide divergence in case law that governs the imposition of severe ESI-spoliation sanctions. Each opinion cites scores of cases and provides informative guidance in a treatise-like fashion on the standards governing the imposition of an adverse inference instruction as a sanction for failing to preserve ESI. The decisions apply two very different standards that courts have relied on in

penalizing a party for failing to preserve ESI. They underscore the need for uniform standards, urged by the court in *Victor Stanley Inc. v. Creative Pipe, Inc.*, 2010 U.S. Dist. LEXIS 93644 (D. Md. Sept. 9, 2010), a third treatise-like opinion discussing severe ESI-spoliation sanctions.

Background

The sanctioned plaintiffs in *Pension Committee* consisted of six individual groups of investors that filed a lawsuit on February 12, 2004, to recover losses of 550 million dollars from the liquidation of two hedge funds. They alleged claims under the federal securities laws and claims under New York law against former directors, administrators, the auditor, and the prime broker and custodian of the funds. The plaintiff in *Rimkus* is a forensic engineering contractor with 30 offices located in 18 states. It filed its lawsuit in January 2007. The sanctioned defendants in *Rimkus* were two former employees who allegedly breached non-competition and non-solicitation covenants in their written employment agreements and misused trade secrets and proprietary information in setting up a new company in competition with the plaintiff.

In both cases, the offending parties were sanctioned for failing to preserve relevant ESI when the parties were under an obligation to do so. But the *Rimkus* court required a higher level of culpability than the court in *Pension Committee*. The *Rimkus* defendants admitted that they intentionally deleted ESI, while the defendants suspected that the plaintiffs in *Pension Committee* deleted ESI caused by sloppy and careless preservation efforts.

Form of Adverse Inference Instructions

A court exercises broad discretion in supervising discovery. It can employ a wide range of sanctions in penalizing parties for ESI spoliation though its inherent authority to regulate the litigation process. Courts narrowly construe their inherent power when sanctioning a party, and their sanctions should be reasonable and proportional under all the circumstances of the case.

An adverse inference instruction is one of the most severe sanctions a court can impose on a party for failing to preserve ESI, when the party is under a duty to do so. Only outright dismissal of a case or a default judgment is more severe. The first two terminate a case, while litigants usually view the most severe form of an adverse inference instruction as case dispositive, with settlements typically ensuing in short order. These three types of severe sanctions are properly reserved only for cases involving particularly egregious conduct.

Pension Committee and *Rimkus* describe three forms of adverse inference instructions that a court can impose on the opposing party for failing to preserve ESI, which are based on the parties' culpability and prejudicial effect. In its most severe form, a court may instruct a jury that lost ESI must be deemed admitted and must be accepted as true. Under such an instruction, the opposing party cannot rebut the facts that are deemed to be true. In a less harsh form, a court may give a mandatory presumption instruction that lost ESI must be deemed admitted and accepted as true, subject to rebuttal from the opposing party. In its least harsh form, a court may give a permissive presumption instruction that shifts the burden of proof, instructing the jury that it may, but is not required, to presume that the lost ESI is relevant and favorable to the opposing party, subject also to rebuttal by the opposing party.

The Fifth, Seventh, Tenth, Eleventh, and D.C. Circuits have held that a party's negligence in losing or deleting ESI is insufficient to issue an adverse inference instruction. The First, Second, Fourth, and Ninth Circuits have held that bad faith is not required as a predicate to issue an adverse instruction, though the cases typically emphasize the party's bad faith and the party's egregious conduct. The Third Circuit balances the extent of fault and prejudice.

Divergent Approaches

The court in *Pension Committee* recognized that the "judgment call of whether to award sanctions is inherently subjective. A court has a 'gut reaction' based on years of experience as to whether a litigant has complied with its discovery obligations...." Both judges in *Pension Committee* and *Rimkus* awarded a permissive, rebuttable adverse

inference instruction as a sanction against parties for failing to preserve ESI when the parties were obligated to do so. But the evidence sufficient to support the sanctions significantly varied. *Rimkus* applied a subjective standard, requiring a "bad faith" finding that the defendants intentionally had deleted ESI for the specific purpose of preventing its use in the litigation. Conversely, *Pension Committee* applied an objective standard, requiring a finding that the plaintiffs' conduct in failing to preserve ESI was "grossly negligent." Unlike *Rimkus*, a failure to conform to the grossly negligent standard in *Pension Committee* could be found even if the actions arose "from a pure heart and an empty head."

The sanction in *Rimkus* was conditioned on an additional finding. *Rimkus* left open the preliminary question of whether the defendants' intentional destruction of ESI was intended to prevent its use in the litigation, because the prejudice caused by the deletion was uncertain. That issue was also reserved for the jury's decision. In *Pension Committee*, the court, not the jury, made the preliminary finding that the plaintiffs were "grossly negligent" in failing to preserve ESI. The limited charge to the jury was solely to agree or decline to agree with the presumption that the lost or deleted ESI was relevant and favorable to the opposing party.

The difference between the parties' culpability that was sufficient to trigger an adverse inference instruction for failing to preserve ESI in each case was so markedly different that it prompted the court in *Victor Stanley* to call for uniform national standards.

Specific Examples of Party's Conduct Warranting Sanctions

The parties in *Pension Committee* and *Rimkus* received basically the same sanction, though the facts demonstrating the extent of their culpability varied substantially. Any analysis of spoliation case law is fact intensive, and evaluating the parties' conduct in fulfilling their discovery obligations in these two cases is no exception. In *Rimkus*, the defendants admitted that they were deleting ESI. They claimed, however, that the ESI was not deleted in bad faith for the purpose of gaining an advantage in the litigation. Rather, the deletions were made innocently as part of routine business practices. The court required a finding of scienter or bad faith in addition to a finding that the ESI was deleted as a condition for giving an adverse inference instruction. Though the overt actions of the *Rimkus* defendants in deleting ESI were manifest, the court declined to make the preliminary bad faith finding itself, which would have triggered the presumption. Instead it reserved the preliminary finding for the jury's consideration because it was unclear whether the lost ESI was, in fact, unfavorable to the opposing party.

In *Pension Committee* the defendants suspected that plaintiffs deleted ESI, because few emails were produced. The plaintiffs had failed to comply with several discovery obligations. The court found that plaintiffs' conduct in *Pension Committee* was sufficient to meet the "grossly negligent" standard as it interpreted the Second Circuit case law. And the court ruled that the plaintiffs' conduct failed to meet this standard.

Though the differences between the two standards applied in *Rimkus* and *Pension Committee* are significant, it is only when the actual sanctionable conduct of the parties is compared that the consequences of the differences between the objective gross-negligence and subjective bad-faith standards applied in both cases become apparent.

The initial lawsuit in *Pension Committee* was filed in the Southern District of Florida on February 12, 2004. Plaintiffs had retained counsel a few months earlier in November 2003, who promptly advised the plaintiffs "to begin document collection and preservation," noting that "emails and electronic documents should be included in the production." The court ruled that the plaintiffs' preservation duty arose in April 2003. Discovery was stayed in June 2004 pursuant to the Private Securities Litigation Reform Act. Discovery resumed in April 2007. Most of the plaintiffs' major discovery violations occurred during the 14-month preservation and collection period in 2003-2004, before the case was transferred to the Southern District of New York on October 25, 2005.

The nature of the sanctionable conduct of two of the six groups of plaintiffs in *Pension Committee*, namely the Chagnon and Coronation plaintiffs, emphasizes the modest level of culpability sufficient to warrant sanctions in this case. The Chagnon plaintiffs produced a small number of emails from 1998 through 2002 and they asked only four of

twelve "key players" for documents during the 2003-2004 discovery. Defendants suspected that relevant emails favorable to them were not produced. In support of their contention, they identified three emails that should have been, but had not been, produced from this period. In addition, the plaintiffs' erroneously declared that "all" documents had been produced. Solely on the basis of these grounds, the court found the Chagnon plaintiffs' conduct to be grossly negligent, warranting an adverse inference instruction and shifting the burden from the defendants to the plaintiffs to affirmatively show that the ESI was not relevant or favorable to the defendants.

The opinion in *Pension Committee* did not address whether there were any extenuating circumstances explaining the reasons why the Chagnon plaintiffs failed to request the remaining eight employees to produce documents. The opinion noted, however, that when discovery was resumed in 2007, several of the eight key players who were not asked to produce ESI in 2003-2004 later said that they "had no documents or had only a few that had already been produced." Whether the ESI from these eight employees might not have been relevant or may have been duplicative of the ESI obtained from the four key players was not discussed.

The Coronation plaintiffs were sanctioned for conduct in their offices in London and Cape Town, South Africa. Plaintiffs relied on an employee situated in the office's "due diligence area" to conduct the search in 2003-2004, even though she had little experience conducting ESI searches, received no instructions, and had no supervision or contact with counsel during the discovery. She searched the investment team's drive and she limited her search to asking three of twenty investment specialists on the team who were most likely to possess relevant ESI to respond to discovery requests. The court found the actions to be grossly negligent because she searched only one network drive, permitted other employees to conduct their own searches, and delegated the Cape Town office search without follow up. In addition, the defendant identified 39 emails in 2003 that should have been, but were not, produced.

These examples show a pattern of sloppy and careless preservation and collection efforts when measured against today's standards developed by case law and rules. But the nascent ESI-discovery jurisprudence was not fully developed in early 2004 when the plaintiffs' conduct occurred, and the precise jurisprudential limits on discovery obligations often varied depending on the jurisdiction (some of the law remains unsettled today).

In rendering its decision in *Pension Committee*, the court relied on its final *Zubulake* opinion issued in July 2004, which enumerated certain conduct that met the court's definition of gross negligence in the rapidly evolving ESI-discovery jurisprudence. Many, but not all, courts have adopted similar definitions, and a large number of courts has not addressed the issue. Consistent with the final 2004 *Zubulake* opinion, the court found the following failures to preserve ESI to be grossly negligent: (1) to issue a written litigation hold; (2) to identify all key players and to ensure that their electronic and paper records are preserved; (3) to cease the deletion of email or to preserve the records of former employees that are in a party's possession or control; (4) to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources. Though some fundamental ESI preservation and collection principles were firmly established in 2003-2004 when the plaintiffs' sanctionable discovery conduct in *Pension Committee* occurred, not every obligation listed in *Zubulake* was recognized or was less well defined in many jurisdictions other than the Southern District of New York. Significantly, the ESI-discovery amendments to the Federal Rules of Civil Procedure would not take effect until December 2006, more than two years after the disputed conduct in the case.

The court in *Pension Committee* acknowledged the uncertainties in some of the discovery obligations. For example, it found that the failure to issue a written litigation hold in a timely manner by several other plaintiffs to be grossly negligent, yet it found the failure to do so to be only negligent - a finding that does not trigger an adverse inference instruction. The court concluded that the "failure to institute a written litigation hold in early 2004 in a case brought in federal court in Florida was on the borderline between a well-established duty and one that was not generally required." But it ruled, nonetheless, that the plaintiffs should have been aware of the other discovery obligations listed in *Zubulake*, including identifying "all" key players and suspending recycling of backup tapes when the existence of relevant ESI located in other sources is unknown - findings that do trigger an adverse inference instruction.

Lessons

The judge in *Pension Committee* found that the party responsible for losing or deleting ESI in a grossly negligent manner should bear the burden of proving that the ESI was not relevant or favorable to the opposing party. The ruling reflects a policy position that a party who fails to comply with its discovery obligations and causes ESI loss or deletion should be responsible to demonstrate that the ESI was not relevant nor prejudicial to the opposing party. Consistent with this policy, the court's definition of what conduct constitutes gross negligence was relatively broad, compared with other courts' definitions. On the other hand, the judge in *Rimkus* found that the party alleging loss or deletion of ESI should bear the burden of proving that the ESI was relevant and favorable to it - unless the opposing party's bad faith was shown. This ruling reflects a policy position that is sensitive to the very real practical difficulties that parties encounter in preserving and collecting all ESI, and it also recognizes the inevitable loss of some ESI despite the parties' best efforts to preserve and collect it.

In other words, *Pension Committee* places a thumb on the scale in favor of a party whose interests may have been harmed through no fault of its own as a result of ESI loss caused by the opposing party, underscoring the principle that each party should bear the risk of its own negligence. Conversely, *Rimkus* places the thumb on the scale in favor of the party who lost or deleted the ESI, in light of the practical recognition that despite a party's best efforts some ESI will inevitably be lost or deleted and the opposing party should not be given a windfall based on mere suspicion that relevant and favorable ESI might have been included in the loss or deletion.

Until uniform national standards governing severe discovery sanctions are promulgated, jurisdictions will continue to apply different standards of care to the preservation and collection of ESI based on their circuit case law, which either favor: (1) a party who may suffer prejudice because of ESI loss or deletion, or (2) a party who loses or deletes ESI absent a showing of bad faith. The decisions in *Pension Committee*, *Rimkus*, and *Victor Stanley* explain in great detail the various standards and how they are applied in the various jurisdictions. Beyond reading and understanding these three cases, the careful lawyer should be mindful of the possibility that a case originally filed in one jurisdiction may be transferred to another jurisdiction, whose jurisprudence may impose a stricter standard of discovery obligation care - a predicament that the plaintiffs in *Pension Committee* encountered. The obvious difficulty in making this judgment call is exacerbated by the fact that compliance with the strictest standard of care in every case can substantially increase discovery costs and burdens.

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Fraudulent Misjoinder: In re Prempro Prods. Liab. Litig.

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Fraudulent Misjoinder: In re Prempro Prods. Liab. Litig.

By Georgene Vairo

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SUMMARY: *In re Prempro Prods. Liab. Litig.* addresses the doctrine of fraudulent misjoinder. The Eighth Circuit held that any misjoinder of claims by women and survivors of women who were allegedly injured by taking hormone replacement therapy (HRT) drugs manufactured by a number of different companies was not so egregious as to constitute fraudulent misjoinder.

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ARTICLE: Georgene Vairo on *In re Prempro Prods. Liab. Litig.*

Summary. *In re Prempro Prods. Liab. Litig.*, 591 F.3d 613, 2010 U.S. App. LEXIS 239 (8th Cir. 2010), addresses the doctrine of fraudulent misjoinder. This doctrine is used by removing defendants who argue that the citizenship of some parties should be ignored for the purpose of determining whether complete diversity exists. Without deciding whether to adopt the doctrine of fraudulent misjoinder, the Eighth Circuit held that any misjoinder of claims by women and survivors of women who were allegedly injured by taking hormone replacement therapy (HRT) drugs manufactured by a number of different companies was not so egregious as to constitute fraudulent misjoinder. Although the Eighth Circuit declined to take a position on the viability of the doctrine, it did provide guidance with respect to the contours of the doctrine.

The Lawsuits. This case involved three lawsuits asserting various state-law claims. The *Kirkland* case was brought by 57 women who allegedly developed breast cancer after taking hormone replacement therapy (HRT) drugs manufactured, marketed, and sold by one or more of 11 manufacturers. Fourteen of the *Kirkland* plaintiffs were citizens of the same state as at least one of the manufacturers, and three of those 14 asserted claims against manufacturers with the same citizenship. The *Jasperson* suit was brought by the trustee of the next-of-kin of six decedents who allegedly developed breast cancer as a result of taking HRT drugs manufactured, marketed, and sold by one or more of six defendants. One of the decedents was a citizen of the same state as three of the companies that manufactured and marketed HRT drugs that she took. The *Allen* suit was brought by 60 women who allegedly developed breast cancer as a result of HRT medications manufactured, marketed, and sold by one or more of eight defendants. Five of the plaintiffs were citizens of the same state as at least one of the defendants, and three of these five asserted claims against manufacturers who were citizens of the same state.

Procedural History. The suits were all filed in Minnesota state court. The defendants removed all of them, claiming the federal district court had diversity jurisdiction because the plaintiffs had fraudulently misjoined claims that did not arise out of the same transaction or occurrence in order to defeat diversity jurisdiction. All three cases then came before the United States Judicial Panel on Multidistrict Litigation (MDL) and were transferred to an MDL court. The MDL judge remanded the claims of seven plaintiffs who had asserted claims against defendants from their own states. The judge denied remand for the other 116 plaintiffs, concluding that there was no reason for the joinder of the nondiverse plaintiffs other than to defeat diversity jurisdiction. He then dismissed these claims because they duplicated previously filed California claims. The Eighth Circuit reversed the district court's orders denying remand and vacated the orders dismissing claims.

Fraudulent Misjoinder Doctrine. Courts have long recognized fraudulent joinder as an exception to the complete diversity rule [see 16 Moore's Federal Practice § 107.14[2][c][iv]]. Fraudulent joinder occurs when a plaintiff files a frivolous or illegitimate claim against a non-diverse defendant solely to prevent removal [see *Filla v. Norfolk & Southern Ry.*, 336 F.3d 806, 809 (8th Cir. 2003)]. When determining if a party has been fraudulently joined, a court considers whether there is any reasonable basis in fact or law to support a claim against a nondiverse defendant, a relatively easy bar for a plaintiff to meet when seeking a remand on the ground that no party was fraudulently joined.

The fraudulent misjoinder doctrine, in contrast, is of relatively recent vintage. Sometimes referred to as "procedural misjoinder," the fraudulent misjoinder doctrine prevents a plaintiff from defeating diversity jurisdiction through the misjoinder of parties. Pursuant to the doctrine, diversity jurisdiction survives when a diverse defendant is joined with a nondiverse defendant as to whom there is no joint, several, or alternative liability and the claim against the diverse defendant has no real connection to the claim against the nondiverse defendant. The fraudulent misjoinder doctrine was first adopted by the Eleventh Circuit [see *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996), *abrogated on other grounds by Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir. 2000)]. According to the Eleventh Circuit, if a plaintiff so egregiously misjoins a party as a procedural matter - i.e., in violation of Federal Rule of Civil Procedure 20 - such misjoinder can amount to "fraudulent joinder." The Eleventh Circuit cautioned that "mere misjoinder" is not fraudulent misjoinder. However, the plaintiffs' joinder of two groups of unrelated defendants was "so egregious as to constitute 'fraudulent joinder.'"

Although no other court of appeals has adopted the doctrine of fraudulent misjoinder, it has been acknowledged by the Fifth and Ninth Circuits [see *Crockett v. R.J. Reynolds Tobacco Co.*, 436 F.3d 529, 533 (5th Cir. 2006); *In re Benjamin Moore & Co.*, 309 F.3d 296, 298 (5th Cir. 2002); *California Dump Truck Owners Ass'n v. Cummins Engine Co.*, 2001 U.S. App. LEXIS 26228, at **6 (9th Cir. Dec. 5, 2001)]. District court opinions on the subject have been mixed [compare *Reed v. American Med. Sec. Group, Inc.*, 324 F. Supp. 2d 798, 805 (S.D. Miss. 2004) (adopting doctrine) with *Osborn v. Metropolitan Life Ins. Co.*, 341 F. Supp. 2d 1123, 1127 (E.D. Cal. 2004) (rejecting doctrine)].

The Eighth Circuit had not yet considered the doctrine. After surveying the doctrine, and stating that it had "no judgment on the propriety of the doctrine in this case," it declined to take a position on the validity of the fraudulent misjoinder doctrine, concluding instead that even if it adopted the doctrine, the alleged misjoinder in this case was not egregious.

Commentary. The Eighth Circuit clearly wanted to avoid the debate about whether the fraudulent misjoinder doctrine is valid. The fraudulent misjoinder doctrine developed by the Eleventh Circuit in *Tapscott* is based on the idea that the plaintiff's joinder of parties failed to meet the standard of Fed. R. Civ. P. 20, which requires that the joinder of parties arise out of the same transaction or occurrence or series of transactions or occurrences, and involve a common question of law or fact. If the joinder fails that test, then the court can ignore the claims of the party involved and disregard that party for complete diversity purposes.

The Eighth Circuit aptly noted other courts' mixed reactions to the Eleventh Circuit's approach in *Tapscott*. Some district courts have adopted the doctrine to ensure defendants their statutory right of removal to the federal courts by precluding plaintiffs from preventing removal to federal court [see, e.g., *In re Diet Drugs*, 1999 U.S. Dist. LEXIS 11414,

at *16-*17 (E.D. Pa. July 16, 1999) (explaining that plaintiffs' egregious misjoinder "wrongfully deprives Defendants of their right of removal"); *Reed v. American Medical Sec. Group, Inc.*, 324 F. Supp. 2d 798, 805 (S.D. Miss. 2004) (adopting the fraudulent misjoinder doctrine because "diverse defendants ought not be deprived of their right to a federal forum by such a contrivance as this"); see also Laura J. Hines & Steven S. Gensler, Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction, 57 Ala. L. Rev. 779, 825 (2006) (explaining that fraudulent misjoinder doctrine protects access to federal courts)].

Other courts have criticized the doctrine, arguing that questions of joinder under state law should not implicate federal subject matter jurisdiction. These courts also typically note the axiom that federal jurisdiction is to be narrowly construed [see, e.g., *Osborn v. Metropolitan Life Ins. Co.*, 341 F. Supp. 2d 1123, 1127 (E.D. Cal. 2004) (rejecting fraudulent misjoinder because "the last thing the federal courts need is more procedural complexity"); *Rutherford v. Merck & Co.*, 428 F. Supp. 2d 842, 851 (S.D. Ill. 2006) (holding that *Tapscott* is an improper expansion of federal diversity jurisdiction, and misjoinder should be resolved by a state court)].

Indeed, the doctrine is an unpredictable and complex jurisdictional rule. It requires courts to delve into questions of federal joinder, i.e., the extent to which the standards of Fed. R. Civ. P. 20 had been met, as opposed to the substance of the state law claim and or the validity of the joinder under state law as a procedural matter. Thus, it goes well beyond the reach of the original fraudulent joinder doctrine. As the Eighth Circuit pointed out, even the courts within the Eleventh Circuit have had a difficult time determining what constitutes fraudulent misjoinder. Thus, the Eighth Circuit's approach is a sensible one: to analyze what is or is not "egregious" misjoinder. Although, as discussed below, figuring out what that is will also be a difficult proposition, it is more sensitive to the idea that the plaintiff is the master of the complaint.

No Fraudulent Misjoinder. The Eighth Circuit pointed out that Fed. R. Civ. P. 20(a)(1) allows multiple plaintiffs to join in a single action if (1) they assert claims "with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences"; and (2) "any question of law or fact common to all plaintiffs will arise in the action." "Transaction" is construed very broadly by the Eighth Circuit, permitting all reasonably related claims for relief by or against different parties to be tried in a single proceeding [*Mosley v. General Motors Corp.*, 497 F.2d 1330, 1333 (8th Cir. 1974)].

The Eighth Circuit concluded that the defendants did not meet their burden of establishing that the plaintiffs' claims were egregiously misjoined. The court noted that the claims arose from a series of transactions between HRT pharmaceutical manufacturers and individuals that have used HRT drugs; the plaintiffs alleged that the manufacturers conducted a national sales and marketing campaign to falsely promote the safety and benefits of HRT drugs and understated the risk of the drugs; plaintiffs contended their claims were logically related because they each developed breast cancer as a result of the manufacturers' negligence in designing, manufacturing, testing, advertising, warning, marketing, and selling HRT drugs; and some of the plaintiffs allegedly took several HRT drugs made by different manufacturers. Moreover, given the nature of the claims, common questions of law and fact, such as the causal link between HRT drugs and breast cancer, were likely to arise.

Thus, the court could not say that the claims had no real connection to each other, as required to invoke the fraudulent misjoinder doctrine. Finally, the manufacturers presented no evidence that the plaintiffs joined their claims to avoid diversity jurisdiction, as required by most courts that do subscribe to the fraudulent misjoinder doctrine. With no evidence of bad faith, the Eighth Circuit declined to conclude the plaintiffs egregiously misjoined their claims, which meant that the district court did not have diversity jurisdiction and should have remanded the cases to state court.

The Eighth Circuit also noted that courts applying the fraudulent misjoinder doctrine have disagreed with whether federal or state rules on joinder apply post-*Tapscott* [compare *Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996), abrogated on other grounds by *Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir. 2000) (applying, without analysis, the federal rules of joinder to determine that the plaintiffs egregiously misjoined the defendants), and *Brooks v. Paulk & Cope, Inc.*, 176 F. Supp. 2d 1270, 1274 (M.D. Ala. 2001) (applying the Federal Rules of Civil

Procedure), with *Osborn v. Metropolitan Life Ins. Co.*, 341 F. Supp. 2d 1123, 1128 (E.D. Cal. 2004) ("[M]ost courts looking at this issue have applied the state rule. This seems the better choice since the question is whether the parties were misjoined in state court."), and *Asher v. 3M*, 2005 U.S. Dist. LEXIS 42266 at *33-*34 (E.D. Ky. June 30, 2005) (unreported) (stating that more courts apply state procedural rules)]. However, the Eighth Circuit, like so many others, could decline to address that choice of law issue because the standards for joinder under Fed. R. Civ. P. 20 and the relevant state law rule [see Minn. R. Civ. P. 20.0] were identical in all significant respects, and application of the state joinder rules did not affect the analysis.

Commentary. The fraudulent misjoinder doctrine is another tool used by defendants who seek to remove a case to federal court. The problem with the doctrine is that it is contrary to the idea that the plaintiff is master of the complaint because it asks the federal court to ignore parties properly joined by the plaintiff under the state procedural rules in the state in which the lawsuit was filed. By refusing to adopt the doctrine and by issuing a rather limited view of what amounts to fraudulent joinder, the Eighth Circuit correctly positions the plaintiff's choice of forum over that of the defendant.

Having said that, there is one part of the Eighth Circuit's test that is problematic. Whether a plaintiff joins certain parties to defeat diversity jurisdiction, in and of itself, should not be viewed as inappropriate in the sense that it might provide a basis for removal. As long as the plaintiff plays by the state's rules for joinder, it ought to be able to join whatever parties it wishes. In terms of the choice of law debate, Fed. R. Civ. P. 20 should not apply to the question of which parties were properly joined for diversity jurisdiction purposes. If state joinder rules are broader, then all parties properly joined should count.

RELATED LINKS: For further information, see Moore's Federal Practice:

- 15 Moore's Federal Practice (3d Ed.) 102.21[5][a];
- 16 Moore's Federal Practice (3d Ed.) 107.14[2][c][iv][A]

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Expansive View of Twombly and Iqbal: Tooley v. Napolitano

2010 Emerging Issues 5311

Expansive View of Twombly and Iqbal: Tooley v. Napolitano

By Georgene Vairo

September 21, 2010

SUMMARY: *Tooley v. Napolitano* ("Tooley II") is a significant case because it shows how the Supreme Court's landmark and controversial pleading opinion in *Ashcroft v. Iqbal* can effect a plaintiff's ability to survive a motion to dismiss for failure to state a claim. The court seems to have abandoned the quite restrictive view of Twombly taken in the *Aktieselskabet* case and adopted a more expansive view of Twombly and Iqbal.

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ARTICLE: Georgene Vairo on *Tooley v. Napolitano*

Summary. *Tooley v. Napolitano*, 586 F.3d 1006, 2009 U.S. App. LEXIS 25175 (D.C. Cir. Nov. 17, 2009) ("Tooley II"), is a significant case because it shows how the Supreme Court's landmark and controversial pleading opinion in *Ashcroft v. Iqbal* [556 U.S. -, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)], can effect a plaintiff's ability to survive a motion to dismiss for failure to state a claim.

Facts and Procedural Background. The plaintiff sued various federal governmental authorities for infringing on his rights. The district court dismissed the complaint, and the D.C. Circuit originally reversed in *Tooley v. Napolitano*, 556 F.3d 836 (D.C. Cir. 2009) ("Tooley I"). In *Tooley I*, the D.C. Circuit held that the plaintiff's allegations, stating that he had been subjected to illegal wiretapping and other government surveillance, were sufficiently "plausible" to survive a motion to dismiss. On motion for rehearing, the D.C. Circuit withdrew its *Tooley I* opinion and instead ruled that the district court had properly dismissed the allegations. The *Tooley I* court had reversed the district court's dismissal for failure to state a claim, holding that the plaintiff's allegations were sufficiently plausible even under the pleading standard of *Bell Atlantic Corp. v. Twombly* [550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)]. However, the D.C. Circuit granted a rehearing in light of the Supreme Court's opinion in *Ashcroft v. Iqbal* [556 U.S. -, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)], and held that the plaintiff's allegations failed to state a claim.

Plaintiff's Allegations. Alleging violations of his constitutional rights, the plaintiff brought suit against the U.S. Attorney General, the Secretary of the Department of Homeland Security, and the Administrator of the Transportation Security Administration, all in their official capacities.

According to the complaint, the plaintiff had phoned an airline to buy tickets. At the end of the call, after he had

provided the airline with his name and contact information, the representative asked him if he had any comments, and he suggested that the airline screen "100 percent of everything that went into the airline." In response to a further question he stated that without proper security members of the traveling public were "less safe due to the potential that those who wish to harm American citizens could put a bomb on a plane." The representative became alarmed and placed him on hold, and after 20 minutes he hung up.

He alleged that about a year and a half later he began to notice problematic phone connections, including intermittent clicking noises, and he stated on information and belief that these telephone problems were caused by illegal wiretaps placed on at least nine phones: his residential landline phone, his landline phone at his former residence, his cellular phone, his wife's cellular phone, the phones of his father, brother, sister, and in[§8209]laws, and his family's phone in another state where he was visiting his mother. He alleged that these wiretaps were placed in response to his comments to the airline representative.

The complaint also alleged that the government monitored his activities using "radio frequency identification tags" placed on his and his wife's vehicles, and that he had been subjected to detention and strict searches whenever he traveled. Also, in the week before and the week of a presidential visit to his home city, an officer in a Ford Crown Victoria had sat out in front of his home for approximately six hours a day.

Allegations Were Not Plausible. In *Tooley II*, the D.C. Circuit reviewed these allegations, noting that the plaintiff claimed that *a year and a half* after a conversation with an airline representative, the government launched a massive surveillance program against him, involving numerous wiretaps, tracking devices, and other acts of surveillance. Moreover, the program as alleged was both sloppy (as the wiretaps could be detected by the clicking noises), well beyond state of the art, and that the alleged motivation was bizarre. "We recognize that in a nation of 300 million people, with millions of government employees, some are bound at any given moment to be acting unwisely, foolishly, counterproductively, mistakenly, maliciously, viciously, even inanely. But the particular combination of sloth, fanaticism, inanity and technical genius alleged here seems to us to move these allegations into the realm of claims" that are essentially fictitious. Because the allegations constituted patently insubstantial claims, the D.C. Circuit finally concluded that district court was correct in its judgment of dismissal.

Commentary: *Iqbal* Impact. In *Iqbal*, the Supreme Court reaffirmed and extended the "plausibility" pleading standard it first developed in *Twombly*. The defendant in *Tooley* therefore argued that *Iqbal* invalidated the restrictive construction of *Twombly* previously advanced by the D.C. Circuit. In an earlier case the D.C. Circuit had concluded that *Twombly* left the long-standing fundamentals of notice pleading intact, and did not require any higher threshold for pleading [see *Aktieselskabet Af 21 v. Fame Jeans Inc.*, 525 F.3d 8 (D.C. Cir. 2008)]. There, the court stated: "Over the years, courts have tended to drift away from this standard by imposing various requirements of particularity. ... The Supreme Court has continually pruned back such requirements, with the admonition that we are not to impose heightened pleading requirements. ... After decades of such consistency, we will not lightly assume the Supreme Court intended to tighten pleading standards. ... Indeed, the Court has indicated quite clearly that it meant no such thing." [*Aktieselskabet Af 21 v. Fame Jeans Inc.*, 525 F.3d 8, 16-17 (D.C. Cir. 2008) (*Twombly* was concerned with plausibility of inference of conspiracy, not with plausibility of claim)]. In *Tooley I*, the D.C. Circuit appeared to adopt that restrictive reading of *Twombly*. In *Tooley II*, the D.C. Circuit did not directly repudiate its *Aktieselskabet* opinion, but it stated that "[w]hile we do not reject the government's argument [that *Iqbal* invalidated *Aktieselskabet*], upon reflection we believe that we should affirm the district court in this case for reasons distinct from but not inconsistent with the holding in *Iqbal*."

Accordingly, while the court declined to say so directly, it seems to have abandoned the quite restrictive view of *Twombly* taken in the *Aktieselskabet* case and adopted a more expansive view of *Twombly* and *Iqbal* that provides greater leeway for the district court to dismiss.

The bottom line here is that the District of Columbia Circuit first took a restrictive view of *Twombly*, holding that it left the long-standing fundamentals of notice pleading intact, and did not require any higher threshold for pleading. In

fact, in *Tooley I*, the plaintiffs survived *Twombly* [*Tooley v. Napolitano*, 556 F.3d 836, 839-841 (D.C. Cir. 2009) (plaintiff's allegations that he had been subjected to illegal wiretapping and other government surveillance were sufficiently plausible so that district court had erred by dismissing complaint)]. In *Tooley I*, the D.C. Circuit said that the complaint in *Twombly* was insufficient because it failed to meet the threshold requirement that the statement of a claim show that the pleader is entitled to relief, not because it failed to meet a higher requirement for allegations that were particularized. But, *Tooley II* shows the dramatic impact that *Iqbal* can have. In *Tooley I*, the District of Columbia Circuit held that the plaintiff's allegations that he had been subjected to illegal wiretapping and other government surveillance were sufficiently plausible under the *Twombly* standard. Then, after *Iqbal* was decided, the court granted rehearing and reached the opposite conclusion- that the allegations were not plausible, but constituted "patently insubstantial claims."

RELATED LINKS: For further information, see Moore's Federal Practice:

- 2 Moore's Federal Practice (3d Ed.) § 8.04[1][a]

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Plaintiff's Service Obligations in a Removed Case: Wallace v. Microsoft Corp.

2010 Emerging Issues 5313

Plaintiff's Service Obligations in a Removed Case: Wallace v. Microsoft Corp.

By Georgene Vairo

September 21, 2010

SUMMARY: *Wallace v. Microsoft Corp.* discusses the plaintiff's service obligations in a removed case. The Tenth Circuit held that a plaintiff whose case is removed to federal court before service is perfected in state court has 120 days from the date of removal in which to perfect service.

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ARTICLE: Georgene Vairo on *Wallace v. Microsoft Corp.*

Summary. *Wallace v. Microsoft Corp.*, 596 F.3d 703, 2010 U.S. App. LEXIS 3184 (10th Cir. Feb. 18, 2010), discusses the plaintiff's service obligations in a removed case. The Tenth Circuit held that a plaintiff whose case is removed to federal court before service is perfected in state court has 120 days from the date of removal in which to perfect service.

Facts and Procedural History. A former Microsoft employee was fired on May 27, 2005. He sued the company in a Kansas court for retaliatory discharge, breach of an employment contract, outrage, and various state and federal statutory claims. The petition was filed in state court on May 18, 2007, and served on Microsoft's registered agent on June 28, 2007. On August 15, having been served with the petition but not the summons, Microsoft removed the case to federal district court. On August 23, the plaintiff served a summons and another copy of the petition on Microsoft. The district court dismissed the common-law tort claims on the ground they were untimely under Kansas's two-year statute of limitation and granted summary judgment to Microsoft on the breach of contract claim. The Tenth Circuit affirmed the summary judgment on the contract claim but reversed the dismissal of the tort claims and remanded the case to the district court for further proceedings.

Analysis. Under Kansas law, the plaintiff had until May 27, 2007, to sue. Both the petition and the summons have to be served to "commence" an action in Kansas [Kan. Stat. Ann. § 60-304(e)], but if process is served within 90 days after the petition is filed, the filing date is deemed the date of commencement [Kan. Stat. Ann. § 60-203]. In other words, under Kansas law, the employee had until August 16, 2007, to serve the petition and summons on Microsoft. His actual service on August 23, 2007, was outside the 90-day grace period, so if the suit had stayed in the Kansas court, dismissal of the tort claims would have been required.

Unfortunately for Microsoft, its removal to federal court one day before the Kansas grace period expired changed the timetable for service. According to the Tenth Circuit, removed cases are governed by federal law with regard to procedural matters. Thus, the case was now governed by 28 U.S.C. § 1448, and Federal Rules of Civil Procedure 4(m) and 81(c). Section 1448 provides as follows [28 U.S.C. § 1448]:

In all cases removed from any State court to any district court of the United States in which any one or more of the defendants has not been served with process or in which the service has not been perfected prior to removal, or in which process served proves to be defective, such process or service may be completed or new process issued in the same manner as in cases originally filed in such district court.

Rule 81(c) states that the Federal Rules of Civil Procedure "apply to a civil action after it is removed from a state court" [Fed. R. Civ. P. 81(c)]. Rule 4(m) gives plaintiffs 120 days to serve the defendant [Fed. R. Civ. P. 4(m)].

The Tenth Circuit agreed with Microsoft that service was not perfected when the case was removed, because the summons had not yet been served. However, the court agreed with the plaintiff that Section 1448 and Rule 4(m) gave the plaintiff an additional 120 days after removal in which to perfect service. Because the plaintiff's actual service on August 23, 2007 was within this 120-day period, the district court erred in dismissing the state law tort claims. The Tenth Circuit noted that had Microsoft waited one more day to remove the case, the tort claims would have become stale in the state court, and in that case, they could not have been revived by removal.

Commentary. The result here presents an important practical lesson to be learned. Microsoft did what many defendants do: it removed a state claim based case to federal court under its diversity jurisdiction. Had the case stayed in a Kansas court, the Kansas court surely would have found that the defendant was served well after the grace period had expired and would have dismissed the plaintiff's claims as barred by the statute of limitations. In other words, it is important for counsel to make sure that it is in a defendant's best interest to remove. At the very least, in this case, Microsoft could have removed the case after the grace period expired. As the Tenth Circuit pointed out, had Microsoft waited until August 16, 2007 to remove, a federal court would have dismissed the case as time-barred as well. It quoted a Third Circuit opinion: "§ 1448 cannot be utilized to breathe jurisprudential life in federal court in a case legally dead in state court" [see *Witherow v. Firestone Tire & Rubber Co.*, 530 F.2d 160, 168 (3d Cir. 1976); see also *Marshall v. Warwick*, 155 F.3d 1027, 1033 (8th Cir. 1998) ("[w]e do not believe that this section [§ 1448] can 'resurrect' a removed diversity case which would have been dismissed as time-barred had it remained in state court")].

Beyond the practical lesson, however, is the question whether the Tenth Circuit was correct to refuse to dismiss on Kansas statute of limitations grounds. It correctly determined that federal service rules applied under § 1448. However, the court did not deal with the implicit *Erie* issue. It is one thing to say that the Federal Rules of Civil Procedure apply. It is another to say that application of a Federal Rule can trump a state rule with a substantive impact. With respect to this case, it is unquestionably true that federal methods for service of process, including the 120-day rule for completing service, apply [see *Hanna v. Plumer*, 380 U.S. 460, 850 S. Ct. 1136, 14 L. Ed. 2d 8 (1965)]. However, the Supreme Court has held that the federal rule of civil procedure, Rule 3, regarding commencement of a lawsuit must give way to the state statute of limitations [see *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-753, 100 S. Ct. 1978, 64 L. Ed. 2d 659 (1980)].

RELATED LINKS: For further information, see Moore's Federal Practice:

- 1-4 Moore's Federal Practice (3d Ed.) § 4.80;
- 14-81 Moore's Federal Practice (3d Ed.) § 81.04[3];
- 16-107 Moore's Federal Practice (3d Ed.) § 107.31[4 & 5];
- 17A-124 Moore's Federal Practice (3d Ed.) § 124.03[2][a]

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Plausibility Pleading as Applied to a Class-of-One Equal Protection Claim

2010 Emerging Issues 5314

Plausibility Pleading as Applied to a Class-of-One Equal Protection Claim

By Allan Ides

September 21, 2010

SUMMARY: In *Ruston v. Town Board for Town of Skaneateles*, the Second Circuit applied the "plausibility" pleading standard created in *Ashcroft v. Iqbal* to a complaint asserting a class-of-one equal protection claim. In upholding the district court's dismissal of the complaint, the appellate court underscored the difference between federal pleading standards pre- and post-*Iqbal*.

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ARTICLE: *Allan Ides on Plausibility Pleading as Applied to a Class-of-One Equal Protection Claim*

Introduction. In *Ruston v. Town Board for Town of Skaneateles*, 610 F.3d 55, 2010 U.S. App. LEXIS 13920 (2d Cir. July 18, 2010), the Second Circuit applied the "plausibility" pleading standard created in *Ashcroft v. Iqbal* to a complaint asserting a class-of-one equal protection claim. In upholding the district court's dismissal of the complaint, the appellate court underscored the difference between federal pleading standards pre- and post-*Iqbal*.

Background. The plaintiffs brought a class-of-one equal protection claim against various local authorities - the Village of Skaneateles, the Town Board of Skaneateles, the Town Planning Board, and several individual members of these boards - alleging that the named defendants had frustrated plaintiffs' efforts to subdivide and develop a 27-acre lakefront lot. The complaint alleged that the defendants had raised a number of obstacles to the development and had delayed responding to their application until after a new zoning law went into effect. The application was then rejected under this new law, which plaintiffs alleged was specifically designed to block their proposed development. The defendants moved to dismiss for failure to state a claim, citing the inadequacy of plaintiffs' pleading. The district court eventually dismissed the case, and the plaintiffs appealed.

A "Clarified" Pleading Standard. The Second Circuit began by observing that the pleading standards required to withstand a motion to dismiss had been "clarified" in *Ashcroft v. Iqbal* [- U.S. -, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)] and *Bell Atl. Corp. v. Twombly* [550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)]. In accord with those decisions, only a complaint that states a "plausible" claim for relief will survive. Determining whether a complaint states a plausible claim for relief is a context-specific task that requires the reviewing court to draw on its judicial experience

and common sense. Under this approach, legal conclusions must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether those factual allegations plausibly give rise to an entitlement to relief.

District courts in the Second Circuit had differed as to the impact of this clarified pleading standard on class-of-one equal protection claims. This uncertainty, the court of appeals said, was attributable to the tension between the above Supreme Court precedents and *DeMuria v. Hawkes* [328 F.3d 704, 707 (2d Cir. 2003)], which had held (under the former pleading standard) that a class-of-one claim is adequately pleaded ("albeit barely" so) even without the specification of other persons similarly situated (an element of the claim).

The Second Circuit explained, however, that *Iqbal*'s "plausibility" standard superseded *DeMuria*'s "general allegation" standard. Under the new standard, a court may rely only on non-conclusory factual allegations in the complaint to determine whether the complaint plausibly suggests an entitlement to relief. General allegations would not suffice as to any element of the claim, for the surviving "factual allegations must be sufficient to support necessary legal conclusions."

Plaintiffs Failed To State Claim on Which Relief Could Be Granted. The plaintiffs argued that they had sufficiently alleged a class-of-one equal protection claim. On the merits, such a claim may succeed only when the plaintiff successfully establishes that she has been intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment. *Village of Willowbrook v. Olech* [528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000)].

In the Second Circuit's view, however, the complaint failed to allege facts that plausibly suggested an entitlement to relief. The plaintiffs' argument was that the defendants had refused to consider their application while considering applications of other persons similarly situated. However, plaintiffs did not allege any specific examples of other proceedings by the Town, let alone any applications by other persons similarly situated. The plaintiffs also alleged that other properties were allowed to connect to the local sewer system, while their own requests were denied. The court was required to accept these factual allegations as true. However, the other properties plaintiffs identified were not sufficiently similar—they were individual homes or commercial properties. None was a development of the type the plaintiffs proposed. Class-of-one plaintiffs must show an extremely high degree of similarity, such that no rational person could regard the circumstances to differ to a degree that would justify the differential treatment. That was not the case here. As the plaintiffs had failed to allege that other persons or properties sufficiently similar to theirs were treated more favorably, plaintiffs had failed to plausibly state a class-of-one equal protection claim.

Commentary. Although the Supreme Court in *Ashcroft v. Iqbal* asserted that it was not adopting a new pleading standard, the reality appears to be otherwise. The decision in *Ruston* provides yet another example of the impact of the new plausibility standard. General allegations once deemed sufficient to support a class-of-one equal protection claim no longer suffice. Moreover, given the new standard's emphasis on the pleading of facts to support all "necessary legal conclusions," it appears that plausibility pleading tracks very closely the standards of fact pleading.

RELATED LINKS: For further information, see Moore's Federal Practice:

- 2-8 Moore's Federal Practice (3d Ed.) § 8.04

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Allan Ides on Intervention, Realignment and Supplemental Jurisdiction

2010 Emerging Issues 5315

Allan Ides on Intervention, Realignment and Supplemental Jurisdiction

By Allan Ides

September 21, 2010

SUMMARY: In *Price v. Wolford*, the Tenth Circuit held that the intervention of a state Medicaid agency to assert its right to a share of settlement proceeds from a medical malpractice case did not deprive the district court of diversity jurisdiction despite the fact that the agency was not a "citizen of a state" within the meaning of the diversity statute.

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ARTICLE: *Allan Ides on Intervention, Realignment and Supplemental Jurisdiction*

Introduction. In *Price v. Wolford* [608 F.3d 698, 2010 U.S. App. LEXIS 12411 (10th Cir. June 17, 2010)], the Tenth Circuit held that the intervention of a state Medicaid agency to assert its right to a share of settlement proceeds from a medical malpractice case did not deprive the district court of diversity jurisdiction despite the fact that the agency was not a "citizen of a state" within the meaning of the diversity statute.

Facts and Proceedings. The plaintiffs' child was born with severe brain damage and other disabilities. As a condition of receiving Medicaid benefits for the child, the mother assigned the right to receive any payments from a third party for the child's medical care to the state Medicaid agency. In the first four years of the child's life, the agency paid \$544,282 for the child's medical expenses.

In federal district court, the plaintiffs sued the doctor who delivered the child. Jurisdiction was based on diversity: the plaintiffs were residents of Oklahoma and the doctor was a resident of Maryland. The plaintiffs' expert estimated the cost of the child's lifetime medical care at just over \$12 million. The parties then agreed to settle the malpractice claim for \$1.1 million. Counsel for the Medicaid agency was present and did not object. However, when the plaintiffs and the doctor asked the district court to approve the settlement with an allocation of only \$37,667 to the Medicaid agency in full satisfaction of its lien and another \$30,000 to go to the father as reimbursement for expenses he had incurred in caring for the child, the agency objected.

The court allowed the agency to intervene so that it could file a brief with respect to the settlement. The district

court increased the agency's share of the settlement by the \$30,000 that the settlement agreement had allocated to the father, for a total award to the agency of \$67,667. The agency asked the court to modify its judgment or dismiss the action on the ground its intervention destroyed diversity. The court refused, and the agency appealed. The Tenth Circuit held that the agency's intervention did not destroy the district court's jurisdiction, but reversed and remanded the case for further proceedings with respect to allocation of the settlement proceeds.

Agency's Intervention Did Not Destroy Diversity Jurisdiction. For purposes of the diversity discussion, the Tenth Circuit assumed that the agency was an alter ego of the State of Oklahoma and therefore not a citizen of a state for purposes of diversity jurisdiction. Hence, the agency could not sue or be sued in diversity. Nonetheless, the panel concluded that the agency's intervention in the lawsuit did not destroy the diversity jurisdiction that existed when the suit was filed.

The Tenth Circuit explained that a district court's jurisdiction ordinarily depends on the state of things when the action is brought, and there was no doubt that the district court had diversity jurisdiction when the malpractice suit was filed. Moreover, the court explained, once a district court has jurisdiction, additional claims and parties can be added to a suit under the supplemental jurisdiction statute as long as the claims "are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article II of the United States Constitution" [see 28 U.S.C. § 1367(a)]. A claim is part of the same case or controversy if it derives from a common nucleus of operative fact. The agency's claim for a share of the settlement proceeds clearly arose out of the same facts as the underlying tort claim.

There are exceptions to the exercise of supplemental jurisdiction with respect to claims by persons seeking to intervene as plaintiffs under Rule 24 or claims by plaintiffs against persons made parties under that rule [see 28 U.S.C. § 1367(b); Fed. R. Civ. P. 24]. But, as the court explained, neither exception applied because the agency intervened as a defendant, not as a plaintiff, and because the plaintiff did not make any claim against the intervening agency. In short, § 1367(a) permitted the exercise of supplemental jurisdiction over the agency's claim and § 1367(b) imposed no limits on exercise of that jurisdiction.

Agency Not Realigned as Plaintiff. Because an exception to supplemental jurisdiction might apply if the agency were realigned as a plaintiff, the Tenth Circuit considered whether realignment was required. [Note: Section 1367(b) provides that a district court may not exercise supplemental jurisdiction over a person seeking to intervene as a plaintiff under Rule 24 if doing so would be inconsistent with the jurisdictional standards of 28 U.S.C. § 1332. Both of these elements would be satisfied if the "non-citizen" agency were treated as an intervening plaintiff, *i.e.*, intervention as a plaintiff under Rule 24 would combine with the destruction of complete diversity.] Citing **Moore's**, the court noted that there is a circuit split as to the test to use for determining whether to realign a party. Under the primary-purpose test, the parties must be realigned if there is no adversity with regard to the primary issue in dispute. Under the substantial-conflict-of-interest test, a party need not be realigned as long as it has an "actual and substantial conflict" with a party on the other side. This is so even if the conflict is not over the primary issue in dispute. As a third alternative, which is similar to the substantial-conflict-of-interest test, a party need not be realigned so long as there is a "collision of interests" with an opposing party. Again, this collision need not be over the primary issue in dispute.

The Tenth Circuit follows the substantial-conflict-of-interest test. Under that test, there was no reason to realign the agency. There was a substantial conflict between the agency and the plaintiffs, in that any amount going to the agency would be taken from the plaintiffs' recovery. Therefore, the Tenth Circuit concluded, it could not realign the agency as a plaintiff, and the district court retained jurisdiction over the entire suit after the agency's intervention as a defendant.

Commentary. The Tenth Circuit's application of the substantial-conflict-of-interest test is a textbook example of that test applied. Moreover, this approach to realignment (also followed by the Seventh and Eighth Circuits) offers an eminently sensible way to address the problem of realignment. It ensures an actual controversy between opposing parties and at the same time permits a flexibility in joinder that promotes a complete resolution of the underlying

controversy. The same can be said of the very similar "collision of interests" test followed by the Second Circuit. By way of contrast, the "primary purpose" test (followed by the Third, Fifth, Sixth, and Ninth Circuits) is more difficult to apply, because it is not always easy to identify the primary purpose, which may change during the course of litigation, and because it is less likely to promote an efficient resolution of the overall controversy. Thus, the mechanics of the test might require dismissal when the logic of efficient resolution would not.

RELATED LINKS: For further information, see Moore's Federal Practice

- 15-102 Moore's Federal Practice (3d Ed.) § 102.16;
- 15-102 Moore's Federal Practice (3d Ed.) § 102.20;
- 16-106 Moore's Federal Practice (3d Ed.) § 106.05;
- 16-106 Moore's Federal Practice (3d Ed.) § 106.46.

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FDIC Removal Jurisdiction

2010 Emerging Issues 5303

FDIC Removal Jurisdiction

By Georgene Vairo

September 16, 2010

SUMMARY: Two recent cases out of the Fifth and Eighth Circuits involve the intersection between a special removal statute and the power or duty of a federal court to retain claims that were not the basis for removal under that statute. Taking sides on an issue that has divided the courts of appeals, the Fifth and Eighth Circuits have ruled that a district court has original jurisdiction over state-law claims, and must retain jurisdiction over them.

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ARTICLE: Summary. Two recent cases out of the Fifth Circuit [*Adair v. Lease Partners, Inc.*, 587 F.3d 238, 2009 U.S. App. LEXIS 23847 (5th Cir. Oct. 28, 2009), *cert. denied*, 130 S. Ct. 3326, 176 L. Ed. 2d 1221, 2010 U.S. LEXIS 4355 (May 24, 2010)] and Eighth Circuit [*Casey v. FDIC*, 583 F.3d 586, 2009 U.S. App. LEXIS 22831 (8th Cir. Oct. 20, 2009), *cert. denied*, 130 S. Ct. 2062, 176 L. Ed. 2d 414, 2010 U.S. LEXIS 2858 (Mar. 29, 2010)] involve the intersection between a special removal statute and the power or duty of a federal court to retain claims that were not the basis for removal under that statute. Taking sides on an issue that has divided the courts of appeals, the Fifth Circuit and Eighth Circuit have ruled that a district court has original jurisdiction over state-law claims, and must retain jurisdiction over them, in a case that the FDIC removes to federal court even after the FDIC is dismissed from the case and even if there is no successor in interest to the FDIC. Jurisdiction over all the claims in such a case is original jurisdiction, and, therefore, the district court cannot exercise discretion under the supplemental jurisdiction statute to decline to exercise jurisdiction over the state law claims against parties other than the FDIC.

Facts and Procedural Background. In *Adair*, a group of pharmacies, pharmacists, veterinarians, and veterinary clinics sued a group of salespeople and financial institutions, in state court alleging state law fraud, negligence, breach of contract, and usury claims. After 11 years of litigation, the Federal Deposit Insurance Corporation (FDIC) entered the case as a receiver for a bank that was a successor to one of the original defendants. The FDIC removed the case to federal district court pursuant to 12 U.S.C. § 1819(b)(2). The plaintiffs then moved to dismiss all claims against the FDIC and to remand the remaining claims to state court. The district court granted both motions, finding that once the FDIC was dismissed, only supplemental jurisdiction supported the remaining claims and that it was not required to exercise supplemental jurisdiction over those claims. The defendants appealed the remand. The Fifth Circuit reversed, reinstating the state law claims in federal court. Section 1819(b)(2) provided original jurisdiction over all claims in the case, and, therefore, the exercise of that jurisdiction was mandatory for the district court.

In *Casey*, seven homeowners sued their mortgage lenders in state court, alleging that they engaged in the unauthorized practice of law by charging a fee for the preparation of loan documents by non-lawyers. The state court dismissed the claims against four lenders who were federal savings associations (FSAs) on the ground the claims were preempted by federal law. While that decision was on appeal, the FDIC was substituted for one of the lenders. The FDIC removed the case to federal district court pursuant to 12 U.S.C. § 1819(b)(2). The district court denied a motion by one homeowner to dismiss the claims against the FDIC, did not rule on a motion by the remaining homeowners to remand the appeal to the state court of appeals, adopted the state court's preemption decision, and transferred the appeal to the Eighth Circuit Court of Appeals. The Eighth Circuit granted the motion to dismiss the FDIC, but denied the motion to remand the remaining claims and affirmed dismissal of those claims on the ground of preemption.

In sum, in both cases, the courts of appeals found that even after the FDIC is dismissed, there is continuing jurisdiction over all claims remaining against non-FDIC defendants. Both courts explored the extent to which a district court has discretion to dismiss, and found that there was no such discretion. The United States Supreme Court denied certiorari in both cases, letting stand in both cases an expansive interpretation of the exercise of federal judicial power under the FDIC removal statute.

FDIC Removal Statute. 12 U.S.C. § 1819(b)(2)(A) provides that "all suits of a civil nature at common law or in equity to which the [FDIC], in any capacity, is a party shall be deemed to arise under the laws of the United States." 12 U.S.C. § 1819(b)(2)(B) further provides that the FDIC "may, without bond or security, remove any action, suit, or proceeding from a State court to the appropriate United States district court before the end of the 90-day period beginning on the date the action, suit, or proceeding is filed against the [FDIC] or the [FDIC] is substituted as a party." According to the Fifth Circuit in *Adair*, the statute creates a conclusive presumption that all suits to which the FDIC is a party, and all component claims in those suits, arise under the laws of the United States and, thus, are within the original subject matter jurisdiction of the proper federal district court [*Buchner v. FDIC*, 981 F.2d 816, 819 (5th Cir. 1993)]. Thus, the statute provides jurisdiction over suits whose causes of action may otherwise depend largely, if not exclusively, on state law and that may not otherwise be subject to federal question jurisdiction under 28 U.S.C. § 1331, the general federal question statute.

Circuit Split as to Effect of FDIC Dismissal. The statute does not address what happens to the district court's jurisdiction over state law claims against remaining parties if the FDIC is dismissed as a party. The courts of appeals had split on the question whether the district court has discretion to exercise jurisdiction over such claims. The Fifth and Second Circuits hold that federal jurisdiction continues, and, therefore, that the federal court lacks the power to remand such claims [*see FDIC v. Four Star Holding Co.*, 178 F.3d 97, 100-101 (2d Cir. 1999); *Federal Sav. & Loan Ins. Corp. v. Griffin*, 935 F.2d 691, 697 (5th Cir. 1991)].

Taking a different tack, the Third Circuit held that only supplemental jurisdiction remains over such claims [*see New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc.*, 101 F.3d 1492, 1494-1495 (3d Cir. 1996)]. If only supplemental jurisdiction remains, the district court has discretion to decline to exercise supplemental jurisdiction [*see* 28 U.S.C. § 1367(c)]. And, the supplemental jurisdiction remand provision provides that an appropriate situation for refusing to exercise supplemental jurisdiction is if all claims in the court's original jurisdiction have been resolved [*see* 28 U.S.C. § 1367(c)(3)].

Before its decision in *Casey*, the Eighth Circuit had implicitly adopted the Third Circuit's reasoning in a case that was removed by the Resolution Trust Corporation (RTC) under an analogous statute. When the RTC was dismissed from the case, the district court remanded the case, and the Eighth Circuit reviewed the remand for abuse of discretion -- the standard applicable when determining whether the district court correctly exercised its discretion to remand under the supplemental jurisdiction statute [*see Myers v. Moore Eng'g Inc.*, 42 F.3d 452, 455 (8th Cir. 1994)].

Fifth Circuit Holds Jurisdiction Continues. The Fifth Circuit based its analysis on earlier precedent. In *Federal Sav. & Loan Ins. Corp. v. Griffin*, the Fifth Circuit had held that the district court retains jurisdiction even after the FDIC is dismissed. The *Griffin* court based its holdings on two rationales. First, the power to remove is evaluated at the

time of removal, so the FDIC's later dismissal cannot defeat jurisdiction. Second, federal policy interests favor recognizing jurisdiction over the FDIC's successor in interest [*Federal Sav. & Loan Ins. Corp. v. Griffin*, 935 F.2d 691, 696 (5th Cir. 1991)].

In *Adair*, the Fifth Circuit followed *Griffin*. The court reasoned that under *Griffin*, the jurisdiction retained by the district court after the FDIC was dismissed arose under § 1819(b)(2), which extends to all claims in the "suit," regardless of their state or federal origin. Thus, remand was inappropriate, because the district court retained original jurisdiction over all of the claims in the case.

Absence of FDIC Successor Irrelevant. The Fifth Circuit acknowledged that the *Griffin* court cited the existence of a successor in interest to the FDIC as part of its rationale for continued jurisdiction, and there was no federal successor in interest in *Adair*. However, the *Griffin* court relied on the time-of-filing rationale for recognizing federal jurisdiction under its interpretation of § 1819(b)(2), with the federal policy concerns cited only as "[f]urther" justifications. Moreover, other Fifth Circuit cases following *Griffin* cite only the time-of-filing rationale as the reason for recognizing original jurisdiction, and at least one of these cases recognized original jurisdiction based on § 1819(b)(2) when no successor in interest to the FDIC remained in the case [see *Walker v. Federal Deposit Ins. Corp.*, 970 F.2d 114, 120 (5th Cir. 1992)]. Accordingly, the court concluded, after the FDIC was dismissed, original jurisdiction continued pursuant to § 1819(b)(2) even in the absence of a successor in interest to the FDIC.

District Court Exceeded Authority. The Fifth Circuit concluded that the district court exceeded its authority by remanding the case after the FDIC was dismissed. Even after the FDIC's dismissal, all claims in the case continued to "arise under the laws of the United States" pursuant to § 1819(b)(2). Therefore, the district court had original jurisdiction, exercise of which was mandatory. Because the court found original federal jurisdiction over all claims in the instant case pursuant to § 1819(b)(2), it did not address whether appellees' federally preempted usury claims also provided continuing federal jurisdiction, or whether the state fraud and negligence claims were "separate and independent" so as to otherwise be subject to remand under 28 U.S.C. § 1441(c).

Eighth Circuit holds that District Court Retains Jurisdiction After Dismissal of FDIC. In *Casey*, the homeowners argued that dismissal of the claim against the FDIC deprived the Eighth Circuit of subject matter jurisdiction over the state law claims against the remaining FSA lenders. Therefore, they argued, the case had to be remanded to state court under 28 U.S.C. § 1447(c), which requires remand of a case removed to federal court if it is determined at any time that the federal court does not have subject matter jurisdiction. The Eighth Circuit rejected this argument, concluding that it retained subject matter jurisdiction under 12 U.S.C. § 1819(b)(2)(A).

The Eighth Circuit had not previously considered whether remand is required when the FDIC has been dismissed from a case predicated on § 1819(b)(2) jurisdiction. However, the court harkened back to a Resolution Trust case that the Fifth Circuit had *not* discussed in *Adair*. In the earlier Eighth Circuit case, the court held that dismissal of the Resolution Trust Corporation (RTC) from a case predicated on 12 U.S.C. § 1441a(a)(11) jurisdiction does not deprive federal courts of subject matter jurisdiction over remaining state law claims for which no other basis of jurisdiction existed. In that case, the court had reasoned that under § 1441a(a)(11), once the RTC becomes a party to the case, the entire action is "deemed to arise under the laws of the United States" and, thus, is within the original jurisdiction of the district court [*Kansas Pub. Employees Retirement Sys. v. Reimer & Koger Assocs.*, 77 F.3d 1063, 1067 (8th Cir. 1996)]. Because the language of § 1441a(a)(11) tracks that of § 1819(b)(2)(A), the Eighth Circuit concluded that the same reasoning applies to suits against the FDIC. Therefore, federal courts have "arising under" jurisdiction over all claims in a case to which the FDIC is a party, and dismissal of the claim against the FDIC does not require remand of the remaining claims to state court.

This ruling put the Eighth Circuit and the Fifth Circuit on par with respect to the continuing jurisdiction of the federal court, and set the table for other arguments regarding whether the district court had any discretion to dismiss the remaining claims. The Fifth Circuit analysis dealt with the question whether supplemental, as opposed to original, jurisdiction supported the remaining claims, thereby potentially making them subject to remand under § 1367(c). The

Eighth Circuit dealt with a different set of objections to continuing federal jurisdiction.

Unanimity Not Required for FDIC Removal. The Eighth Circuit also rejected the argument that the failure of all defendants to join the removal motion required remand. The court acknowledged that when a case is removed under 28 U.S.C. § 1446(a), the rule of unanimity ordinarily requires remand unless all the defendants joined in the motion. However, the court held that under 12 U.S.C. § 1819(b)(2)(B), the FDIC may unilaterally remove a case, without regard to consent by other defendants. Reading a unanimity requirement into the statute would undermine the broad removal power granted to the FDIC, the Eighth Circuit concluded. In a case in which the FDIC was a plaintiff, the Second Circuit had similarly held that the unanimity rule does not apply to cases removed by the FDIC under § 1819 [*Franklin Nat'l Bank Sec. Litig. v. Andersen*, 532 F.2d 842, 846 (2d Cir. 1976)].

Discretionary Remand Under § 1441(c) Inappropriate. Next, the Eighth Circuit, like the Fifth Circuit had in *Adair*, rejected the argument that remand was appropriate as a matter of judicial discretion under 28 U.S.C. § 1441(c), which permits a federal court to "remand all [otherwise nonremovable] matters in which State law predominates" to state court when a case arising under federal law has been removed from state court. The court questioned whether § 1441(c) applies to a suit removed by the FDIC pursuant to § 1819(b)(2)(B). In any event, the court reasoned, state law did not predominate in the remaining claims, because the sole issue on appeal was whether a federal regulation preempts the Missouri laws on which the homeowners based their claims, and preemption is always a federal question [see *Int'l Longshoreman's Ass'n v. Davis*, 476 U.S. 380, 388, 106 S. Ct. 1904, 90 L. Ed. 2d 389 (1986)].

Burford Abstention Inappropriate. Finally, the Eighth Circuit held that *Burford* abstention was not appropriate. A court may abstain under *Burford* when a state has established a complex regulatory scheme supervised by state courts and serving important state interests and when resolution of the case demands specialized knowledge and the application of complicated state laws [*Melahn v. Pennock Ins., Inc.*, 965 F.2d 1497, 1506 (8th Cir. 1992); see *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943)]. It is appropriate only with respect to equitable claims [*Barzilay v. Barzilay*, 536 F.3d 844, 850-851 (8th Cir. 2008)]. In this case, *Burford* abstention was inappropriate because (1) there was no indication that Missouri's prohibition of the unauthorized practice of law constituted "a complex regulatory scheme," and (2) the plaintiffs prayed for only monetary relief.

Commentary. Judge Jolly concurred in the Fifth Circuit *Adair* case. He argued that once the FDIC and its interests had been dismissed, there was no longer any federal character in the state claims. He concurred in the result, however, because federal usury claims and related state-law claims that could not be remanded remained in the case. It is important to consider his argument. There is no question that there was federal jurisdiction over all claims when they were removed by the FDIC. The question is whether supplemental or original jurisdiction supported federal jurisdiction because the answer to that question drives whether the district court has the power to dismiss the non-FDIC claims. In turn, that provides a basis for opining as to whether the Fifth and Eighth (and Second) Circuits' continuing jurisdiction approach is correct, or the Third Circuit's supplemental jurisdiction approach is correct.

To the extent that the Fifth and Eighth Circuits based their ruling on the black letter rule that federal jurisdiction is determined at the time of removal, it holds some water. However, this point begs an important question. It does not begin to explain the character of the state law claims as original or supplemental in character. Surely, as the court noted, the statute authorizing removal deems the state law claims to have arisen under federal law. However, it is beyond Congress' power to extend federal jurisdiction beyond the limits of Article III, § 2 [see *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803)]. Although the Supreme Court has held that it is within Congress' power to provide federal jurisdiction over a federally created entity, such as the a United States Bank, even when the claims against it are state claims [see *Osborn v. Bank of United States*, 22 U.S. 738, 9 Wheat 738, 6 L. Ed. 204 (1824)], some aspect "an essential ingredient" must in some respect arise out of federal law. And, if one such claim or ingredient of a case is present, then the federal court will have jurisdiction to hear related state law claims.

To the extent that the FDIC removal provision allows the FDIC to remove, and bring along with it all related state law claims, there is no constitutional issue. But to the extent that it deems state law claims against other defendants that

would not otherwise have been federal in nature to be deemed as federal is constitutionally suspect [see *Mesa v. California*, 489 U.S. 121, 136, 109 S. Ct. 959, 103 L. Ed. 2d 99 (1989) (elimination of requirement that federal defense be present for removal of state action to federal court by federal officer under 28 U.S.C. § 1442(a) would raise serious doubt whether, in enacting § 1442(a), Congress would not have expanded jurisdiction of federal courts beyond constitutional bounds)]. A better fit, therefore, if the FDIC or its successors are dismissed from the case, is to characterize remaining state law claims that were related to the claims against the FDIC as supplemental claims. This would enable the federal court to decide whether it is better or not to retain jurisdiction rather than require it to do so.

Thus, Judge Jolly's concurrence in *Adair* gets at the nut of the issue. What, precisely, is the character of the remaining claims? If they are "federal" then it is correct to say that the claims are in the original jurisdiction of the federal court, and therefore not subject to remand. But how can the court be correct that the statute, as Judge Jolly put it, performed alchemy to turn what was once not a federal claim into a federal claim? As Judge Jolly did, it is possible to appreciate the efficient and judicially economical approach the majority took. However, its analysis is a stretch, and characterizing the claims as supplemental would enable the district court to keep the entire case in federal court if the district court thinks it appropriate, but remand state law claims against the remaining non-FDIC defendants if it thinks there are grounds to do so under the supplemental jurisdiction remand provision [see 28 U.S.C. § 1367(c)]. Unless one expects remaining defendants to fail and be taken over by the FDIC resulting in another round of removal, it is hard to see what sort of federal interest persists once the claims against the FDIC are dismissed. And, the district court could listen to an argument on a motion to remand that such a scenario is likely and refuse to remand under § 1367(c).

While it was clear that the court clearly had jurisdiction over the entire case, including all state claims, that fact does not in itself mean that the court lacked discretion to remand state claims. Citing another Fifth Circuit case, Judge Jolly noted that whether to remand is a discretionary matter subject to the abuse of discretion standard [see *Regan v. Starcraft*, 524 F.3d 627, 631 (5th Cir. 2008)]. Once the FDIC and its interests have been dismissed, there is no federal character in the state claims. Even in *Griffin*, the case upon which the majority relied [see *FSLIC v. Griffin*, 935 F.2d 691, 696 (5th Cir. 1991) (justifying continued federal-question jurisdiction based on presence of successor-in-interest to FSLIC)], because there was a successor in interest, the federal character of the case continued. Judge Jolly rightly noted that the FDIC removal provision provided original jurisdiction to cases in which the FDIC "is a party" [see 12 U.S.C. § 1819(b)(2)(A)]. The statute can not, "through some feat of alchemy, make the case's state-law claims federal-law claims."

While this may seem to be an arcane bit of procedural hair-splitting, it is an important matter. It is interesting to note that the Supreme Court declined to grant certiorari given the split. Whether it intended to or not, it has enhanced federal power over state law claims. Perhaps in this time of financial upheaval, there is some federal interest in doing so.

RELATED LINKS: For further information, see Moore's Federal Practice:

- 15 Moore's Federal Practice (3d Ed.) § 103.20;
- 16 Moore's Federal Practice (3d Ed.) § 107.15[7];
- 17A Moore's Federal Practice (3d Ed.) § 122.04

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Meagher & Flom; and joined the faculty of the Fordham University School of Law in 1982, where she also served as Associate Dean from 1987 until 1995. She has written numerous articles on forum selection problems, mass tort litigation, federal practice and jurisdiction, and has written and edited several books, including *Rule 11 Sanctions* and the chapters on removal jurisdiction, venue, change of venue and multidistrict litigation in *Moore's Federal Practice*. From November 1988 until its closing in April 2000, Professor Vairo served on the Board of Trustees of the Dalkon Shield Claimants Trust, and since 1989 as the Chairperson. She serves on the editorial boards of several litigation and dispute resolution journals, including *Moore's Federal Practice*. She also is a member of the Rand Corporation's Institute for Civil Justice Board of Overseers. She is a member of the American Law Institute, has participated in numerous academic conferences, and has lectured widely to the bench and bar at programs various national and local associations and institutes.

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Removal and the "Last-Served" Defendant Rule

2010 Emerging Issues 5304

Removal and the "Last-Served" Defendant Rule

By Georgene Vairo

September 16, 2010

SUMMARY: In *Barbour v. International Union*, the Fourth Circuit rejected the traditional "first-served defendant" rule and adopted the "last-served defendant" rule. The traditional, first-served defendant rule is predicated on the "unanimity rule," which requires that all served defendants consent to and join in the notice of removal within 30 days. Under the "last-served" rule, the 30-day period for removal is calculated separately for each defendant.

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ARTICLE: Georgene Vairo on *Barbour v. International Union*

Summary. In *Barbour v. International Union*, 594 F.3d 315, 2010 U.S. App. LEXIS 2389 (4th Cir. Feb. 4, 2010), consistent with a strong trend in other courts, the Fourth Circuit rejected the traditional "first-served defendant" rule and adopted the "last-served defendant" rule. When a case is removed under 28 U.S.C. § 1441(a), all served defendants must consent to removal. Under the unanimity rule, if the first served defendant failed to remove within 30 days after service, the case was deemed unremovable on the theory that the first defendant would not consent to removal if later served defendants sought to remove. Under the "last-served" rule, the 30-day period for removal is calculated separately for each defendant, thereby keeping the window open to removal. The Fourth Circuit also held that state-law claims for breach of fiduciary duty against a union are not completely preempted by the National Labor Relations Act.

Second-Served Defendant Removed Action Against Union. Several retirees sued their international union and two locals of that union in state court. The plaintiffs alleged that the defendants provided the plaintiffs with false information about their eligibility to receive retirement incentive packages. The complaint included state-law causes of action for breach of fiduciary duties, negligent misrepresentation, and negligence.

The international union was served on March 20, 2008, and the first local was served on March 29, 2008. On April 28, 2008, more than 30 days after the international union was served, but within 30 days of service on the first local, and before service on the second, all three defendants filed a joint notice of removal. The ground for removal was that the plaintiffs' claims were completely preempted by § 9(a) of the National Labor Relations Act (NLRA) [see 29 U.S.C. § 159].

The plaintiffs moved to remand, arguing (1) removal was untimely, and (2) there was no basis for federal

jurisdiction. The district court refused to remand and granted the defendants' motion to dismiss on the ground the plaintiffs' claims were barred by the NLRA statute of limitation [see 29 U.S.C. § 160(b)]. The Fourth Circuit affirmed in part, holding that the removal notice was timely filed, but reversed in part with instructions to remand the case to state court because the district court did not have subject matter jurisdiction.

Thirty-Day Time Limit for Removal. The time limit for filing a notice of removal is set forth in 28 U.S.C. § 1446(b) as follows:

The notice of removal of a civil action or proceeding shall be filed by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

Circuit Split Concerning Later-Served Defendants. Section 1446(b) speaks only in terms of a single defendant. It does not explicitly address the timeliness of removal in cases involving multiple defendants. The circuits are divided with respect to how the 30-day limit applies to multiple defendants served at different times.

In *Getty Oil Corp. v. Insurance Co. of North America*, the Fifth Circuit adopted the "first-served defendant" rule. Under this rule, the 30-day removal period begins to run for the entire case as soon as the first defendant is served. All served defendants must join in the removal petition within 30 days from that date [*Getty Oil Corp. v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1262-1263 (5th Cir. 1988)].

More recently, the Sixth, Eighth, and Eleventh Circuits adopted the "last-served defendant" rule [*Bailey v. Janssen Pharm., Inc.*, 536 F.3d 1202, 1205 (11th Cir. 2008); *Marano Enters. of Kan. v. Z-Teca Rests., L.P.*, 254 F.3d 753, 757 (8th Cir. 2001); *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 533 (6th Cir. 1999)]. Under this rule, the 30-day period begins for each defendant on the date that defendant is served. An earlier-served defendant may choose whether to join in a later-served defendant's motion, preserving the rule that removal requires the unanimous consent of the defendants [*Bailey v. Janssen Pharm., Inc.*, 536 F.3d 1202, 1207-1209 (11th Cir. 2008)].

McKinney Decision. In *McKinney v. Board of Trustees of Maryland Community College*, the Fourth Circuit appeared to take a middle ground. Rejecting the first-served defendant rule, the court held that each defendant has 30 days from the date on which it is served to join "an otherwise valid removal petition" [*McKinney v. Board of Trs. of Md. Cmty. Coll.*, 955 F.2d 924, 928 (4th Cir. 1992)]. However, the court did not embrace the last-served defendant rule, stating in a footnote that if a second defendant is served more than 30 days after the first defendant, the case may not be removed unless the first defendant petitions for removal within 30 days of service on that defendant [955 F.2d at 926 n.3].

The Fourth Circuit characterized its footnote in *McKinney* as non-binding dictum. In *McKinney*, the first-served defendant *did* file a timely notice of removal. The issue was whether the later-served defendants could join in that petition more than 30 days after service on the first-served defendant. The court was not faced with the question whether a later-served defendant could file its own removal notice more than 30 days after service on the first defendant. Moreover, the authority for that dictum is itself no longer good law, having been overruled by the Eighth Circuit [see *Quick Erectors, Inc. v. Seattle Bronze Corp.*, 524 F. Supp. 351, 354 (E.D. Mo. 1981), overruled by *Marano Enters. of Kan. v. Z-Teca Rests., L.P.*, 254 F.3d 753 (8th Cir. 2001) (citing *Moore's*)].

The Fourth Circuit also concluded that the *McKinney* dictum was undermined by the Supreme Court's decision in *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.* [526 U.S. 344, 119 S. Ct. 1322, 143 L. Ed. 2d 448 (1999)]. In *Murphy*, the Court held that the 30-day time limit for removal is triggered by simultaneous service of the summons and complaint, or receipt of the complaint through service or otherwise, after and apart from service of the summons, but not by mere receipt of the complaint unattended by any formal service [526 U.S. at 347-348]. Although not directly on point, this holding suggests that the Court would permit a later-served defendant to remove a case within 30 days of

service on that defendant even if the first-served defendant did not file a removal notice within its 30-day period. The Fourth Circuit agreed with the Eighth and Eleventh Circuits that *Murphy* "lends credible and persuasive support to the propriety of the last-served defendant rule" [see *Bailey v. Janssen Pharm., Inc.*, 536 F.3d 1202, 1208 (11th Cir. 2008); *Marano Enters. of Kan. v. Z-Teca Rests., L.P.*, 254 F.3d 753, 756 (8th Cir. 2001) (citing *Moore's*)].

Application to Facts of Case. In this case, under the first-served defendant rule, the second local would have been required to file a removal notice before it was served. Under either the first-served rule or *McKinney's* "middle ground," the second local's right to remove would have been waived by the international union's failure to file a removal notice within 30 days of service, even though the second local had not yet been served. The Fourth Circuit concluded that either result would violate the spirit, if not the letter, of *Murphy's* "bedrock principle" that "a defendant is not obliged to engage in litigation unless notified of the action, and brought under a court's authority, by formal process" [see *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347, 119 S. Ct. 1322, 143 L. Ed. 2d 448 (1999)]. Moreover, it would be inequitable for the first-served defendant's failure to remove the case to waive the other defendants' right to remove.

Last-Served Defendant Rule Adopted and Satisfied. The Fourth Circuit joined the Sixth, Eighth, and Eleventh Circuits in adopting the last-served defendant rule, holding that each defendant has 30 days from the date that defendant was served with formal process to file a notice of removal. Earlier-served defendants may join in the notice regardless of whether they have previously filed a removal notice. Accordingly, the joint notice of removal filed in this case was timely.

Dissent: McKinney Precludes Adoption of Last-Served Defendant Rule. In a concurring and dissenting opinion, Judge Hamilton accused the majority of improperly jettisoning *McKinney*, which he considered binding precedent. He argued that *Murphy* did not overrule *McKinney* because (1) *Murphy* did not involve multiple defendants, and (2) the concerns of *Murphy* were not implicated in this case. He would remand the case to state court on the ground removal was untimely under the "*McKinney* Intermediate Rule."

Commentary. The traditional, first-served defendant rule is predicated on the "unanimity rule," which requires that all served defendants consent to and join in the notice of removal within 30 days. The theory is that all served defendants must agree to removal, and because the notice must be submitted within 30 days of service on the first defendant, all served defendants must join in the petition no later than 30 days from the day on which the first defendant was served. This approach surely promotes unanimity among the served defendants without placing undue hardships on subsequently served defendants, because later served defendants may either accept the removal or exercise their right to choose the state forum by moving to remand.

The traditional view promotes two other considerations. First, the removal statutes are strictly construed against removal (see 16 *Moore's Federal Practice*, § 107.05). Second, the purpose of the time limits in Section 1446 is to ensure that the question of where the case will be litigated be put to rest as soon as possible. The problem with the approach is that it facilitated some gamesmanship on the part of plaintiffs who could first serve a defendant that would not want to remove or whose lawyers may fail to think about removal as an option.

To deal with this concern, courts began to develop a less-strict approach that provided later-served defendants the opportunity to remove. This "later-served defendant rule," prevents the unfairness of allowing the first-served defendant's failure to remove to deprive other unserved defendants—who may not know about the action—of their right to seek removal.

The last-served defendant rule is in some respects consistent with the rules adopted in some courts that an unserved defendant need not join in the notice of removal (see 16 *Moore's Federal Practice*, § 107.11[1][d]), and in some courts that an unserved defendant's citizenship may be disregarded when determining if the case is removable (see 16 *Moore's Federal Practice*, § 107.14[2][c][ii]). These courts argue that the goal of unanimity can still be served under the later-served defendant rule: the later-served defendant can be given 30 days from the date of service to file a notice of

removal, but may only do so with the unanimous consent of the later-served defendant's previously served codefendants. The fact that the codefendants may not have chosen to file a notice of removal on their own within 30 days of service does not necessarily mean that they will not join the later-served defendant's motion. Moreover, some courts are reluctant to read "first-served" into the statute, as required under the "first-served" rule, when the statute as written can reasonably be read to allow each defendant to remove within 30 days of service on that defendant.

Additionally, the Fourth Circuit correctly looked to the Supreme Court's decision in *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.* As the Fourth Circuit explained, *Murphy*, in which the Supreme Court held that a defendant may not be required to take any action in a civil case until proper service has been made, will likely determine the result of this debate in favor of the later-served defendant rule. The last-served defendant rule is consistent with *Murphy* because it suggests that a defendant should not lose any procedural right until it is served. By elevating the importance of proper service in the removal context, however, the Court has implicitly rejected the policies that the removal statute be strictly construed and that the choice of forum be settled as soon as possible. Nonetheless, especially in light of *Murphy*, the removal right of later-served defendants should not be compromised before they are served and they ought to have the opportunity to persuade the earlier served defendants to join the removal notice. With the Eighth Circuit joining the trend towards the last-served defendant rule, it is likely that the fairness approach may well, and should, supersede the traditional approach in other courts.

State-Law Claims Were Not Completely Preempted. Under the complete preemption doctrine, some state-law claims are converted into claims arising under federal law, providing a basis for removal to federal court. The presumption is against complete preemption. This presumption is rebutted only when a federal statute indisputably displaces any state cause of action over a given subject matter [*Lontz v. Tharp*, 413 F.3d 435, 441 (4th Cir. 2005)].

To support removal on the basis of complete preemption, a defendant must show that the state-law claim is cognizable only as a federal claim and that Congress clearly intended the federal claim to provide the exclusive cause of action for claims of overwhelming national interest [*Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 11, 123 S. Ct. 2058, 156 L. Ed. 2d 1 (2003)]. It is not enough that the state-law claims are subject to ordinary or defensive preemption. Ordinary preemption may be a defense to state-law claims, but it does not provide grounds for removal.

The Fourth Circuit noted that the plaintiffs pled typical state-law causes of action for violation of a fiduciary duty resulting from their membership in the union, causes of action that do not inherently represent an overwhelming national interest. The plaintiffs did not plead a claim against their employer, breach of a collective bargaining agreement, or breach of any duty owed by the union as their bargaining agent, and nothing in a collective bargaining agreement was relevant to their claims. The union did not direct the court to any language in § 9(a) [29 U.S.C. § 159] or in the legislative history showing a clear congressional intent that all state-law claims relating to all fiduciary duties owed to union members by virtue of their union membership are exclusively federal claims under that section. The Fourth Circuit concluded that a finding of complete preemption would undermine established concepts of federalism and contradict clear Fourth Circuit precedent strongly counseling against imputation to Congress of an intent to displace a whole panoply of state law absent some clearly expressed direction.

The Fourth Circuit distinguished § 9(a) of the NLRA from § 301 of the Labor Management Relations Act [29 U.S.C. § 185], which does completely preempt state-law claims. The court noted that § 301 not only provides federal courts with jurisdiction over employment disputes covered by collective bargaining agreements, it also directs federal courts to fashion a body of federal common law to resolve such disputes [*McCormick v. AT & T Technologies, Inc.*, 934 F.2d 531, 534 (4th Cir. 1991)]. No such congressional imperative exists with respect to § 9(a) because the duty of fair representation is itself judicially created. Moreover, the Supreme Court has stated that the union's duty of fair representation is *implied* from its status as the exclusive bargaining representative of the bargaining unit workers [see *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 48, 119 S. Ct. 292, 142 L. Ed. 2d 242 (1998)]. Thus, holding state-law claims completely preempted by § 9(a) would require the court to find that Congress implicitly intended to preempt state law based on duties that are themselves implied from the statute. The court concluded that the doctrine of complete preemption did not apply and, therefore, there was no basis for removal to district court and no jurisdiction in

that court.

Commentary. The Fourth Circuit correctly analyzed the complete preemption issue. In light of the Supreme Court's own ambivalence over the last several terms about whether Congress intended to preempt state law in drug and medical device cases, even defensively, it is not surprising that the Fourth Circuit would take a very narrow approach to a complete preemption argument that is even more repugnant to the idea of federalism.

RELATED LINKS: For more information, see Moore's Federal Practice:

- 16 Moore's Federal Practice (3d Ed.) § 107.30[3][a][iv][C];
- 16 Moore's Federal Practice (3d Ed.) § 107.14[4][b][v][A.1]

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Restraining Costs Incurred in Preserving ESI

2010 Emerging Issues 5300

Restraining Costs Incurred in Preserving ESI

By John K. Rabiej

September 15, 2010

SUMMARY: The 2006 amendments to the FRCP addressed discovery issues involving electronically stored information (ESI). The amendments deliberately left open the scope of a party's ESI preservation obligations. Parties continue to spend enormous sums to preserve ESI for discovery purposes. *U.S. v. Louisiana Generating LLC* offers one effective way to restrain unnecessary discovery preservation costs in certain cases.

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ARTICLE: A party's discovery preservation obligations are set by common law, and they vary depending on the jurisdiction. The standards governing sanctions for failing to comply with these preservation obligations also vary depending on the jurisdiction. The result is that practitioners are faced with much uncertainty about the precise dimensions of preservation obligations, and they often err on the conservative side, taking expensive steps to preserve ESI when in doubt.

In general, a party is obligated to preserve all relevant ESI for discovery purposes when a law suit is filed. Depending on the jurisdiction, the preservation obligation may arise much sooner, when the party knew or should have known that litigation was imminent. The failure to preserve relevant ESI has led to severe sanctions, including adverse jury instructions and default judgments. To prevent such penalties, clients spend enormous sums ensuring that all their ESI is preserved, while careful practitioners devote substantial time preparing litigation hold letters, monitoring client's preservation actions, and reviewing ESI for relevancy and privilege. Yet the vast bulk of ESI in virtually all cases is not relevant or important.

Though the rules committees that draft the Federal Rules of Practice and Procedure recognized that preservation of ESI can raise many serious issues, the committees decided not to address them in the 2006 Civil Rules discovery amendments, with the exception of establishing a shallow "safe-harbor" provision in Rule 37(e). The committees concluded that preservation of ESI touched substantive law, which was outside the purview of its jurisdiction. That position, however, may be changing. During the 2010 Duke Law School Litigation Conference, prominent lawyers and academics advocated a rule-based solution to ESI preservation issues, based on existing rules that already address certain preservation issues. (A paper issued by one of the conference's panels contains a proposed "Elements of a Preservation Rule," which can be found at

[http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/\\$defaultview/EAF7D6B2D709B78E8525770700487925/\\$File/E‑](http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/EAF7D6B2D709B78E8525770700487925/$File/E‑)

In light of the conference's discussions, the rules committees are reexamining their former position and exploring different rules-based approaches to handle ESI preservation issues. In the meantime, practitioners are faced with difficult practical decisions in assessing wide-ranging judicial rulings in an effort to determine what ESI must be preserved in individual cases. (See John K. Rabiej, *Reasonableness Standard Governing Discovery Obligations and Preservation Duty*, 2009 *Emerging Issues* 4250.) The lawyer's decision-making is made with the knowledge that a wrong decision in a particular case can be outcome determinative. Conservative approaches in preserving all ESI can be expected, though it results in enormous sums being spent for no benefit.

Alternative to Preserving All ESI: In *United States v. Louisiana Generating LLC*, 2010 U.S. Dist. LEXIS 20207 (M.D. La. March 5, 2010), the parties themselves set the parameters of their discovery obligations to preserve ESI. In the case, the court approved the stipulation entered into by the Department of Justice on behalf of the Environmental Protection Agency and the defendant. The purpose of the stipulation was "to reduce the time, expense and other burdens of discovery of certain electronically stored information and privileged materials ... and to better define the scope of their obligations with respect to preserving such information and materials." Presumably, the stipulation reflects the Department's considered views on the appropriate way to handle ESI-preservation issues in a case where both parties have enormous amounts of ESI located in multiple media and places. The Department's stipulation offers a good model that parties in similar ESI-laden cases can consider and effectively use to reduce discovery costs and burdens.

Types of ESI Addressed by Stipulation: The stipulation in *Louisiana Generating LLC* does not address every ESI preservation issue, but it does address three important areas where substantial savings in time and money can be achieved. Most importantly the stipulation makes clear that neither party must preserve certain "not reasonably accessible ESI," including ESI on back-up systems, if such ESI is "routinely purged, overwritten or otherwise made not reasonably accessible in accordance with an established routine maintenance policy."

Preserving ESI located on back-up tapes can be extremely expensive and time-consuming. Retrieving deleted ESI also can be expensive and burdensome. Relieving a party from preserving and retrieving such ESI can substantially alleviate a party's discovery burden. The stipulation is subject to two major conditions. First, the deletion of the ESI must occur "in accordance with an established routine system maintenance policy." This condition is important to show that the ESI was deleted for reasons other than for purposes of the litigation. Second, if the party has a policy of retaining the ESI that supersedes its record-retention policy, then the ESI must be preserved.

How does the stipulation in *Louisiana Generating LLC* differ from: (1) the provision in Rule 26(b)(2)(B), which relieves a party from producing ESI from sources identified "as not reasonably accessible," or (2) the safe-harbor provision of Rule 37(e), which bars any sanction for failing to produce ESI if it was deleted "as a result of the routine, good-faith operation of an electronic information system"? In a word, the stipulation provides greater *certainty* than the rule provisions, which contain significant caveats. The stipulation eliminates the threat of wasteful satellite litigation interpreting the rule provisions, relieving discovery burdens and costs that a cautious party might assume.

Rule 26(b)(2)(B) is limited. It applies only to ESI located in sources that are not reasonably accessible because of undue burden or cost, an assessment which is subject to reasonable alternative interpretations. Determining what is an "undue cost or burden" in a particular case requires a normative judgment that weighs costs and benefits, which may be subject to disagreement among reasonable minds. Courts have routinely found ESI located on back-up tapes systems to be "inaccessible." But as back-up systems become cheaper and alternative storage devices are used placing recovery data on-line, making retrieval of ESI easier and cheaper, such routine assessments may no longer be valid. As a result, it is becoming less certain that Rule 26(b)(2)(B) will always apply to ESI stored on back-up systems. More importantly, Rule 26(b)(2)(B) does not relieve a party of any common-law preservation obligation. As explained in the Committee Note to the rule, "Whether a responding party is required to preserve unsearched sources of potentially responsive information that it believes are not reasonably accessible depends on the circumstances of each case." The bottom-line is that Rule 26(b)(2)(B) does not provide a practitioner certainty, but requires the practitioner to make difficult assessments that are subject to second guessing by the other party and the court.

Rule 37(e)'s safe-harbor is quite shallow. (See John K. Rabiej, Expert Commentary, *How Shallow is the Rule 37(e) Safe Harbor?*, **2008 Emerging Issues 2902**.) It applies only when ESI is deleted in "good faith" as part of a routine operation of an electronic information system. Qualifying the protection by requiring an element of good faith leaves open the possibility of litigation challenging the party's intent in operating its electronic information system. For example, the rule does not apply when a party knows or should have known that ESI located in inaccessible sources is located nowhere else, e.g., when one of its employees deleted e-mails from the active database. Because of the potentially severe consequences for failing to preserve ESI on back-up systems in such cases when the ESI was deleted from the active database, prudent practitioners err on the conservative side and preserve all such ESI despite Rule 26(b)(2)(B) and Rule 37(e).

The stipulation in *Louisiana Generating LLC* does a good job in limiting the uncertainty about any obligation to preserve ESI on backup systems for discovery purposes. The parties agree that such ESI need not be preserved, eliminating the threat of litigation challenging its destruction. But is the stipulation good policy? The rationale supporting such a stipulation is solid. Discovery should focus on ESI located in active databases where relevant ESI is most often available. The likelihood of finding important evidence on a back-up system, which otherwise could not be found in active databases, is typically very low. In most cases, there is no further need to search ESI on inaccessible sources, including back-up tape systems. Compelling a party to always preserve ESI on back-up tape systems makes little sense.

In addition, case law is clear that a party need not change its record-retention practices solely to facilitate discovery in litigation, unless the ESI is otherwise not available. A party should not be forced to adopt a new policy retaining ESI that was not retained before litigation, unless a specific reason justifies the retention. Preservation of information should be driven by business, and not discovery, reasons. If a business has decided to routinely place certain ESI that it rarely uses to conduct its daily business in inaccessible sources for temporary periods of time for business reasons (e.g., less expensive storage), the business should not be compelled to create a new business practice solely for litigation reasons, e.g., to make discovery easier or retain the ESI indefinitely. As long as the inaccessible ESI is deleted in accordance with established and routine deletion maintenance procedures that were in effect before the litigation arose, there should be no new obligation to establish some new record-retention system or procedure retaining it solely for discovery purposes, unless some specific justification warrants retention.

The stipulation addresses another recurring ESI preservation issue, the handling of drafts of electronic writings. An employee can prepare multiple drafts of a document before finalizing it. Software programs capture every iteration, which can be retrieved with some cost. The stipulation in *Louisiana Generating LLC* makes clear that a party must only preserve drafts that are shared by the author with another person (by e-mail, print, or otherwise). The parties agree that "they need not preserve for discovery a document before and after every change made to it," so long as the draft document is preserved. This provision reflects a common-sense approach that was assumed in the former "paper" world, where an author's drafts of paper documents were thrown away with no hesitation.

The stipulation in *Louisiana Generating LLC* provides some limits on the preservation of ESI stored in mobile sources. Under the stipulation, electronic mail or pin messages sent to or from a Personal Digital Assistant (e.g., Blackberry Handheld) need not be preserved so long as the ESI "is routinely saved elsewhere." This coverage would apply, for example, when ESI messages are sent simultaneously to an employee's PDA and office computer.

Perhaps the most far-reaching provision of the stipulation in *Louisiana Generating LLC*, but one which should be adopted only after considerable thought, is the provision that ESI be produced only if it is specifically requested. If not requested, ESI need not be searched or produced. This protocol is designed to target only specific ESI for discovery, relieving the parties of the burden and cost of reviewing all ESI. The stipulation is inconsistent with Rule 34, which includes ESI in a request of any information. It is clear that the parties in *Louisiana Generating LLC* concluded that complying with the Rule 34 provision would not benefit them in their case. The parties presumably had a very good idea of the ESI that was important to their case, and they were not overly concerned about the possibility of missing some of it.

Lessons for Practitioners: The stipulation in *Louisiana Generating LLC* saved both parties time and money that would have otherwise been wasted on preserving irrelevant or not important ESI. It provided greater certainty to the practitioners on their preservation obligations than the existing rules, relieving them of burdens in retaining ESI and reducing costs. The stipulation reflected the parties' considered assessment of the costs and burden incurred in preserving all ESI, weighed against the possibility that relevant and important ESI, which was not located anywhere else, would be lost. Practitioners should consider entering a stipulation modeled on the one in *Louisiana Generating LLC*, especially if the need of both parties for ESI discovery is not asymmetrical, the parties are in a relatively similar bargaining position, and much ESI is located in multiple locations and media sources.

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Internet Contacts and Personal Jurisdiction

2010 Emerging Issues 5267

Internet Contacts and Personal Jurisdiction

By Allan Ides

August 18, 2010

SUMMARY: In *Tamburo v. Dworkin*, a panel of the Seventh Circuit held that a district court could exercise specific personal jurisdiction over out-of-state defendants based on allegedly defamatory and harassing e-mails and messages posted on their public websites when this activity was expressly aimed at the plaintiff in the forum state and when defendants should have been aware that the brunt of the harm would be felt there.

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ARTICLE: Introduction. In *Tamburo v. Dworkin*, 601 F.3d 693, 2010 U.S. App. LEXIS 7261 (7th Cir. Apr. 8, 2010), a panel of the Seventh Circuit held that a district court could exercise specific personal jurisdiction over out-of-state defendants based on allegedly defamatory and harassing e-mails and messages posted on their public websites when this activity was expressly aimed at the plaintiff in the forum state and when defendants should have been aware that the brunt of the harm would be felt there.

Facts and Proceedings. The plaintiff, an Illinois resident who operated a dog breeding software business in Illinois, filed suit in the Northern District of Illinois against several out-of-state defendants. His claims arose out of a dispute over the contents of a dog-pedigree software program he had developed using data collected from the defendants' websites. The defendants included residents of Colorado, Michigan, Ohio, Canada, and Australia, each of whom had had little or no contact with Illinois.

In his complaint, the plaintiff alleged that the U.S. and Canadian defendants engaged in a campaign of e-mails and postings falsely accusing him of stealing their data and urging dog enthusiasts to boycott his products. He further alleged that the Australian defendant reposted some of these messages on a private dog-breeder listserve. Plaintiff sought a declaratory judgment that he had not violated any federal law by incorporating the defendants' data, which he claimed was in the public domain, into his software. He also sought damages for federal and state antitrust violations and asserted state law claims for defamation, tortious interference with existing contracts and prospective economic advantage, trade libel, and civil conspiracy.

The defendants moved to dismiss for lack of personal jurisdiction and failure to state a claim. The district court dismissed the claims against all defendants for lack of personal jurisdiction.

Antitrust Allegations were Inadequately Pled under *Bell Atlantic Corp. v. Twombly*. The Seventh Circuit

affirmed the dismissal of plaintiff's antitrust claims on the alternate basis that those claims were inadequately pled under the standards announced in *Bell Atlantic Corp. v. Twombly*. In that case, the Supreme Court ruled that a formulaic recitation of the elements of an antitrust cause of action will not do—the factual allegations must be sufficient to raise a claimed right to relief above the speculative level [*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929, 2007 U.S. LEXIS 5901 (2007)]. The plaintiff's claims here, however, were pled in wholly conclusory terms and contained no factual allegations plausibly suggesting the existence of an antitrust conspiracy or antitrust injury. Accordingly, the court of appeals affirmed the dismissal of plaintiff's antitrust claims.

Specific Jurisdiction and the *Calder* Test. After dismissing the antitrust claims, the remaining question was whether the district court could exercise personal jurisdiction over the five defendants with respect to the state-law tort claims. The court explained that in cases involving allegations of tortious activity outside the forum state but causing an effect within the forum, the inquiry focuses on whether the conduct underlying the claims was "purposefully directed" at the forum. This is the "*Calder* (or Effects) Test." The Supreme Court's decision in *Calder v. Jones* suggests three requirements for satisfying this test: (1) intentional conduct (or intentional and allegedly tortious conduct); (2) expressly aimed at the forum state; (3) with the defendant's knowledge that the brunt of the harm would be felt—that is, that the plaintiff would be injured—in the forum state [*Calder v. Jones*, 465 U.S. 783, 790, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984)].

The "Aim" and the "Brunt." The court noted that some circuits have read *Calder*'s "express aiming" requirement fairly broadly, requiring only conduct that is targeted at a plaintiff known to be a resident of the forum state [see *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000)]. Others have read it more narrowly to require that the forum state be the "focal point of the tort" [see *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1074 n.9 (10th Cir. 2008)]. The present case involved both a forum-state injury and tortious conduct specifically directed at the forum, making the forum state the focal point of the tort. Thus, even under the narrower view, the "express aiming" element was met.

The individual defendants' use of their public websites to defame an Illinois-based businessman and exhort readers to boycott his products may be conceptualized as an electronic "entry" into Illinois for jurisdictional purposes, the court said. The individual defendants were each alleged to have published false and defamatory statements about the plaintiff, either on their public websites or in e-mails. In some of these messages, readers were encouraged to boycott the plaintiff's products; in others, the plaintiff's Illinois address was supplied and readers were urged to contact and harass him. The defendants engaged in this conduct with the knowledge that the plaintiff lived in Illinois and operated his business there. Thus, although they acted from points outside the forum state, these defendants specifically aimed their tortious conduct at the plaintiff and his business in Illinois with the knowledge that he lived, worked, and would suffer the "brunt of the injury" there. These allegations sufficed to establish personal jurisdiction over these defendants under either a broad or a more restrictive view of *Calder*.

This reasoning, however, applied only to the U.S. and Canadian defendants. The Australian defendant, a corporation, allegedly facilitated the posting of some of the individual defendants' tortious messages on its private e-mail listserve. The complaint did not say how many, nor did it describe the content of the messages that were reposted. Moreover, there were no allegations that anyone associated with this defendant acted with the knowledge that the plaintiff operated his business in Illinois or with the specific purpose of inflicting injury there. The allegations were therefore not sufficient to make out a prima facie case that this defendant "expressly aimed" its allegedly tortious conduct at Illinois. As such, the claims against this defendant were properly dismissed for lack of personal jurisdiction.

Injury Arose out of the Alleged Tortious Conduct. In a specific jurisdiction analysis, the plaintiff's injury must "arise out of" or "relate to" the conduct that makes up the defendants' contacts with the forum. The panel noted that the circuits have varied in their understanding of this element, with some courts requiring only a relatively loose "but for" relationship to others requiring a stricter proximate cause relationship (as well as a number of variations in between these two standards). The Seventh Circuit did not find it necessary to take a position in this conflict. Under even the most rigorous approach to the determination of whether the plaintiff's injury arises out of the defendants' contacts with

the forum state, the plaintiff's injury here clearly did. The individual defendants had all expressly aimed their allegedly tortious conduct at the plaintiff and his Illinois-based business for the purpose of causing him injury there; these contacts with the forum state were both the cause in fact (or but for cause) and the legal (or proximate) cause of his injury.

Fair Play and Substantial Justice. Finally, the court determined that exercising personal jurisdiction over the individual defendant would not offend traditional notions of fair play and substantial justice. A court considers the following facts with respect to this element of the jurisdictional inquiry: the burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies.

Here, Illinois had a strong interest in providing a forum for its residents and local businesses to seek redress for tort injuries suffered within the state and inflicted by out-of-state actors. The defendants lived in other U.S. states and in Canada—none of these locations had a substantial interest at stake here. It would be unreasonable to expect the plaintiff to file separate lawsuits to give each defendant the privilege of defending the litigation in his or her home state when jurisdiction was otherwise proper in Illinois. Rather, it was reasonable to conclude that the defendants should anticipate being haled into court in the plaintiff's home state. A single suit in Illinois also promoted the most efficient resolution of the claims.

Finding that the elements of the specific jurisdiction analysis were met and that the district court could properly exercise jurisdiction over the individual defendants, the court of appeals reversed the order dismissing the state-law tort claims against them.

Commentary. The Seventh Circuit's opinion provides an unusually detailed and lucid account of the *Calder* (or Effects) Test, which is universally used to measure personal jurisdiction over out-of-state defendants who engage in intentional activity directed at the forum state. The opinion is quite useful in that it presents an accurate account of that test, as well as a balanced discussion of recent cases developing and applying it. The opinion also includes a well-reasoned application of the *Calder* Test, to the facts before it, providing a contrast between those circumstances where the test would be satisfied (as to the defendants who aimed activity at the forum) and those where it would not (as to the defendant that did not so aim).

It is worth noting that the court did not apply the so-called "*Zippo* Test," which has sometimes been used as a measure of personal jurisdiction in Internet-related cases [*Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997)]. Instead, the Seventh Circuit panel observed, "[W]e hesitate to fashion a special jurisdictional test for Internet-based cases. *Calder* speaks directly to personal jurisdiction in intentional-tort cases; the principles articulated there can be applied to cases involving tortious conduct over the Internet." This judgment is sound. *Zippo* provides a way of considering whether specific Internet activity can be characterized as purposefully directed toward a forum state, but does not provide the ultimate measure of jurisdiction over the party engaging in that activity. At best, *Zippo* provides an estimation of potential jurisdiction.

RELATED LINKS: For further information, see Moore's Federal Practice:

- 16 Moore's Federal Practice (3d Ed.) § 108.42[3], [5], [7].

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The Foreign Sovereign Immunities Act and Individual Immunity

2010 Emerging Issues 5268

The Foreign Sovereign Immunities Act and Individual Immunity

By Allan Ides

August 18, 2010

SUMMARY: In *Samantar v. Yousuf*, the Supreme Court held that the Foreign Sovereign Immunities Act (FSIA) does not provide immunity from suit for officials of foreign governments. The Court did not, however, preclude the possibility that the petitioner would be entitled to common law immunity.

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ARTICLE: Introduction. In *Samantar v. Yousuf*, - U.S. -, 130 S. Ct. 2278, 176 L. Ed. 2d 1047, 2010 U.S. LEXIS 4378, 78 U.S.L.W. 4460 (June 1, 2010), the Supreme Court held that the Foreign Sovereign Immunities Act (FSIA) does not provide immunity from suit for officials of foreign governments. The Court did not, however, preclude the possibility that the petitioner would be entitled to common law immunity.

Facts and Proceedings. Natives of Somalia sued an ex-Somali official under the Torture Victim Protection Act of 1991 [106 Stat. 73, note following 28 U.S.C. § 1350] and the Alien Tort Statute [28 U.S.C. § 1350]. The defendant had been First Vice President and Minister of Defense of Somalia from 1980 to 1986 and Prime Minister from 1987 to 1990 and had been in charge of Somalia's armed forces before its military regime collapsed. He fled Somalia in 1991 and now lives in Virginia. The plaintiffs alleged that he exercised command and control over members of the Somali military forces, who tortured, killed, or arbitrarily detained the plaintiffs or members of their families; that he knew or should have known of the abuses perpetrated by his subordinates; and that he aided and abetted the commission of those abuses.

The district court dismissed the suit, concluding that the defendant was immune under the FSIA [*Yousuf v. Samantar*, 2007 U.S. Dist. LEXIS 56227, at *23-*46 (E.D. Va. 2007)]. The Fourth Circuit reversed, holding that the FSIA does not apply to individual foreign government officials, and remanded the case for further proceedings, including a determination of whether the defendant was entitled to immunity under the common law [*Yousuf v. Samantar*, 552 F.3d 371, 383-384 (4th Cir. 2009)]. The Supreme Court granted certiorari to resolve a circuit split on this issue [compare *Yousuf v. Samantar*, 552 F.3d 371, 381 (4th Cir. 2009), and *Enahoro v. Abubakar*, 408 F.3d 877, 881-882 (7th Cir. 2005) (both holding that FSIA does not govern immunity of individual foreign officials), with *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1103 (9th Cir. 1990), *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 83 (2d Cir. 2008), *Keller v. Central Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002), *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999), and *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996) (all holding that suit against individual official for acts committed in official capacity

must be analyzed under FSIA)]. The Court affirmed the Fourth Circuit's decision and remanded the case for further proceedings.

Foreign Sovereign Immunities Act. The FSIA provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States. . . ." [28 U.S.C. § 1604]. FSIA defines "foreign state" as follows [28 U.S.C. § 1603]:

(a) A "foreign state" . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity-

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

Text of FSIA Does Not Apply to Individual Defendants. Writing for the Court, Justice Stevens first analyzed the text of the statute. He pointed out that the term "foreign state" on its face indicates a body politic that governs a particular territory. The use of the word "entity" in the definition of "agency or instrumentality of a foreign state" provided further indication that individuals were not meant to be covered, because "entity" typically refers to an organization, not an individual. Moreover, the three components of the definition of "entity" do not appear to refer to individuals. Justice Stevens reasoned that (1) the phrase "a separate legal person" typically refers to the legal fiction that allows an entity to hold personhood separate from the natural persons who are its shareholders or officers; (2) it is awkward to refer to a person as an "organ" of a foreign state; (3) section 1332(c) and (e) refer to the citizenship of corporations and estates; and (4) a natural person cannot be "created under the laws of any third country."

The Court rejected the argument that an official can be included within the meaning of "foreign state" because § 1603(a) merely sets out a nonexhaustive list, not restricting the term to political subdivisions, agencies, or instrumentalities. The Court noted that even if the list were merely illustrative, it suggests that "foreign state" does not encompass officials, because the types of defendants listed are all entities. Moreover, Congress expressly mentioned officials elsewhere in the FSIA when it wished their acts to be considered equivalent to acts of the foreign state [*see, e.g., 28 U.S.C. §§ 1605(a)(5), 1605A(a)(1), 1605A(c)*], which suggests that officials are not included in the term "foreign state." The Court also noted various other provisions of the Act, including the provisions for service of process, which make no express mention of service of process on individuals [*see 28 U.S.C. § 1608(a)*], and the Act's remedial provisions, which specify different remedies with respect to different defendants [*see 28 U.S.C. §§ 1606, 1610*], all of which indicate individuals are not to be considered "foreign states" within the meaning of the Act.

Justice Stevens concluded that reading the FSIA as a whole, there is nothing in it that suggests "foreign state" in § 1603(a) should be read to include an official acting on behalf of the foreign state, and much to indicate that this is not what Congress intended. The Court was unanimous on this point.

Legislative History Confirms FSIA Does Not Apply to Individual Defendants. Justice Stevens also looked to the legislative history of FSIA for guidance and, based on that history, rejected the defendant's argument that the FSIA codified the common law with respect to immunity for individual state officials. The Court acknowledged that one of the primary purposes of the FSIA was to codify the restrictive theory of sovereign immunity, which Congress recognized as consistent with extant international law. A related purpose was codification of international law at the time of FSIA's enactment. However, there are differences between a state's immunity and that of a state official. Therefore, the Court concluded, there is "little reason to presume that when Congress set out to codify state immunity, it

must also have, *sub silentio*, intended to codify official immunity." In fact, to the extent Congress *did* contemplate FSIA's effect on officials, it appears to have intended for the Act *not* to apply to officials.

Common Law May Still Bar Suit. The Court also rejected the argument that its decision would permit litigants to evade FSIA's restrictions by artfully pleading a cause of action against a state official instead of against the state. First, not every action could be successfully pleaded against an individual officer alone. Second, even when it could, the action might be barred by common law principles of immunity.

Concurring Justices Would Not Consider Legislative History. All of the Justices concurred in the Court's judgment, agreeing that the FSIA does not apply to individual government officials. Justices Thomas and Scalia concurred only in the judgment, objecting to the use of legislative history in the Court's analysis. Justice Alito concurred in the opinion and the judgment, but noted that he thought the citations to legislative history were "of little value."

Justice Stevens acknowledged that it may not have been "strictly necessary" to consult the legislative history for confirmation of its reading of the statutory text. Nevertheless, he defended the use of legislative history, quoting Justice White [*Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 610 n.4, 111 S. Ct. 2476, 115 L. Ed. 2d 532 (1991)]:

As for the propriety of using legislative history at all, common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it. As Chief Justice Marshall put it, "[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived." *United States v. Fisher*, 6 U.S. 359, 2 Cranch 358, 386, 2 L. Ed. 304 (1905). Legislative history materials are not generally so misleading that jurists should never employ them in a good-faith effort to discern legislative intent. Our precedents demonstrate that the Court's practice of utilizing legislative history reaches well into its past. *See, e.g., Wallace v. Parker*, 31 U.S. 680, 6 Pet. 680, 687-690, 8 L. Ed. 543 (1832). We suspect that the practice will likewise reach well into the future.

Commentary. Perhaps we are witnessing a trend toward the primacy of textual analysis in the realm of procedure. During the first week of June 2010, the Supreme Court decided two cases pertaining to federal procedure and in both cases relied largely on straightforward readings of the relevant text. *See also Krupski v. Costa Crociere, S.p.A.*, - U.S. -, 130 S. Ct. 2485, 177 L. Ed. 2d 48, 2010 U.S. LEXIS 4567, 78 U.S.L.W. 3715 (June 7, 2010) (interpreting and applying Federal Rule of Civil Procedure 15(c)(1)(C)). And in both cases the Court rejected creative glosses placed on the relevant text by lower federal courts. If this is a trend, it is a welcome one since it might help bring clarity to the law of procedure. *Cf. Ashcroft v. Iqbal*, - U.S. -, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (torturing the text of Federal Rule of Civil Procedure 8(a)(2)). There remains a debate on the role of legislative history in interpreting the text, but the Court appears to be unanimous in its emerging view that the critical question in statutory and rule analysis is to be discovered through a careful and sensible reading of the text. Let's hope.

RELATED LINKS: For further information, see Moore's Federal Practice:

- 15 Moore's Federal Practice (3d ed.) § 104.11[2].

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Irrelevance of Whether a Counterclaim is Designated Compulsory or Permissive

2010 Emerging Issues 5269

Supplemental Jurisdiction and the Irrelevance of Whether a Counterclaim is Designated Compulsory or Permissive

By Allan Ides

August 18, 2010

SUMMARY: In *Global NAPs, Inc., v. Verizon New England Inc.*, the First Circuit joined the Second and Seventh Circuits in ruling that 28 U.S.C. § 1367(a) gives federal courts supplemental jurisdiction over some permissive counterclaims. This ruling runs counter to the long-held view, which was well established prior to the adoption of § 1367, that permissive counterclaims require an independent basis of jurisdiction.

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ARTICLE: Introduction. In *Global NAPs, Inc., v. Verizon New England Inc.*, 603 F.3d 71, 2010 U.S. App. LEXIS 8929 (1st Cir. Apr. 29, 2010), the First Circuit joined the Second and Seventh Circuits in ruling that 28 U.S.C. § 1367(a) gives federal courts supplemental jurisdiction over some permissive counterclaims. This ruling runs counter to the long-held view, which was well established prior to the adoption of § 1367, that permissive counterclaims require an independent basis of jurisdiction. Essentially, the First Circuit concluded that § 1367(a) rendered that rule obsolete.

Facts and Proceedings Below. Global NAPs (GNAPs) sued Verizon, seeking to avoid paying internet-access charges to Verizon as ordered by the Massachusetts Department of Telecommunications and Energy (DTE). GNAPs also sought its purported share of reciprocal fees from Verizon. Verizon responded with a counterclaim for breach of the interconnection agreement (ICA) between the two companies, seeking the access charges owed under the DTE order. Suspecting that GNAPs was transferring assets to avoid paying an eventual judgment, Verizon also asserted a counterclaim alleging fraudulent transfer of assets, under which it sought to pierce GNAPs' corporate veil and hold GNAPs' owner and affiliates jointly liable ("alter ego counterclaim"). The district court entered a summary judgment for Verizon on its breach of contract counterclaim and a default judgment on its alter ego counterclaim, holding GNAPs, its owner, and three affiliates jointly and severally liable for nearly \$58 million.

On appeal, GNAPs argued that the district court lacked subject matter jurisdiction over both counterclaims.

Supplemental Jurisdiction over the Breach of Contract Counterclaim. The appellate court first held that the district court had supplemental jurisdiction over the breach of contract counterclaim. The panel rejected GNAPs' argument that the Telecommunications Act divested federal courts of such jurisdiction. The court then explained that this counterclaim was "more than sufficiently related to GNAPs' complaint" to qualify for supplemental jurisdiction under § 1367, noting that both claims arose from a dispute over the same agreement and involved the same basic factual question: what fees the carriers owe each other. The latter ruling involved a straightforward application of § 1367(a)'s

"same case or controversy" standard.

District Court had Jurisdiction over the Alter Ego Counterclaim. The First Circuit also held that the district court had supplemental jurisdiction over the alter ego counterclaim. Without defining the scope of § 1367(a)'s "same case or controversy" requirement, the court ruled that the alter ego counterclaim was "sufficiently related to the underlying litigation to fall within Article III's [and § 1367(a)'s] jurisdiction." The panel reasoned that the underlying dispute was about what fees the parties owe each other and involved efforts by both parties to collect claimed fees from a discrete and common body of calls. The alter ego counterclaim was part of Verizon's effort to collect those fees when GNAPs tried to avoid payment. The court noted that other courts have accepted supplemental jurisdiction over claims to pierce the corporate veil and similar claims [see, e.g., *Bd. of Trs., Sheet Metal Workers' Nat'l Pension Fund v. Elite Erectors, Inc.*, 212 F.3d 1031, 1037 (7th Cir. 2000)].

The First Circuit added that there were no due process constraints on the exercise of federal jurisdiction over the alter ego counterclaim. In light of the years of litigation and the district court's familiarity with and expertise on the complicated claims at issue and with GNAPs' efforts to avoid paying access charges, it was sensible for the district court to try Verizon's claim to pierce the corporate veil with the rest of the litigation rather than sending it back to state court.

Permissive Counterclaims and Supplemental Jurisdiction. GNAPs argued that supplemental jurisdiction could not be exercised over the alter ego counterclaim since that claim was permissive only, i.e., not compulsory. The panel took the bait and addressed the question of whether supplemental jurisdiction could be exercised over a permissive counterclaim. This seems odd since the distinction between compulsory and permissive counterclaims was completely irrelevant to the question presented to the court. That question before the court simply asked whether the alter ego counterclaim was sufficiently related to the litigation such that it satisfied the "same case or controversy" requirement of § 1367(a). The compulsory or permissive nature of the claim was completely beside the point, and, in fact, was never resolved by the court.

In any event, the panel embarked on a discussion of the compulsory/permissive counterclaim jurisdictional thicket. It began by explaining that prior to the enactment of § 1367, some courts - actually, most courts - had held that a district court could exercise supplemental jurisdiction over compulsory counterclaims but not over permissive counterclaims, which needed an independent basis of jurisdiction. The panel reasoned, however, that this principle arose from case law distinguishing between pendent claims, which were brought by the plaintiff, and ancillary claims, which were brought by third parties. There was jurisdiction over a pendent claim if it arose from the same "common nucleus of operative fact" as the underlying claim over which the federal court had jurisdiction [see *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)]. In contrast, there was jurisdiction over an ancillary claim if it arose "from the same transaction or occurrence."

In the panel's view § 1367 eliminated the relevance of the former categories. That section generally grants federal courts supplemental jurisdiction over claims that "are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." The statute does not use the terminology of "permissive" or "compulsory," and "nothing in § 1367 indicates a congressional intent to recognize, preserve, or create some meaningful, substantive distinction between the jurisdictional categories [the Court has] historically labeled pendent and ancillary" [*Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 558-559, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005)]. The First Circuit concluded, therefore, that by its plain text, § 1367 governs supplemental jurisdiction over *all* counterclaims, superseding the pre-§ 1367 case law distinguishing between compulsory and permissive counterclaims. In so holding, the First Circuit joined the Second and Seventh Circuits [see *Jones v. Ford Motor Credit Co.*, 358 F.3d 205, 212-213 (2d Cir. 2004); *Channell v. Citicorp Nat'l Servs.*, 89 F.3d 379, 385 (7th Cir. 1996)].

Commentary. This coalition of the First, Second and Seventh Circuits may be hard to resist. Moreover, the prior and well-established rule that permissive counterclaims require an independent basis of jurisdiction may have unnecessarily entangled the rules of joinder with the principles of subject matter jurisdiction. Begin with Federal Rule

of Civil Procedure 13. That rule gives a party the right to file a counterclaim against an opposing party, regardless of the claim's compulsory or permissive nature. Basically all counterclaims are allowed under the rule. The critical question once a counterclaim has been filed is whether that counterclaim satisfies the standards of subject matter jurisdiction, either independent or supplemental. If it does, the district may (or must) exercise jurisdiction over it. And it does not matter, and should never have mattered, whether that counterclaim was designated compulsory or permissive. This relatively simply structure is the true insight of the "coalition" approach. Simply put, one should ignore the distinction between compulsory and permissive counterclaims when determining whether the court has jurisdiction over any particular counterclaim, for the rules do not determine jurisdiction.

There is one wrinkle here. The approach endorsed by the First, Second and Seventh Circuits draws a distinction between the jurisdictional standards of § 1367(a) - "same case or controversy under Article III" or "common nucleus of operative facts" - and the standards of Rule 13(a) (and other of the federal rules) - "same transaction or occurrence." The former test is described as being somewhat broader than the latter test, such that a claim could theoretically be part of the same case or controversy for purposes of Article III and yet not arise out of the same transaction or occurrence that forms the "nucleus" of that case. One can expect that real-world applications of this same-case-but-different-transaction standard will be rare.

RELATED LINKS: For further information, see Moore's Federal Practice:

- 16 Moore's Federal Practice (3d Ed.) § 106.25[1].

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The Scope of Relation Back Under Federal Rule of Civil Procedure 15(c)(1)(C)

2010 Emerging Issues 5229

The Scope of Relation Back Under Federal Rule of Civil Procedure 15(c)(1)(C)

By Allan Ides

July 30, 2010

SUMMARY: The unanimous Court in *Krupski v. Costa Crociere* endorsed an approach to relation back that carefully tracked and explained the text of Rule 15(c)(1)(C). In so doing, the Court eliminated a gloss on that text that imposed additional, non-textual burdens on the amending party and that inappropriately added to the complexity of the rule. In applying *Krupski*, however, it is important not to over-read the decision.

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ARTICLE: Introduction. Federal Rule of Civil Procedure 15(c)(1)(C) governs the relation back for purposes of the statute of limitations of an amendment to a pleading that adds a new party. Prior to the decision in *Krupski v. Costa Crociere, S.p.A.*, - U.S. -, 130 S. Ct. 2485, 177 L. Ed. 2d 48, 2010 U.S. LEXIS 4567, 78 U.S.L.W. 3715 (June 7, 2010), some circuits had held that an amending party's awareness of the existence of the party to be added prior to the filing of the original pleading constituted a "deliberate choice" not to name that party in the original pleading and thereby foreclosed the availability of relation back. In *Krupski*, the Supreme Court rejected this view and ruled that "relation back under Rule 15(c)(1)(C) depends on what the party to be added knew or should have known, not on the amending party's knowledge or its timeliness in seeking to amend the pleading." In so ruling, the Court adhered closely to the text of Rule 15(c)(1)(C) and usefully clarified the operational scope of that rule.

The Text of Rule 15(c)(1)(C). Rule 15(c)(1)(C) provides that an amendment to a pleading "that changes the party or the naming of a party against whom a claim is asserted" relates back for purposes of the statute of limitations if, consistent with Rule 15(c)(1)(B), "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out - or attempted to be set out - in the original pleading" and if, "within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment (i) received such notice of the action that it will not be prejudiced in defending on the merits; and (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity."

Of particular relevance in *Krupski*, was subsection (c)(1)(C)(ii) and the question of what constitutes a "mistake" for purposes of that subsection.

Facts and Proceedings. Wanda Krupski brought this personal-injury suit after she was injured when she tripped over a cable aboard a cruise ship. Her ticket identified the carrier as "Costa Crociere S. p. A.," and required an injured

party to submit written notice of any cruise-related claim to the carrier or its duly authorized agent within 185 days after the date of the injury. The carrier's sales and marketing agent was identified as "Costa Cruise Lines N. V." The ticket further required that any lawsuit on such a claim be filed against the carrier within one year after the date of the injury.

Krupski notified Costa Cruise, the sales and marketing agent, of her claims, and the two engaged in negotiations but were unable to reach a settlement. Three weeks before the one-year limitations period expired, Krupski filed a negligence action against Costa Cruise the U.S. District Court for the District of Southern Florida. In its answer (filed after the limitations period had expired), Costa Cruise asserted that it was not the proper defendant but merely an agent of Costa Crociere, the actual carrier and vessel operator. Costa Cruise later moved for summary judgment, again stating that Costa Crociere was the proper defendant.

The district court denied defendant's summary judgment motion and granted Krupski leave to amend her complaint to add Costa Crociere. After she did so, the district court dismissed Costa Cruise pursuant to the parties' stipulation. Costa Crociere then moved to dismiss the suit, contending that the amended complaint did not relate back under Rule 15(c)(1)(C) and was therefore barred as having been untimely filed. The district court, following Eleventh Circuit precedent, agreed and dismissed the case, explaining that Krupski's knowledge of the identity of the correct defendant precluded a finding that her decision to sue Costa Cruise was a "mistake" within the meaning of Rule 15(c)(1)(C)(ii). The Eleventh Circuit affirmed, concluding also that no mistake had been made given the information available to Krupski on the passenger ticket issued to her. Rather, in the appellate court's view, Krupski had made a deliberate choice to sue only Costa Cruise. As an alternative, the appellate court also held that the district court did not abuse its discretion in denying relation back because Krupski had delayed 133 days in seeking leave to amend her original complaint. The Supreme Court granted certiorari "to resolve tension among the Circuits over the breadth of Rule 15(c)(1)(C)(ii)."

Of Knowledge, Mistakes and Deliberate Choices. The Supreme Court began its analysis with the text of Rule 15(c)(1) and, after quoting that text, including subsections (A) through (C), immediately announced, "neither of the Court of Appeals' reasons for denying relation back under Rule 15(c)(1)(C)(ii) finds support in the text of the Rule." As to the "deliberate choice" rationale followed by the lower courts, the Court observed,

By focusing on Krupski's knowledge, the Court of Appeals chose the wrong starting point. The question under Rule 15(c)(1)(C)(ii) is not whether Krupski knew or should have known the identity of Costa Crociere as the proper defendant, but whether Costa Crociere knew or should have known that it would have been named as a defendant but for an error. Rule 15(c)(1)(C)(ii) asks what the prospective *defendant* knew or should have known during the Rule 4(m) period, not what the *plaintiff* knew or should have known at the time of filing her original complaint. (emphasis in original)

Information in the plaintiff's possession is relevant only to the extent "it bears on *defendant's* understanding of whether the plaintiff made a mistake regarding the proper party's identity. For purposes of that inquiry, it would be error to conflate knowledge of a party's existence with the absence of mistake." (emphasis supplied). A plaintiff, knowing of a party's existence, may make a mistake about that party's status or may misunderstand the role that party played in the occurrence giving rise to the claims. The question under Rule 15(c)(1)(C)(ii) is whether the party to be brought in knew or should have known that, absent some mistake, the action would have been brought against that party.

Costa Crociere argued that the key issue under Rule 15(c)(1)(C)(ii) was whether the plaintiff made a "deliberate choice" to sue one party over another. The Court agreed that making a deliberate choice to sue one party instead of another, while fully understanding the factual and legal differences between the two parties, would be the antithesis of making a mistake concerning the proper party's identity. This does not mean, however, that any time a plaintiff is aware of the existence of two parties and chooses to sue the wrong one, the proper defendant could reasonably believe that the plaintiff made no mistake. The reasonableness of the *mistake* is not itself at issue. Therefore, a deliberate but mistaken choice does not foreclose a finding that Rule 15(c)(1)(C)(ii) has been satisfied.

This reading, the Court said, is consistent with the purpose of relation back: to balance the interests of the defendant protected by the statute of limitations with the preference expressed in the Federal Rules of Civil Procedure in general, and Rule 15 in particular, for resolving disputes on their merits. "A prospective defendant who legitimately believed that the limitations period had passed without any attempt to sue him has a strong interest in repose, but repose would be a windfall for a prospective defendant who understood, or who should have understood, that he escaped suit during the limitations period only because the plaintiff misunderstood a crucial fact about his identity. Because a plaintiff's knowledge of the existence of a party does not foreclose the possibility that she has made a mistake of identity about which that party should have been aware, such knowledge does not support that party's interest in repose."

Plaintiff's Delay in Seeking Leave to Amend. The court of appeals had offered a second reason why the amended complaint did not relate back—the plaintiff had unduly delayed in seeking to file and in eventually filing an amended complaint. The Supreme Court rejected this rationale as well. In the Court's view, Rule 15(c) sets forth an exclusive list of requirements for relation back, and dilatory conduct is not among them. Moreover, the rule mandates relation back when the requirements are satisfied; it does not leave this question in the court's equitable discretion.

Similarly, Rule 15(c) does not require a plaintiff to move to amend the complaint or file and serve an amended complaint within the Rule 4(m) period. Rule 15(c) simply requires that the prospective defendant has received sufficient notice of the action within the Rule 4(m) period so that the defendant will not be prejudiced in defending the case on the merits. The notice need not be formal.

As Applied: Krupski's Amendment Relates Back. Applying the principles it had set out, the Court concluded that the district court and court of appeals erred in denying relation back. Costa Crociere had notice of the complaint within the Rule 4(m) period, and should have known that it was not named as a defendant only because of the plaintiff's misunderstanding about which "Costa" entity was in charge of the ship—clearly a "mistake concerning the proper party's identity."

Costa Crociere contended that because the original complaint referred to the ticket's forum requirement and presuit claims-notification procedure, the plaintiff was clearly aware of the contents of the ticket, and because the ticket identified Costa Crociere as the carrier and proper party for a lawsuit, Costa Crociere was entitled to think that the plaintiff had made a deliberate choice to sue Costa Cruise instead. However, while the plaintiff may have known the contents of the ticket, this did not foreclose the possibility that she nonetheless misunderstood crucial facts regarding the two companies' identities. The face of the complaint plainly indicated such a misunderstanding. Moreover, Costa Crociere had not articulated any strategy that it could reasonably have thought the plaintiff was pursuing in suing a defendant that was legally unable to provide relief.

The Court also noted that Costa Cruise and Costa Crociere were related corporate entities with very similar names. This interrelationship and similarity heightened the expectation that Costa Crociere should have suspected a mistake had been made when Costa Cruise was named in a complaint that actually described Costa Crociere's activities.

The Court concluded that Costa Crociere should have known that the plaintiff's failure to name it as a defendant in her original complaint was due to a mistake concerning the proper party's identity. The Court therefore reversed the judgment of the court of appeals and remanded for further proceedings.

Concurrence. Justice Scalia joined the Court's opinion except to the extent that the Court relied on the Advisory Committee Notes to Rule 15. These Notes, in Justice Scalia's view, are useful only to the same extent as any other scholarly commentary, but have no effect on a rule's meaning; rather, it is the text of the rule that controls.

Commentary. *Krupski* is a welcome decision. The unanimous Court endorsed an approach to relation back that carefully tracked and explained the text of Rule 15(c)(1)(C). In so doing, the Court eliminated a gloss on that text that imposed additional, non-textual burdens on the amending party and that inappropriately added to the complexity of the rule. In applying *Krupski*, however, it is important not to over-read the decision. The Court did not hold that the

amending party's pre-filing knowledge of the existence of the "correct" defendant was irrelevant. Rather, it said that this knowledge was only relevant to the extent that it might demonstrate the reasonableness of that defendant's belief that the original decision not to sue him, her or it represented a deliberate, strategic choice, and, hence, was not a "mistake" within the meaning of the rule. Again, it is not the reasonableness of the mistake (or choice) but the reasonableness of the defendant's belief that plaintiff made a deliberate choice in not suing it.

RELATED LINKS: For further information, see Moore's Federal Practice:

■ 3 Moore's Federal Practice (3d Ed.) § 15.19[3][d]

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Bisceglie on Pension Committee and Duty to Preserve

2010 Emerging Issues 5137

Kyle C. Bisceglie on Zubulake Revisited: Six Years Later -- Pension Committee and the Duty to Preserve in 2010 and Beyond

By Kyle Bisceglie

June 28, 2010

SUMMARY: Six years after her pivotal *Zubulake* decisions, Judge Scheindlin revisits e-discovery issues and reinforces the importance of the duty to preserve. Kyle C. Bisceglie, author of the LexisNexis Practice Guide New York e-discovery and Evidence, analyzes the impact of this decision and offers some suggestions for practitioners to ensure that they avoid the pitfalls that ensnared the plaintiffs.

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ARTICLE: Judge Scheindlin Identifies Gross Negligence in Failure to Preserve Relevant e-Discovery Evidence.

Judge Scheindlin (author of the pivotal *Zubulake* decisions) issued another important, thorough and widely-discussed e-discovery opinion on January 11, 2010, amended and revised on January 15, 2010 and May 28, 2010: *Pension Committee of the University of Montreal Pension Plan et al. v. Banc of America Securities, LLC et al.*, 685 F. Supp. 2d 456 (S.D.N.Y. January 15, 2010) ("*Pension Committee*"). Therein she teaches us again that failure to comply with the duty to preserve and the resulting loss of evidence can have a dramatic impact on litigation. Significantly, the court found *inter alia* that, even without bad faith, the failure to issue a written litigation hold, preserve the documents of key players or preserve unique information on back-up tapes constitutes sanctionable gross negligence when evidence is lost.

January 15th and May 28th Revisions to *Pension Committee*. The January 15th amended opinion clarified ten or eleven points in the original decision, most notably with regard to backup tapes. Specifically, the court revised language and added footnote no. 99 to make clear that failure to preserve backup tapes constitutes gross negligence only if the backup tapes are the only source of relevant data from key players.

On May 28, 2010, the court revised a single sentence that had engendered some confusion, but fairly read in context of the entire decision does not change the implications of this case, prior *Zubulake* decisions or discovery obligations. The court struck and replaced this sentence on page 10, lines 7-10: "By contrast, the failure to obtain records from *all* employees (some of whom may have had only a passing encounter with the issues in the litigation), as opposed to key players, likely constitutes negligence as opposed to a higher degree of culpability." The court substituted: "By contrast, the failure to obtain records from all those employees who had any involvement with the issues raised in the litigation or anticipated litigation, as opposed to key players, could constitute negligence." This change reinforced both that (1) legal holds need only be issued to "key players" and not all employees and (2) that

failure to obtain records from key players "could constitute negligence" rather than "likely constitutes negligence." This revision does not substantively alter the court's position in this case or prior *Zubulake* decisions but rather eliminates potentially misleading language about which commentators have speculated. *See, e.g.,* Boehning, H. Christopher and Toal J., Daniel, In "*Pension Committee*," *Judge Revisits Zubulake*, N.Y.L.J. (February 2, 2010) ("Especially troubling is her suggestion that a failure to 'obtain records from all employees ... is likely negligent.' That would strike many experienced practitioners as an abrupt shift in the law. Discovery obligations require a search that is reasonable under the circumstances. Litigants thus have long been under a duty to search for responsive documents where they are reasonably likely to be found.").

Through these revisions, the court apparently recognizes just how closely read these opinions are. Indeed, in a colloquy of lawyers with Judge Scheindlin on May 27, 2010 in Washington, D.C., an attorney asked about this very sentence, fretting it meant that the records of all employees had to be preserved! Judge Scheindlin's response was that all of her opinions have been consistent that there is a duty to preserve only relevant evidence of key players and that this could be "one poorly drafted sentence." Dutifully, the court issued the revised opinion the next day.

What was involved in *Pension Committee*. In *Pension Committee*, a group of investors sued to recover \$550 million lost in the liquidation of two hedge funds. The investors filed state and federal securities claims against former directors, administrators, auditors, custodian of the funds and prime brokers. The investors retained counsel in the fall of 2003 after the hedge fund manager ("Lancer") filed for bankruptcy in the spring of 2003. They filed suit in February of 2004 in the Southern District of Florida. The case was stayed under the Private Securities Litigation Reform Act, and then transferred to the Southern District of New York in September 2005. Discovery began in 2007. Following the close of discovery in October, 2008, the defendants sought sanctions against 13 plaintiffs for failing to preserve and produce documents, including ESI, and for submitting false declarations regarding their collection and production efforts.

The "continuum" of culpability. Much of the decision focused on the standards controlling applications for spoliation sanctions. The ruling makes clear that sanctions may be imposed for spoliation that is the result of negligent, grossly negligent, and willful and bad faith conduct. The court characterized these levels of culpability as residing on a "continuum" made via a "judgment call ... by a court reviewing conduct through the backward lens known as hindsight."

Applying this continuum to discovery, the court found as follows:

(i) A failure to preserve "is surely negligent, and, depending on the circumstances, may be grossly negligent or willful."

(ii) The intentional destruction of evidence after the duty to preserve has attached is "willful."

(iii) Possibly after October, 2003, when *Zubulake IV* was issued, and definitely after July, 2004, when the final *Zubulake* opinion was issued, the failure to issue a written litigation hold "constitutes gross negligence because that failure is likely to result in the destruction of relevant information."

(iv) The failure to collect and review resulting in loss or destruction of evidence is "surely negligent, and depending on the circumstances, may be grossly negligent or willful."

(v) As revised in the May 28th opinion, "the failure to obtain records from *all those employees* who had any involvement with the issues raised in the litigation or anticipated litigation, as opposed to key players, could constitute negligence."

(vi) "[F]ailure to take all appropriate measures to preserve ESI likely falls in the negligence category."

The court noted other decisions where (vii) the "failure to collect information from files of former employees that remain in the party's possession, custody, or control after the duty to preserve has attached" was gross negligence and (viii) "failure to assess the accuracy and validity of selected search terms" is negligence. These examples are illustrative

only -- the court emphasized that its list is not definitive and "[e]ach case will turn on its own facts and the varieties of efforts and failures is infinite." Practitioners take note: there are additional ways to act with negligence or gross negligence in attempts to preserve evidence.

The most serious conduct -- willful and bad faith conduct -- is punishable with the most severe sanctions, including "terminating sanctions," such as dismissal of claims and entering of default judgments. In cases of negligence or gross-negligence, an adverse inference instruction or "less severe sanctions -- such as fines and cost shifting," may be imposed even without a showing that particular materials were lost. "Like many other sanctions, an adverse inference instruction can take many forms, again ranging in degrees of harshness. The harshness of the instruction should be determined based on the nature of the spoliating party's conduct -- the more egregious the conduct, the more harsh the instruction." 685 F. Supp. 2d 456, 471. The least harsh instruction -- which should be administered for mere negligence and termed a spoliation instruction -- "permits (but does not require) a jury to presume that the lost evidence is both relevant and favorable to the innocent party."

It appears that Judge Scheindlin applied sanctions under the Court's inherent power rather than under Fed. R. Civ. P. 37. Much can be said about the varying standards with respect to levels of culpability applied by different circuit courts to determine if an adverse inference instruction is warranted. In the Second Circuit, negligence is enough to warrant an adverse inference instruction if the prejudice is sufficient. See *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108-109 (2d Cir. 2002). Not so in other circuits: some, like the Fifth and Eleventh, require bad faith and others, like the Eighth, require intent.

In *Pension Committee*, the court found some plaintiffs grossly negligent and others negligent. Most notably, Judge Scheindlin explicitly found gross negligence for the failure to issue a formal, written litigation hold at the time litigation is reasonably anticipated. Reasoning that the absence of a litigation hold will "inevitably result" in the spoliation of evidence, the court found that the failure to issue a written litigation hold is indicative of a high level of culpability, and that potentially severe sanctions are warranted. Additionally, Judge Scheindlin noted that "the following failures support a finding of gross negligence, when the duty to preserve has attached: ... to identify all of the key players and to ensure that their electronic and paper records are preserved; to cease the deletion of email or to preserve the records of former employees that are in a party's possession, custody, or control; and to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources." 685 F. Supp. 2d 456, 471.

Lessons from Pension Committee. Much can be learned from the *Pension Committee* plaintiffs' efforts at preservation and the court's assessment of their efforts. Some of these lessons are related below; practitioners are encouraged to read the entire opinion.

The court described plaintiffs' efforts at preservation and production as follows: "Counsel telephoned and emailed plaintiffs and distributed memoranda instructing plaintiffs to be over, rather than under, inclusive, and noting that emails and electronic documents should be included in the production." The court found that:

It does not direct employees to *preserve* all relevant records -- both paper and electronic -- nor does it create a mechanism for *collecting* the preserved records so that they can be searched by someone other than the employee. Rather, the directive places total reliance on the employee to search and select what that employee believed to be responsive records without any supervision from Counsel. Throughout the litigation, Counsel sent plaintiffs monthly case status memoranda, which included additional requests for Lancer-related documents, including electronic documents. But these memoranda never specifically instructed plaintiffs not to destroy records so that Counsel could monitor the collection and production of documents.

The court expected the plaintiffs to maintain documents related to due diligence. The court noted the paucity of evidence and the admitted failure to preserve and the inexorable result: that relevant records were lost or destroyed.

Six plaintiffs were charged with gross negligence for a combination of the following:

- Taking "no action to collect or preserve electronic documents prior to 2007;" failing to oversee employees' collection of documents and misleading initial disclosures and declarations;
- Deleting emails after November 2003; failure to seek documents from a current and former employee who had knowledge of the subject of the dispute; and inconsistencies in deposition testimony and declaration;
- Using an employee with no search experience to handle document production without supervision from an attorney; failing to search files of 17 employees with knowledge; defendants could identify 39 relevant emails plaintiffs failed to produce;
- Failing to suspend recycling of back-up tapes; failing to ask 11 employees with potential knowledge; and failing to produce documents produced by other plaintiffs.

In contrast, the seven plaintiffs who were merely negligent engaged in much of the same behavior to a lesser degree and without the inaccurate and misleading declarations. The court observed that, while they did not initiate a litigation hold, they were merely negligent in significant part because the case was filed in the Southern District of Florida in early 2004 before that court had adopted a "well-established duty" to issue a written litigation hold (in contrast with the Southern District of New York -- via Judge Scheindlin -- which had done so in mid-2004). The court further identified as a factor for leniency that, by the time the case was transferred to New York in 2005, the electronic records from 2003 would have already been lost.

Even after a careful review of each of the court's findings it is difficult to state precisely the difference between negligence and gross negligence. Perhaps this illustrates the court's observation that these determinations are "fact intensive" and involve a "gut reaction based on years of experience as to whether a litigant has complied with its discovery obligations and how hard it has worked to comply." 685 F. Supp. 2d 456, 471. Negligent plaintiffs worked just a little harder than grossly negligent plaintiffs, apparently.

Significance of Pension Committee. This case may well be the most important e-discovery case of 2010 and is important reading given the subtitle Judge Scheindlin chose for the court's decision: "Zubulake Revisited: Six Years Later." Many clients and practitioners may continue to resist the issuance of a written litigation hold for fear that breaching it will make matters worse. Under *Pension Committee*, that is not advisable. The court suggested a bright-line rule for written legal holds (the failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information. 685 F. Supp. 2d 456, 465) although the court appeared to undermine that rule at times, stating that sanctionable conduct "cannot be measured with exactitude and might be called differently by a different judge."

The practitioner should also be aware that the preservation obligation applies equally to plaintiffs and defendants. All parties have an obligation to preserve evidence, including ESI, that is relevant to current or to reasonably anticipated future litigations. "Identifying the boundaries of the duty to preserve involves two related inquiries: *when* does the duty to preserve attach, and *what* evidence must be preserved?" *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) ("*Zubulake IV*"). "The obligation to preserve arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation." 220 F.R.D. 212, 216. See also *Fujitsu Ltd. v. Federal Exp. Corp.*, 247 F.3d 423, 436 (2d Cir. 2001) (obligation to preserve evidence arises when party has notice that evidence is relevant to litigation or when party should have known that evidence may be relevant to future litigation). This duty often arises first for the plaintiff, as "plaintiff's duty is more often triggered before litigation commences, in large part because plaintiffs control the timing of litigation." (In *Pension Committee*, the duty to preserve arose in April 2003 although suit was not filed until February 2004.) However, the mere existence of a dispute between two parties does not necessarily mean that a party should have reasonably anticipated litigation at that time and taken steps to preserve ESI. *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 371 (S.D.N.Y. 2006) (the company was on notice of preservation obligations only when it became aware that suit was about to be served).

The practitioner should note the importance of establishing an accurate and defensible position early on. Many of

the plaintiffs in *Pension Committee* made submissions to the court that were later contradicted, found to be misleading based on their deposition testimony, and, most notably, resulted in lost evidence. Likewise, *Pension Committee* suggests that a practitioner should be careful about permitting a client to self-preserve without adequate attorney supervision. Practitioners must be careful about limiting the employees who receive the litigation hold and ensuring that former employees are included in preservation and collection efforts. Practitioners who need to establish and maintain a defensible and repeatable position on e-discovery must read the 88 page *Pension Committee* decision. While promising some flexibility such that courts "cannot and do not expect ... perfection," the standards *Pension Committee* applies seem to require something pretty close to perfection and will often be applied by hindsight, which can be harsh.

Practitioners may want to develop a comprehensive preservation plan with the client. Pro-active counsel should encourage clients to develop and implement a litigation preparedness plan in advance of the litigation. For a discussion of this topic, see Kyle C. Bisceglie, *LexisNexis Practice Guide: New York e-Discovery and Evidence*, §§ 16.06 to 16.12 (LexisNexis Matthew Bender).

Preservation after *Pension Committee*. Practitioners should strongly consider issuing a written legal or litigation hold taking into account the practitioner's prior experiences, the nature of issues raised, and the amount in controversy. The litigation hold should be issued to those key players who hold relevant evidence in a way that ensures they will, in fact, receive it. Counsel and client should use a generous definition of key player based on available facts to ensure preservation of all evidence. Counsel must monitor compliance with the litigation hold. The following general guidelines should be considered as part of the issuance of a litigation hold and other document preservation efforts:

1. Develop a pre-litigation action plan of steps to take in the event of a potential investigation, regulatory inquiry or litigation that necessitates preserving documents or ESI.

2. Issue a litigation hold at the time litigation is reasonably anticipated. That point will, in most cases, fall earlier for plaintiffs than for defendants. However, a defendant who is the target of threatened litigation should issue a litigation hold immediately and should not wait for commencement of a lawsuit. That hold should be in writing under *Pension Committee*. If your client will not issue a litigation hold in writing, ensure that the client is making such decision for sound reasons and document all steps taken to preserve evidence.

3. Re-issue the litigation hold periodically to ensure that its requirements are fresh in the minds of employees and known to new hires.

4. Designate a manager with knowledge of the client's document retention practices and policies to supervise the process of identifying and preserving potentially discoverable documents and ESI. Employees searching for relevant documents should be adequately supervised by the designated manager and counsel. At a minimum, counsel must understand the IT involved and the employees' role and provide the employee with adequate instruction on any role the employee plays in collection efforts.

5. Suspend routine overwriting and data destruction procedures that would affect relevant evidence. Turn over relevant backup tapes or other media containing relevant evidence to counsel, or store such materials in a segregated location, away from other materials available for use in the ordinary course.

6. Make meaningful efforts to identify all "key players" based on available facts and provide their names to counsel. Search for and retain all files for key players, including computer systems, emails, backup servers or tapes and hard copy documents.

7. Identify former employees and any third-parties that may have relevant evidence. If the party has the legal or practical ability to retrieve that evidence, extend the hold to those former employees and third-parties.

8. Keep a log of specific actions taken to identify and preserve potentially relevant documents. This log should be labeled "created at the request of counsel for use by counsel." Litigants are often called upon by the court or opposing

parties to recount their efforts to comply with discovery obligations and the ability to provide all relevant information and witnesses is crucial.

9. A party need only preserve relevant evidence. Making the determination of what sources may or may not contain relevant information involves subjective judgment. In determining what sources of ESI may contain relevant evidence and whether to preserve, weigh the usually inconsequential cost of preserving evidence against the usually high consequences of failing to preserve it.

10. Promptly extend and expand the hold as new allegations or facts become known that suggest the possibility of additional relevant evidence that has not yet been preserved.

Kyle C. Bisceglie, Thomas J. Fleming, Jeffrey A. Udell, *Client Alert: Preservation and Production of Electronically-Stored Information* (February 8, 2010). Available at http://www.olshanlaw.com/docs/Client_Alert_1002.pdf.

The duty to preserve certainly may extend to third-parties where a party has a practical or legal right to obtain relevant evidence. See *Gordon Partners et. al. v. Blumenthal (In re NTL, Inc. Sec. Litig.)*, 244 F.R.D. 179 (S.D.N.Y. 2007) (document production required when party has legal or practical ability to obtain them from third parties). "Control [does] not require legal ownership or actual physical possession; rather, documents [are] considered to be under a party's control when that party had the right, authority, or practical ability to obtain the documents from a non-party." *SSangyong Corp. v. Vida Shoes Int'l, Inc.*, 2004 U.S. Dist. LEXIS 9101, at *9-10 (D. Colo. 2007) (defendant "retained control" over third-party administrator of pension plan and had authority and ability to obtain and produce requested data).

The Limitations of *Pension Committee*. While practitioners should heed the lessons of *Pension Committee*, it is unclear how many other courts will apply the same level of scrutiny to e-discovery as this court did. By its own estimate, the court and its law clerks spent approximately 300 hours resolving this single motion. See n. 56. At nine hours a day, 300 hours amounts to over 33 days of time spent exclusively on producing this opinion. Not every court can or will apply that amount of attention to every motion. All practitioners know that there are still many judges who are disengaged for one reason or another from day-to-day discovery battles and shortcomings under the theoretically self-executing nature of the Federal Rules of Civil Procedure. Many courts rely on a heightened expectation of counsel that sadly is not always achieved in practice. Many jurists will certainly wade into palpable and obvious disputes that are well-articulated by counsel, but few will take anywhere close to 300 hours of time to sort out complicated, technical and fact-intensive e-discovery disputes.

Pension Committee should not be read literally, but with an eye to the facts of the specific case at hand. For example, although *Pension Committee* provides strong argument for the need for a written litigation hold, it is more important that the litigation hold be effective, whether written or oral, which may vary with the circumstances of the client. After all, at its core, *Pension Committee* was nothing more than a case about missing relevant evidence that should have been preserved. Practitioners are well-advised to focus on doing their job in preserving relevant evidence, and the rest will follow.

With respect to this unofficial "Supreme Court of e-Discovery," there are a series of federal judges playing a major role in developing law on electronic discovery issues including Judge Scheindlin, Magistrate Judge Andrew Peck also in the Southern District, Magistrate Judge John Facciola in the District of Columbia, Magistrate Judge Paul Grimm in the District of Maryland and Magistrate Judge David Waxse in the District of Kansas. Some of these judges have stated their practice of reading their brethren's judicial rulings on e-discovery to inform their own thoughts. Practitioners may wish to do the same.

RELATED LINKS: For further explanation of the duty to preserve, see

- Kyle C. Bisceglie, LexisNexis Practice Guide New York e-Discovery and Evidence, Ch. 10, Analyzing Duty to

Preserve

For further discussion of litigation holds, see

■ Kyle C. Bisceglie, LexisNexis Practice Guide New York e-Discovery and Evidence, Ch. 16, Establishing Best Practices for Electronic Document Management

For additional information about e-discovery consult

■ Kyle C. Bisceglie, LexisNexis Practice Guide: New York e-Discovery and Evidence (LexisNexis Matthew Bender)

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Perry v. Schwarzenegger and Mandamus Review

2010 Emerging Issues 5125

Perry v. Schwarzenegger and Mandamus Review

By Allan Ides

June 17, 2010

SUMMARY: In *Perry v. Schwarzenegger*, *Perry II*, the Ninth Circuit denied a petition for mandamus directed at a district court order that may have misinterpreted the legal standards established by the Ninth Circuit in an earlier mandamus proceeding in the same case, *Perry v. Schwarzenegger*, *Perry I*. Despite this potential misinterpretation, the Ninth Circuit concluded that the order did not technically violate the prior mandate.

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ARTICLE: In *Perry v. Schwarzenegger*, 602 F.3d 976, 2010 U.S. App. LEXIS 7492 (9th Cir. 2010) (*Perry II*), the Ninth Circuit denied a petition for mandamus directed at a district court order that may have misinterpreted the legal standards established by the Ninth Circuit in an earlier mandamus proceeding in the same case [*Perry v. Schwarzenegger*, 591 F.3d 1147, 2010 U.S. App. LEXIS 170 (9th Cir. Dec. 11, 2009, amended Jan. 4, 2010) (*Perry I*)]. Despite this potential misinterpretation, the Ninth Circuit concluded that the order did not technically violate the prior mandate. Nor did any of the factors pertinent to mandamus review support granting the petition.

Background. In November 2008, California voters approved Proposition 8, an initiative measure that amended the California Constitution to provide, "[o]nly marriage between a man and a woman is valid or recognized in California." *Perry v. Schwarzenegger* involves a challenge to the constitutionality of this provision. When the state Attorney General declined to defend the suit, the official proponents of the ballot measure were allowed to intervene as defendants. In *Perry I*, those defendant/proponents sought mandamus review of a discovery order that compelled them to reveal internal communications of a political nature. The Ninth Circuit concluded that the order "would likely have a chilling effect on political association and the formulation of political expression." The appellate court further concluded that the plaintiffs had "not shown a sufficient need for the information." The writ was, therefore, granted and the district court was ordered to enter a protective order consistent with the Ninth Circuit's opinion.

In *Perry II* - the immediate proceeding, two organizations that had opposed Proposition 8, but were not parties to the litigation, sought relief from the district court's orders compelling them to produce documents they contended were protected by the First Amendment privilege established in *Perry I*. These "third party appellants" argued that the Ninth Circuit could exercise jurisdiction over their appeal under 28 U.S.C. § 1291 or, alternatively, pursuant to a writ of mandamus.

No Appellate Jurisdiction. The Ninth Circuit quickly disposed of the appellants' assertion of jurisdiction under 28 U.S.C. § 1291. As nonparties in the underlying litigation, the third party appellants could obtain direct review of the district court's order only by electing to ignore the order and then appealing any ensuing contempt citation. Since no such contempt order had been issued, the Ninth Circuit concluded that appellate jurisdiction was lacking.

No Mandamus Jurisdiction. The third party appellants contended in the alternative that the Ninth Circuit could exercise mandamus jurisdiction over this appeal to compel the district court to follow the mandate in *Perry I*. In *Vizcaino v. United States District Court*, the Ninth Circuit recognized that mandamus jurisdiction is available when a district court disregards a prior appellate mandate on remand [*Vizcaino v. U.S. Dist. Ct.*, 173 F.3d 713, 718-720 (9th Cir. 1999)]. The Ninth Circuit concluded, however, that the present case was distinguishable from *Vizcaino* because the district court's orders here did not conflict with the earlier appellate mandate. The appeal in *Perry I* concerned the application of a First Amendment privilege to discovery requests between the parties to this litigation. The present appeal concerned subpoenas issued by parties to nonparties who had not been involved in the prior appeal (except as amicus curiae), asking for different documents from the ones involved in the previous appeal. Although the district court here purported to apply the *Perry I* First Amendment privilege and thus interpreted the *Perry I* opinion, the earlier mandate was not directly applicable to the order under review; instead, the opinion in *Perry I* was pertinent only as precedent. Under these circumstances, the *Vizcaino* principle did not apply.

The Ninth Circuit also concluded that mandamus was inappropriate under the five-factor analysis articulated in *Bauman v. United States District Court* [557 F.2d 650 (9th Cir. 1977)]. In *Bauman*, the court established five factors to determine whether mandamus is appropriate in a given case: (1) whether the petitioner has no other means, such as a direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in any way not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft-repeated error or manifests a persistent disregard of the federal rules; and (5) whether the district court's order raises new and important problems or issues of first impression [*Bauman v. United States District Court* 557 F.2d 650, 654-655 (9th Cir. 1977)].

As to the first two factors, the third party appellants could refuse to comply with the order and then appeal from any resulting contempt citation; if their appeal had merit, they could then obtain the relief they desired. Hence, neither of these factors supported granting the writ. Similarly, neither the fourth nor the fifth factor was implicated in this proceeding, there being no "oft repeated error" or "persistent disregard of federal rules" and no "new and important problems or issues of first impression." Only the third factor - whether the district court's order was clearly erroneous as a matter of law - arguably militated in favor of granting the petition. Yet, although the appellate court agreed that the district court may have misunderstood the scope of the *Perry I*'s First Amendment standard, it was not clear "that the district court's ultimate conclusions were clearly erroneous as a matter of law." Hence, the Ninth Circuit denied the petition for a writ of mandamus.

Comment. The opinions in *Perry I* and *Perry II* provide useful guidance in assessing the availability of mandamus review.

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Salazar v. Buono -- Scope of Review on Certiorari; Standing to Enforce Injunction

2010 Emerging Issues 5126

Salazar v. Buono -- Scope of Review on Certiorari; Standing to Enforce Injunction

By Allan Ides

June 17, 2010

SUMMARY: The basic questions presented in *Salazar v. Buono* were: 1) whether the Supreme Court, on certiorari, had jurisdiction to revisit questions resolved in an otherwise unreviewable final judgment entered earlier in the same case; 2) whether the plaintiff had standing to enforce the injunction; and 3) whether the district court properly granted the plaintiff's motion to enforce the injunction.

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ARTICLE: Introduction. The central point of controversy in *Salazar v. Buono*, 130 S. Ct. 1803, 176 L. Ed. 2d 634, 2010 U.S. LEXIS 3674 (April 28, 2010), was the propriety of a district court order enforcing a previously issued injunction. The basic questions presented were: 1) whether the Supreme Court, on certiorari, had jurisdiction to revisit questions resolved in an otherwise unreviewable final judgment entered earlier in the same case; 2) whether the plaintiff had standing to enforce the injunction; and 3) whether the district court properly granted the plaintiff's motion to enforce the injunction. There was no majority opinion. There were, however, majority views on three points. First, the Court unanimously held that it did not have jurisdiction to revisit the standing and Establishment Clause issues previously decided by the district court. Next, seven Justices, including four dissenting Justices, held that the plaintiff had standing to enforce the injunction. (All nine Justices agreed that party awarded an injunction has standing to enforce the injunction.) Finally, five Justices concluded that the district court's enforcement order was improper under the circumstances presented. The case was remanded for further consideration.

Facts and Proceedings Below. In 1934, the Veterans of Foreign Wars (VFW) erected a cross on federal land in the Mojave National Preserve as a memorial to soldiers who died in World War I. In 2001, a retired Park Service employee who makes regular visits to the preserve sued the federal government, claiming that the display of the cross on public land offended him and violated the Establishment Clause. The government challenged the plaintiff's standing to raise this Establishment Clause claim as well as the merits of his claim. The district court ruled in favor of the plaintiff on both points and entered an injunction requiring removal of the cross [*Buono v. Norton*, 212 F. Supp. 2d 1202, 1210-1216 (C.D. Cal. 2002) (*Buono I*)]. The Ninth Circuit affirmed [*Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004) (*Buono II*)]. The government did not seek review of the Ninth Circuit's judgment. However, while the government's appeal was pending in the Ninth Circuit, Congress passed a statute directing the Secretary of the Interior to transfer to the VFW the government's interest in the land on which the cross stood in exchange for land elsewhere in the preserve that was owned by a private party. The statute specified that the property would revert to the government if

not maintained "as a memorial commemorating United States participation in World War I and honoring the American veterans of that war."

After the Ninth Circuit affirmed the district court's judgment, the plaintiff filed a motion in the district court seeking enforcement or modification of the injunction to prevent transfer of the land pursuant to the statute. Concluding that the attempt to transfer the land was an attempt to keep the cross on the land, rather than a bona fide attempt to comply with the injunction, the district court granted the plaintiff's motion to enforce the injunction, denied as moot his motion to amend it, and permanently enjoined the government from implementing the land-transfer statute [*Buono v. Norton*, 364 F. Supp. 2d 1175, 1182 (C.D. Cal. 2005) (*Buono III*)]. Again, the Ninth Circuit affirmed [*Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007) (*Buono IV*)]. This time, the government sought certiorari, and the Supreme Court granted the petition and reversed. There was no majority opinion.

The Scope of Review on Certiorari. The government argued that the scope of the Court's certiorari jurisdiction, which had been granted to review the Ninth Circuit's decision in *Buono IV*, included the authority to review the otherwise final proceedings in *Buono I* and *Buono II*. Specifically, the government asked the Court to reverse the district court's *Buono I* determinations that the plaintiff had standing to assert an Establishment Clause claim and that the display of the cross violated that clause. The Court unanimously - albeit in separate opinions - declined this invitation to expand the scope of its certiorari jurisdiction. All of the Justices agreed that both issues decided in *Buono I* (and affirmed in *Buono II*) were final and unreviewable. See *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 418, 43 S. Ct. 458, 67 L. Ed. 719 (1923); *Travelers Indemnity Co. v. Bailey*, 129 S. Ct. 2195, 174 L. Ed. 2d 99, 110 (2009). The most surprising thing about this issue is that the government seems to have been unaware of this firmly established limit on the Court's certiorari jurisdiction.

Plaintiff's Standing to Enforce the Injunction. All of the Justices agreed that a party awarded an injunction has standing to enforce that specific injunction. The question here, however, was whether the plaintiff was, in fact, seeking to enforce the *Buono I* injunction or to extend it. In a plurality opinion, Justice Kennedy, joined by Chief Justice Roberts and Justice Alito, concluded that the plaintiff was seeking only to enforce the prior injunction. "Based on the rights he obtained under the earlier decree - against the same party, regarding the same cross and the same land - his interests in doing so were sufficiently personal and concrete to support his standing." The government's argument to the contrary was, in the plurality's view, "properly addressed to the relief granted by the judgment below, not to *Buono*'s standing to seek that relief."

The four dissenting Justices agreed with the plurality on the question of plaintiff's standing. Justice Stevens, joined by Justices Ginsburg and Sotomayor, concluded, "Plainly, respondent had standing to seek enforcement of a decree in his favor." Justice Breyer's dissent was to the same effect.

In an opinion concurring in the Court's judgment, Justice Scalia, joined by Justice Thomas, argued that the plaintiff did not have standing because rather than merely seeking to compel compliance with the original injunction, the plaintiff sought to expand it, to seek new relief. Justice Scalia reasoned that the original injunction, barring the government from "permitting" display of the cross at a particular location, makes sense only if the government owns the location. Therefore, properly read in context, the injunction merely proscribed display of the cross on federal land. The district court's later order purporting to enforce the earlier injunction went well beyond barring display of the cross on public property, and instead enjoined government officials from implementing the land-transfer statute. The plaintiff should have been required to establish standing to seek this new relief.

Justice Scalia then argued that the plaintiff failed to satisfy the actual or imminent injury aspect of standing with respect to the new relief. He explained that whether the VFW would continue to display the cross after taking possession of the land was merely speculative; under the statute, the land would revert to the government if it was no longer maintained as a war memorial, but maintenance of the cross at that location was not required. Moreover, the plaintiff's alleged injury was based specifically on the presence of the cross on federal property. His amended complaint averred that he was "deeply offended by the display of a Latin Cross on government-owned property," but he had "no

objection to Christian symbols on private property." Thus, even if being "deeply offended" by a religious display and taking steps to avoid seeing it constitutes a cognizable injury, the plaintiff made clear that *he* would not be offended if the display were on private property, according to Justice Scalia.

Validity of the District Court's Order. As noted in the previous section, seven Justices concluded that the plaintiff had standing to enforce the judgment by seeking an order to prevent the transfer of the property. On the merits, four of those seven (the dissenters) concluded that the order prohibiting the transfer represented an appropriate means of enforcing the prior judgment, *i.e.*, the order was not an abuse of discretion.

Three of the seven (the plurality) concluded that the district court abused its discretion by failing to consider adequately "the change in law and circumstances effected by the land-transfer statute." The plurality's conclusion seems to have derived in part from a particular perception of what the Establishment Clause permits and prohibits:

But a Latin cross is not merely a reaffirmation of Christian beliefs. It is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving help secure an honored place in history for this Nation and its people. Here, one Latin cross in the desert evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten.

In any event, the combination of the three-person plurality finding an abuse of discretion with Justice Scalia's two-person concurrence - plaintiff lacked standing to seek "new relief" - created a five-person majority requiring reversal of the district court's order.

On remand, the district court will be faced with an interesting dilemma. Four Justices would have affirmed the order (Justices Stevens, Ginsburg, Breyer and Sotomayor); two Justices would have reversed for reconsideration on the merits, presumably leaving open the possibility of a similar injunction being entered (Justice Kennedy and the Chief Justice); one would have reversed on the merits, leaving no possibility for a future order prohibiting the transfer (Justice Alito); and two expressed no view of the merits, having concluded that the plaintiff lacked standing (Justices Scalia and Thomas). Oh, and Justice Stevens has retired. Thus, if the district court were to enter a similar injunction against the transfer, three current Justices (the dissenters minus Justice Stevens) would likely affirm; three others Justices would likely reverse (Alito on the merits and Scalia/Thomas for lack of standing); and two others (Kennedy and the Chief Justice) remain in the middle, which is defined by Justice Kennedy's apparent views on the merits of the underlying controversy.

Comment. As to the scope of certiorari jurisdiction, the Court broke no new ground. While the exercise of certiorari jurisdiction does allow the Court review interlocutory decisions made earlier in a proceeding, certiorari jurisdiction does not authorize the Court to revisit aspects of a previously entered final judgment over which the time to file for certiorari has expired. Second, a plaintiff who has been awarded an injunction clearly has standing to seek relief enforcing that judgment. On the other hand, if the plaintiff seeks new relief, she must be able to satisfy the standards of injury-in-fact, causation and redressability. The difference between what constitutes enforcement and what constitutes new relief is one of interpretation and perception, resting primarily on the sound discretion of the district court. In this case, the battle over the scope of the Establishment Clause may have been a factor in the splintering of the Court.

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Sinclair on Hutchins v. Talbert and City of Suffolk v. Lummis Gin Co.

2010 Emerging Issues 5099

Professor Kent Sinclair on *Hutchins v. Talbert*, 278 Va. 650, 2009 Va. LEXIS 98 (November 5, 2009) and *City of Suffolk v. Lummis Gin Co.*, 278 Va. 270, 683 S.E.2d 549 (September 18, 2009)

By Kent Sinclair

June 7, 2010

SUMMARY: The Supreme Court of Virginia has in recent years addressed of what a "final judgment" is, and how other orders affect either the running of the "21-day rule" terminating trial court jurisdiction, or the 30-day appeal period. Two cases have clarified the effect of post-trial motions while deepening concern over the steps involved in "reserving jurisdiction" to take certain issues under submission in connection with a final order.

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ARTICLE: In two recent decisions the Supreme Court of Virginia has attempted once more to alert the Circuit Court judges and litigating bar to the limits under Rule 1:1 of "reserving jurisdiction" and "suspending orders" issued in connection with disposition of a case, and the problem of ancillary issues that arise in connection with a "final judgment."

Nonsuit Orders and Finality Under Rule 1:1. In *City of Suffolk v. Lummis Gin Co.*, 278 Va. 270, 683 S.E.2d 549 (September 18, 2009), a proceeding brought by a city under Va. Code §§ 58.1-3965 *et seq.* seeking to sell a parcel of land to satisfy delinquent real estate tax liens, the Supreme Court discussed whether a recent tax sale suit was the same cause of action the city had previously brought for delinquent taxes in 1995, and the nonsuit-related effects upon finding the new suit to be a different cause of action. After a hearing on the underlying issues in Circuit Court, the judge stated that he was "going to enter the nonsuit order [and] going to retain the case on the docket to [consider] the issue of fees and costs and whether this is a first voluntary nonsuit of right or whether it is the second nonsuit" under Va. Code § 8.01-380(B). On that same day the trial court granted the motion for a nonsuit without prejudice in an order that stated: "[t]his suit shall remain on the docket for the court to determine issues concerning attorney fees, costs and expenses incurred by [the heirs]." (emphasis added). The parties thereafter filed briefs and argued their positions before the circuit court, which much later entered a "Final Order" in favor of the individual defendants, finding that the present case is a second or additional nonsuit of the prior action, awarding attorney fees and costs, and rejecting the claim that pursuant to Rule 1:1 it lacked jurisdiction to decide the matters raised in the request for attorney's fees. The Supreme Court of Virginia reversed. In *Lummis Gin Co.* the Court found that an order of nonsuit is "sufficiently imbued with the attributes of finality" to be subject to the provisions of Rule 1:1, a Rule with "mandatory" provisions that control the subject matter jurisdiction of the circuit court to take further steps in a case.

■ **Key Issue #1: The 21-Day Rule.** Under traditional principles, once a final judgment has been entered and the 21-one

day time period of Rule 1:1 has expired, the trial court is thereafter without jurisdiction in the case. Quoting from the leading case, *SuperFresh Food Markets v. Ruffin*, 263 Va. 555, 561 S.E.2d 734 (2002), the Court stated that "[o]nly an order within the 21-one day time period that **clearly and expressly** modifies, vacates, or suspends the final judgment will interrupt or extend the running of that time period so as to permit the trial court to retain jurisdiction in the case." *SuperFresh* had made it clear that neither the filing of post-trial or post-judgment motions, nor the trial court's taking such motions under consideration, nor the pendency of such motions on the 21st day after final judgment, is sufficient to toll or extend the running of the 21-day period for modifications allowed by Rule 1:1, applying the holding in *Berean Law Group, P.C. v. Cox*, 259 Va. 622, 626, 528 S.E.2d 108, 111 (2000).

Most troubling for Virginia practitioners today is the further conclusion the Supreme Court reached in *Lummis Gin Co.* that - notwithstanding the circuit court's attempt to *preserve* the nonsuit issues by including the statement: "[t]his suit shall remain on the docket for the [c]ourt to determine issues concerning attorney fees, costs and expenses incurred by [the heirs]" in its initial order -- *the trial court still only had 21 days to resolve the issue before it lost jurisdiction*. The Supreme Court found that order language insufficient to suspend the judgment, and thus the trial court lost jurisdiction to decide any issue in the action 21 days after entry of the nonsuit order. Its later order awarding attorneys' fees and costs to the heirs was a nullity.

Prior to *Lummis Gin Co.*, many observers had assumed that *SuperFresh* meant that in order to prevent the 21-day window from expiring on what would otherwise be a final order, the judge needed only to make it clear in the order that the court was retaining control for some purpose, and thus there was "more to be done" in the action, with no specific language being required to reserve jurisdiction beyond 21 days. *Lummis Gin Co.* indicates, however, that *SuperFresh* is viewed as a case where the Final Order was so labeled, and had no qualifications whatsoever, holding that in that context **only** entry of a specific order suspending, modifying or vacating the prior order avoids the 21-day bar.

Earlier, in *Concerned Taxpayers v. County of Brunswick*, 249 Va. 320, 455 S.E.2d 712 (1995), it appeared that recitations by the trial court that issues were being held over for further rulings was sufficient. There the trial court dismissed a complaint in an order expressly stating that the trial court "would reconsider the . . . request to file an amended bill of complaint" and also granted "leave to file additional submissions and a Notice of Hearing upon their Motion for Sanctions within twenty-one (21) days after entry of this Order." A month later, the trial court in *Concerned Taxpayers* entered a second order, this time denying the motion for leave to file an amended bill of complaint and expressly stating that it "would retain jurisdiction" over the . . . request for sanctions." Then the following month, the trial court entered its last order in the case, in which it granted the motion for sanctions and entered judgment for legal expenses incurred in defending the claim. In *SuperFresh* the Supreme Court construed *Concerned Taxpayers* to represent the situation where "the trial court expressly reserved jurisdiction . . . in the two orders that preceded the final order." By using the term "retain jurisdiction," the trial court was therefore not attempting to interrupt the 21-day time period of Rule 1:1. Rather, it was expressly indicating that the order was not rendering a final judgment.

■ **Key Issue # 2: Finality of Orders.** In the recent *Lummis Gin Co.* decision the bench and bar are told that "[a]t the conclusion of the hearing, the circuit court articulated that it was 'going to enter the nonsuit order [and] going to retain the case on the docket to [consider] the issue of fees and costs and whether this is a first voluntary nonsuit of right or whether it is the second nonsuit contemplated by [Va. Code § 8.01-380(B)].'" On that same day the court entered an order granting the City's motion for a nonsuit without prejudice. The order further provided that "[t]his suit shall remain on the docket for the Court to determine issues concerning attorney fees, costs and expenses incurred by [the Baker heirs]." Thus, like some of the orders in *Concerned Taxpayers* - and unlike the order in *SuperFresh* which called itself the "Final Order" in the case - the nonsuit order did not have the appearance of complete disposition of all issues in the case in order to qualify as a final order in the first place.

The trial court's statement in *Lummis Gin Co.* that "[t]his suit shall remain on the docket for the Court to determine issues concerning attorney fees, costs and expenses incurred" appears to be the exact equivalent of language found sufficient in *Concerned Taxpayers*, but in the more recent case it was *not* enough to defer running of the 21-day period under Rule 1:1. Thus the standards have significantly tightened.

In the wake of *Lummis Gin Co.*, law reform advocates have expressly questioned whether - in light of this strict

interpretation - Rule 1:1 needs to be amended to add language assuring that an order expressly "reserving jurisdiction" to decide a then-pending motion acts as a suspension of the order. In the meantime, the only safe course is for the trial court order to state that it is "reserving jurisdiction and expressly suspends the entry of judgment."

Finally, a True "Sustaining Order" is Reviewed on Appeal. In *Hutchins v. Talbert*, 278 Va. 650, 2009 Va. LEXIS 98 (November 5, 2009), a further piece of the puzzle has fallen into place. In that medical malpractice action, an order denying a motion to set aside the verdict was held not to be a "final judgment" for purposes of the deadline for filing a notice of appeal, because the trial judge had rendered final judgment in a separate, previously entered order, which is not vacated, suspended, or modified by the later order ruling upon the motion to set aside the verdict. Because the notice of appeal filed in the case was therefore untimely, the appeal was dismissed.

At trial of the medical malpractice case in *Hutchins*, trial the jury awarded the plaintiff a verdict in the amount of \$4 million, which was reduced by the circuit court to \$885,000, taking into account an earlier settlement with other defendants and the application of the statutory limit on medical malpractice damages. On April 25 the circuit court entered an order entitled "Final Order" that rendered judgment in favor of the plaintiff for that amount, and it concluded: "AND THIS CAUSE IS ENDED." On that same date, the circuit court also entered a separate "Sustaining Order" providing that the final order was suspended for 14 days. The sustaining order stated:

It is ORDERED that the final Order be suspended for fourteen (14) days from this date. This tolls the running of the twenty-one (21) day provision in Rule 1:1, thus allowing a total of thirty-five (35) days for entry of an Amended Final Order.

The defendants filed a motion to set aside the verdict, but on May 28 the circuit court entered an order denying that motion that did not refer to the April 25 final order in any manner. The circuit court entered no other orders in the case thereafter. Defendants filed a notice of appeal on June 19th. That filing was timely only if the May 28th decision was the appealable "final order" but, unfortunately for plaintiff, the decision back in April was held to be the final decision and time to appeal had expired by the time the June notice of appeal was filed.

Definition of Time to Appeal. Rule 5:9(a) states that no appeal shall be allowed unless, within 30 days after the entry of final judgment or other appealable order or decree, counsel for the appellant files with the clerk of the trial court a notice of appeal and at the same time mails or delivers a copy of such notice to all opposing counsel. The effect of trial court orders in conjunction with final disposition is also controlled by Part Five of the Rules rather than the Part Three trial court rules for civil cases. Rule 5:5(a) declares the time prescribed for filing a notice of appeal to be "mandatory," and the Rule then prescribes:

The time period for filing the notice of appeal is not extended by the filing of a motion for a new trial, a petition for rehearing, or a like pleading unless the final judgment is modified, vacated, or suspended by the trial court pursuant to Rule 1:1 In any such case the time for filing shall be computed from the date of final judgment entered following such modification, vacation, or suspension

In *Hutchins* the circuit court entered final judgment for plaintiff on April 25, and that day entered an order "sustaining" the final judgment order for 14 days. In Virginia, the date of entry of any final judgment, order, or decree is the date the judgment, order, or decree is signed by the judge. However, in this case, as allowed by Rule 1:1 the circuit court suspended the entry of the final order for 14 days.

■ -- **Key Issue # 3: Self-Executing - Self-Terminating - Suspension Orders.** The Supreme Court describes the 14-day time period set forth in a sustaining order of the form used in *Hutchins* as "self-executing," and in that case the suspension expired by the terms of the order on May 9. When the suspension expired, *two critical time periods started to run simultaneously against the losing party*: the 21-day time period under Rule 1:1 during which the trial court could modify, vacate, or suspend the final judgment, and the 30-day time period under Rule 5:9 for filing a notice of appeal.

While the defendants in *Hutchins* filed a motion to set aside the verdict, and the circuit court entered an order on

May 28 denying that motion, the Supreme Court holds in *Hutchins* that Rule 5:5(a) is clear in providing that the time period for filing the notice of appeal is not extended by the filing of a motion for a new trial, a petition for rehearing, or a like pleading unless the final judgment is modified, vacated, or suspended by the circuit court pursuant to Rule 1:1. Thus, the motion to set aside the verdict did not extend the period for filing the notice of appeal, *or* the time for filing a notice of appeal.

Safety Steps: Trial courts can avoid embarrassment, wasted effort, and unfairness to the parties by entering a written order that explicitly recites that a "final order" has been "suspended." *Litigants* can protect themselves in the absence of express "suspension" by filing protective notices of appeal. In *Concerned Taxpayers*, discussed above, the aggrieved party filed such notices at various points prior to the last ruling, and the Supreme Court found the appeal timely without specifying which of the notices was operative.

RELATED LINKS: Regarding finality of judgments and the "21-Day Rule" terminating trial court power to affect a final judgement, see

- Charles E. Friend and Kent Sinclair, *Friend's Virginia Pleading and Practice*, Section 21.04 (Modification, Vacation or Suspension of Judgment);
- Charles E. Friend and Kent Sinclair, *Friend's Virginia Pleading and Practice*, Section 37.04 (Time Limits for Appeal);
- Kent Sinclair and Leigh B. Middleditch, Jr., *Virginia Civil Procedure*, Section 14.1 (Judgments);
- Kent Sinclair and Leigh B. Middleditch, Jr., *Virginia Civil Procedure*, Section 17.3 (Appealable Orders and Decisions))

Regarding nonsuit practice in Virginia, see

- Kent Sinclair and Leigh B. Middleditch, Jr., *Virginia Civil Procedure*, Section 14.2 (Nonsuit);
- Charles E. Friend and Kent Sinclair, *Friend's Virginia Pleading and Practice*, Section 12.05 (Appeal and Nonsuit) (2007);
- Charles E. Friend and Kent Sinclair, *Friend's Virginia Pleading and Practice*, Section 12.12 (Nonsuits and the 21-Day Rule) (2007);
- Charles E. Friend and Kent Sinclair, *Friend's Virginia Pleading and Practice*, Section 12.05 (Appeal and Nonsuit) (2007);
- Charles E. Friend and Kent Sinclair, *Friend's Virginia Pleading and Practice*, Section 12.12 (Nonsuits and the 21-Day Rule) (2007)

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Sinclair and Harrison on Kellerman v. McDonough

2010 Emerging Issues 4940

Sinclair and Harrison on Common Law Duty of Supervision and Care Regarding Minors and Assumption of Duty Under Virginia Law

By Kent Sinclair and Gessner Harrison

June 5, 2010

SUMMARY: A landmark ruling by the Supreme Court of VA, *Kellerman v. McDonough* establishes that adults owe a common law duty of supervision and care for a minor whose parents have given them care of the minor for a social visit. The Court addresses related issues including scope of the duty, circumstances under which a specific duty of care arises, and whether a special relationship exists imposing a duty to protect against criminal acts of third parties.

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ARTICLE: Introduction. Parents who agree to host a social visit involving a minor who is a friend of their own child may frequently wonder what duties they owe to the visiting minor. In *Kellermann v. McDonough*, 278 Va. 478, 684 S.E.2d 786 (2009), a majority of the Supreme Court of Virginia clarifies that adults owe a common law duty of supervision and care for a minor whose parents have relinquished supervision and care to them for the duration of the minor's social visit. The Court also addresses important related issues, including the scope of this common law duty, the circumstances under which a specific duty of care with respect to the visiting minor may be assumed, and whether a "special relationship" exists so as to impose a duty to protect the visiting minor against the criminal conduct of third parties. The underlying facts in *Kellermann*, while undoubtedly tragic, emphasize the importance of recognizing that specific duties are owed to minors whose parents have entrusted their care to other adults.

Background. The defendant couple contacted the plaintiffs in North Carolina, seeking to arrange a visit between the decedent, aged 14, and their own daughter, also 14. On the agreed day, decedent and her father met the other girl and her mother Paula McDonough at a Virginia location approximately halfway between both families' homes. In discussing the girls' planned activities, decedent's father told Paula McDonough that his daughter was "not to be driven by any inexperienced drivers" and he emphasized that she "was not to be in a car with any young, male drivers, stating 'no boys with cars.'" Paula agreed to this request and stated, " 'don't worry, I promise we'll take good care of her.'" Paula later drove the girls to the shopping mall, dropped them off, and left. Later that day, when the girls called Paula, she permitted them to be driven home by a young minor male. Decedent and another friend made telephone calls seeking alternative transportation, to no avail, and reluctantly entered the young male's vehicle along with the defendants' daughter. He drove recklessly, causing an accident in which decedent was killed. Her parents brought a wrongful death action against host couple, alleging that they had a common law duty to supervise and care for decedent, that they had assumed a duty of reasonable care toward her, and that a special relationship existed imposing a duty on

them to protect her from the conduct of third parties, including the young male driver. The defendants' demurrer was granted by the circuit court, and plaintiffs appealed.

Legal Principles. In resolving disputes over the existence of a common law duty of supervision and care, the assumption of a specific duty of reasonable care, and the existence of a "special relationship" between the defendants and the visiting minor in *Kellermann*, the Court provided encyclopedic citations for a number of core topics in Virginia practice:

■ **Elements of actionable negligence claim.** The prior holding in *Delk v. Columbia/HCA Healthcare Corp.*, 259 Va. 125, 132, 523 S.E.2d 826, 830 (2000) was noted as authority for the familiar, well-established elements of a negligence claim under Virginia law: "a 'plaintiff who seeks to establish actionable negligence must plead the existence of a legal duty, violation of that duty, and proximate causation which results in injury.'" The Court also held that "[t]he issue whether a legal duty in tort exists is a pure question of law," and explained that "[i]f the allegations in a complaint are legally sufficient to establish the existence of a duty, then a jury, upon consideration of the evidence, must determine whether the duty has been performed."

■ **Assumption of duty.** Noting that the principle had been recognized in many prior cases, including *Fruiterman v. Granata*, 276 Va. 629, 645, 668 S.E.2d 127, 136 (2008), *Didato v. Strehler*, 262 Va. 617, 628, 554 S.E.2d 42, 48 (2001), *Ring v. Poelman*, 240 Va. 323, 326, 397 S.E.2d 824, 826 (1990), and *Cofield v. Nuckles*, 239 Va. 186, 192, 387 S.E.2d 493, 496 (1990), the Court, quoting *Nolde Bros. v. Wray*, 221 Va. 25, 28, 266 S.E.2d 882, 884 (1980), explained that "[i]t is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all." Referring to this as the "common law principle of assumption of a duty," the Court explained that the principle is embodied in Restatement (Second) of Torts § 323, which provides that "[o]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking. "

Proximate causation requirement. *Moses v. Southwestern Va. Transit Mgmt. Co.*, 273 Va. 672, 679, 643 S.E.2d 156, 160 (2007) and earlier cases had stressed that issues of negligence and proximate causation are questions of fact for the jury's determination. Relying on the long-established definition of proximate cause most recently applied in *Williams v. Le*, 276 Va. 161, 167, 662 S.E.2d 73, 77 (2008), the Court in *Kellermann* then explained that " 'the proximate cause of an event is that act or omission which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the event, and without which that event would not have occurred.' " A key doctrine, enunciated in *Williams*, 276 Va. at 167, 662 S.E.2d at 77, *Atkinson v. Scheer*, 256 Va. 448, 454, 508 S.E.2d 68, 71 (1998), *Panousos v. Allen*, 245 Va. 60, 65, 425 S.E.2d 496, 499 (1993), and *Coleman*, 221 Va. at 131, 267 S.E.2d at 147, is that there may be more than one proximate cause of an event. In *Kellermann*, however, the Court noted that "[a] subsequent proximate cause may or may not relieve a defendant of liability for his negligence." In order to relieve a defendant of liability for a negligent act, the negligence intervening between the defendant's conduct and the injury "must so entirely supersede the operation of the defendant's negligence that it alone, without any contributing negligence by the defendant in the slightest degree, causes the injury. " Citing voluminous case law, the Court emphasized that "a superseding cause of an injury constitutes a new effective cause and operates independently of any other act, making it and it only the proximate cause of injury." However, it also noted that "not every intervening cause is a superseding cause,- specifying that "[i]n order to relieve a defendant of liability for his negligence, negligence intervening between the defendant's negligence and the injury must so entirely supersede the operation of the defendant's negligence that it alone, without the defendant's [negligence contributing] thereto in the slightest degree, produces the injury." A very important limitation on this doctrine, noted in *Coleman*, 221 Va. at 131, 267 S.E.2d at 147, *Jefferson Hospital, Inc. v. Van Lear*, 186 Va. 74, 81, 41 S.E.2d 441, 444 (1947) and *Joynes*, 278 Va. at 63, 677 S.E.2d at 264, is that "an intervening cause is not a superseding cause if it was 'put into operation by the defendant's wrongful act or omission."

● **Protection against conduct of third persons.** In Virginia law, a person generally "does not have a duty to protect another from the conduct of third persons." In *Kellermann* the Court acknowledged the exceptions recognized in several prior cases, summarizing: "this general rule does not apply when a special relationship exists between a defendant and a plaintiff that gives rise to a right to protection to the plaintiff or between the defendant and third persons that imposes a duty upon the defendant to control the conduct of the third person causing reasonably foreseeable danger to the plaintiff." Prior law has recognized several special relationships, including "common carrier-passenger, business proprietor-invitee, innkeeper-guest, and employer-employee with regard to the employer's potential duty of protecting or warning an employee. Indeed, the Court also noted that this "list" of previously recognized special relationships "is not exhaustive."

Key Issue #1: Do non-parent adults owe a general common-law duty in tort to supervise and care for a visiting minor whose parents have relinquished such supervision and care to them? If so, does the scope of that duty include the duty to exercise reasonable care in controlling the conduct of third parties to protect the visiting minor from harm?

The majority in *Kellermann* answered the first portion of this question in the affirmative, but refused to recognize, as a matter of law, the existence of a "special relationship" that would require the exercise of reasonable care to control the conduct of third parties so as to protect the visiting minor. Thus, based on authority from other states the Court holds that "when a parent relinquishes the supervision and care of a child to an adult who agrees to supervise and care for that child, the supervising adult must discharge that duty with reasonable care." On the question whether the Kellermanns had sufficiently stated a negligence claim based on this common law duty, the Court examined specific allegations in the plaintiffs' pleading and found that the "gist" of plaintiffs' claim was an this common law duty to supervise and care for decedent, a 14-year-old child who was dependent upon the defendants' care and supervision. Plaintiffs had pled a duty "to provide ordinary and reasonable care" including reasonable care regarding her transportation during her visit with the defendants. Thus the Court found that plaintiffs had pled a cognizable common law cause of action in negligence.

However, with respect to the scope of this common law duty of supervision and care owed by an adult to whom the supervision and care of a child has been relinquished, the majority in *Kellermann* emphasized that such an adult "is not an insurer of the child's safety," and specified only that "the supervising adult must discharge his or her duties as a reasonably prudent person would under similar circumstances."

Addressing the issue of whether a "special relationship" exists between such an adult and the child who has been entrusted to the adult, the majority, after examining its prior precedent regarding "special relationships," the Court concluded that it could "perceive of no reason to expand our jurisprudence regarding special relationships to include an adult who agrees to supervise and provide care to a minor." Accordingly, it held that the circuit court did not err when it sustained the defendants' demurrer on the "special relationship" theory. On the issue of proximate cause, the majority concluded that, based upon the principles established in prior case law, if the plaintiffs are able to prove at trial the factual allegations in the complaint, and the jury finds that the defendants breached their duty of care and supervision of the decedent, a jury could also find that their breaches of duty constituted a proximate cause of her death and that the young male driver's acts were *not* the sole proximate cause of her death.

The Court in *Kellermann* also concluded that if a jury were to find that the female defendant assumed a duty to exercise reasonable care to provide safe transportation for decedent, and to prevent her from riding in cars with young males and that this defendant breached that duty, the jury could also find that her breach of that duty was a proximate cause of the death -- rejecting the defense claim that the actions of the young male driver in driving recklessly and bringing about the victim's death were the sole proximate cause of death.

Key Issue #2: Under what circumstances will non-parent adults have assumed a duty to render services to a minor which they should recognize are necessary for the protection of the minor's person or things?

In addressing this question, the majority distinguished the conduct of Paul McDonough from that of Paula McDonough with respect to the conditions under which the plaintiffs had permitted their daughter to visit her friend. Applying the well established principles on the assumption of a duty as embodied in Restatement (Second) of Torts § 323, plaintiffs were held to have adequately pled that decedent's father specifically told Paula McDonough that decedent was "not to be driven by any inexperienced drivers" and that he had emphasized that she "was not to be in a car with any young, male drivers, -- in tragically prophetic language, " 'no boys with cars.' " The alleged promise of Paula McDonough given in response, to "take good care of her," was adequate to allege that she undertook a duty to render services to the decedent, that she breached this duty, and the breach was a proximate cause of the decedent's injuries and death. *Paula's husband*, however, was not present for this exchange, and the Court concluded that the complaint contained no allegations that would permit the finder of fact to find that that he assumed any duty of care.

Importance of Rulings. *Kellermann* is clearly informative to parents and other adults who are entrusted with the care of other people's minor children. It teaches that "when a parent relinquishes the supervision and care of a child to an adult who agrees to supervise and care for that child, the supervising adult must discharge that duty with reasonable care." Although it is not a unanimous decision on this point, only one of two dissenting and concurring Justices did not reach the issue of the existence of a common law duty of supervision and care, and the other Justice appeared to disagree only with scope and characterization of the duty, and not its existence. Accordingly, the question of the existence of the common law duty has largely been settled in *Kellermann*, but the issues of the specific contours and scope of this duty remain to be refined in future cases. Significantly, regardless of how the contours and scope of the duty are ultimately described, it is clear that three important principles--all of which enjoyed the support of all of the Justices participating in the decision--will ultimately be used to determine the extent of tort liability based on a breach of that duty. First, an adult, such as Paula McDonough, may assume specific duties with respect to a minor--such as the obligation to provide safe transportation and the obligation to prevent the minor from riding in a vehicle driven by a certain type of inexperienced driver--if the principles of assumption of duty as recognized in *Didato* and described in Restatement (Second) of Torts § 323 are satisfied. On this point, all of the Justices taking part in *Kellermann* agreed that a specific duty had been assumed by Paula McDonough, but not Paul McDonough, under the facts of the case. Second, no "special relationship" can exist as a result of the common law duty that would impose an obligation to protect the minor against the criminal acts of third parties. Finally, regardless of whether the question of liability depends upon the assumption of a specific duty of care, or the general common law duty, proximate cause principles will govern the analysis. Although the circumstances leading to the clarification in *Kellermann* of the issue whether a common law duty of supervision and care exists under Virginia law were indisputably tragic, it is just as indisputable that this important decision should help parents and adults recognize that they clearly owe such a duty to children entrusted to their care and that this recognition should serve to avoid such tragedies in the future.

RELATED LINKS: Regarding wrongful death and survival actions generally, see

- Charles E. Friend, *Personal Injury Law in Virginia*, Chapter 15: Wrongful Death (3rd ed. 2008);
- Charles E. Friend and Kent Sinclair, *Friend's Virginia Pleading and Practice*, Section 25.02 (Negligence Actions for Personal Injuries) (2007);
- Charles E. Friend and Kent Sinclair, *Friend's Virginia Pleading and Practice*, Section 25.04 (Survival of Actions) (2007);
- Charles E. Friend and Kent Sinclair, *Friend's Virginia Pleading and Practice*, Section 25.05 (Wrongful Death Actions) (2007);
- Charles E. Friend and Kent Sinclair, *Friend's Virginia Pleading and Practice*, Section 26.23 (Survival of Actions) (2007);
- Kent Sinclair and Leigh B. Middleditch, Jr., *Virginia Civil Procedure*, Section 2.2 (Survival and Assignment of Causes of Action) (5th ed. 2008);
- Kent Sinclair and Leigh B. Middleditch, Jr., *Virginia Civil Procedure*, Section 2.11 (Wrongful Death Actions) (5th ed. 2008);
- Kent Sinclair and Leigh B. Middleditch, Jr., *Virginia Civil Procedure*, Section 3.7 (Election of Remedies Rules) (5th ed. 2008);

- Kent Sinclair and Leigh B. Middleditch, Jr., Virginia Civil Procedure, Section 5.11 (Actions for Wrongful Death)) (5th ed. 2008);
- John L. Costello, Virginia Remedies, Section 17.07 (Wrongful Death) (2008)

Regarding damages recoverable for wrongful death, see

- Charles E. Friend, Personal Injury Law in Virginia, Chapter 15: Wrongful Death (3rd ed. 2008);
- Charles E. Friend and Kent Sinclair, Friend's Virginia Pleading and Practice, Section 23.07 (Damages- Wrongful Death) (2007);
- Kent Sinclair and Leigh B. Middleditch, Jr., Virginia Civil Procedure, Section 2.11 (Wrongful Death Actions) (5th ed. 2008);
- John L. Costello, Virginia Remedies, Section 17.07 (Wrongful Death) (2008)

Regarding negligence claims and the existence of duties generally, see

- Charles E. Friend, Personal Injury Law in Virginia, Chapter 1: Fundamentals of Negligence Law (3rd ed. 2008);
- Charles E. Friend, Personal Injury Law in Virginia, Chapter 2: The Standard of Care (3rd ed. 2008);
- Charles E. Friend, Personal Injury Law in Virginia, Chapter 3: Breach of Duty (3rd ed. 2008);
- Charles E. Friend and Kent Sinclair, Friend's Virginia Pleading and Practice, Section 25.02 (Negligence Actions for Personal Injuries) (2007);
- John L. Costello, Virginia Remedies, Section 17.14 (Negligence) (2008);
- Michie's Jurisprudence of Virginia & West Virginia, Negligence Sections 1-69

Regarding proximate cause and related concepts, see

- Charles E. Friend, Personal Injury Law in Virginia, Chapter 4: Causation (3rd ed. 2008);
- Charles E. Friend and Kent Sinclair, Friend's Virginia Pleading and Practice, Section 25.02 (Negligence Actions for Personal Injuries) (2007);
- John L. Costello, Virginia Remedies, Section 17.15 (Causation) (2008);
- Michie's Jurisprudence of Virginia & West Virginia, Negligence Sections 20-23

Regarding actions to recover for injuries to minors generally, see

- Charles E. Friend and Kent Sinclair, Friend's Virginia Pleading and Practice, Section 26.05 (Actions for Injuries to Minors) (2007);
- Kent Sinclair and Leigh B. Middleditch, Jr., Virginia Civil Procedure, Section 2.6 (Injuries to Minors) (5th ed. 2008)

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The Rooker-Feldman Doctrine and Intersystem Preclusion

2010 Emerging Issues 5076

The Rooker-Feldman Doctrine and Intersystem Preclusion

By Allan Ides

May 25, 2010

SUMMARY: In *Dodson v. University of Arkansas for Medical Sciences*, a panel of the Eighth Circuit held that one of plaintiff's claims was barred under the Rooker-Feldman doctrine. In so ruling, the panel majority applied Rooker-Feldman in a manner that gave the doctrine a generalized and broad sweep, essentially paralleling the doctrines of claim and issue preclusion.

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ARTICLE: Allan Ides on *Dodson v. University of Ark. for Med. Scis. The Rooker-Feldman Doctrine and Intersystem Preclusion*

Introduction. In *Dodson v. University of Arkansas for Medical Sciences*, 601 F.3d 750, 2010 U.S. App. LEXIS 6924 (8th Cir. Apr. 2, 2010), a panel of the Eighth Circuit held that one of plaintiff's claims was barred under the *Rooker-Feldman* doctrine. In so ruling, the panel majority applied *Rooker-Feldman* in a manner that gave the doctrine a generalized and broad sweep, essentially paralleling the doctrines of claim and issue preclusion. A concurring opinion provided a careful analysis of *Rooker-Feldman* and explained why the subject claim was barred by rules pertaining to intersystem preclusion but not by *Rooker-Feldman*.

The Rooker-Feldman Doctrine. The *Rooker-Feldman* doctrine is a narrow jurisdictional doctrine that prohibits United States District Courts from exercising appellate jurisdiction over state court decisions in the absence of a congressional directive to the contrary. It is not a federal substitute for claim or issue preclusion. Nor is it an extension of abstention doctrines. In recent years, the Supreme Court has made it clear that *Rooker-Feldman* must be confined to its no-appellate-review foundation. In the Court's words:

The *Rooker-Feldman* doctrine . . . is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district proceedings commenced and inviting district court review and rejection of those judgments. *Rooker-Feldman* does not otherwise override or supplant preclusion doctrine or augment the circumscribed doctrines that allow federal courts to stay or dismiss proceedings in deference to state-court actions.

Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005). The

Exxon Court left open one lingering question. The phrase "inextricably intertwined" had been used as descriptive term by the Court in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486-487, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983), one of the cases from which *Rooker-Feldman* derives its name. Prior to *Exxon Mobil*, some lower federal courts had used that phrase to extend the scope of the doctrine beyond its original foundations. The *Exxon Mobil* Court used the phrase when describing the *Feldman* decision, but neither endorsed that phrase nor disavowed it. A question remains, therefore, whether "inextricably intertwined" has any operative value other than as a succinct description of the elements of the doctrine.

Facts and Proceeding in State Court. At issue was a dispute over the right to control the fate of cryogenically frozen embryos. Patricia Dodson and her then-husband had created the embryos through an In-Vitro Fertilization (IVF) program offered by the defendant state university. After the couple divorced, Ms. Dodson asked the university to implant the embryos into her, but the university refused to do so without the former husband's consent, which was not forthcoming. Dodson first sought relief from the state court that had entered the divorce decree (Dodson I). When that court denied relief, having concluded that Dodson had relinquished control of the embryos to the IVF program director, Dodson sued the university (and the IVF program and certain officials) in another state court, seeking to force the university to implant the embryos into her (Dodson II). That court also denied the requested relief on similar grounds. Dodson appealed, but the appellate court dismissed the appeal for failure to order a transcript of the trial-court proceedings.

Federal Lawsuit. Seven years later, Dodson brought the present action in a United States District Court. Again, the question presented involved the right to control the frozen embryos. Her suit named the university (and certain university programs and officials) and her ex-husband as defendants. The federal suit presented two counts: Count I asserted a claim under 42 U.S.C. § 1983 for violations of her rights under the Fourth, Fifth, Ninth, and Fourteenth Amendments to the U.S. Constitution and under the state constitution. Count II asserted a state-law cause of action based on activity occurring after the final judgment in the prior lawsuit. Dodson requested injunctive relief to prevent the university from interfering with her right to control the "potential life" and the disposition of the embryos.

The district court granted the defendants' motions to dismiss for lack of subject-matter jurisdiction under the *Rooker-Feldman* doctrine, reasoning that Dodson's complaint was "inextricably intertwined" with the previous state-court proceedings because her claims "could succeed only upon a finding that the state courts wrongly decided the issues." Having dismissed the Count I federal claims, the court declined to exercise supplemental jurisdiction over the Count II supplemental claims.

The Panel Opinion. The Eighth Circuit affirmed the district court's dismissal in a per-curiam opinion joined by two judges. The panel majority agreed with the district court that *Rooker-Feldman* required dismissal of Dodson's Count I claims. In the panel's view, "Any ruling in the case at bar in Dodson's favor, *i.e.*, that the federal constitution demands the return of the embryos to Dodson, would wholly undermine" the ruling in Dodson I that she had relinquished control over the embryos. In addition, the opinion somewhat ambiguously suggested that the judgment in Dodson II, which was premised partly on sovereign immunity, would be undermined as well since the court in that case dismissed Dodson's lawsuit with prejudice after making findings against her position on the merits. The panel also affirmed the district court's discretionary dismissal of Dodson's Count II supplemental claims.

Judge Melloy's Concurring Opinion. Circuit Judge Michael Melloy filed a concurring opinion. He agreed that the dismissal of Count I should be affirmed, but on grounds of intersystem preclusion rather than *Rooker-Feldman*. His opinion provides a detailed and useful discussion of *Rooker-Feldman* that highlights the potential pitfalls of the majority's more generalized approach to the doctrine.

Judge Melloy agreed that Dodson's Count I could succeed only to the extent that the federal court arrived at factual or legal conclusions that differed with those of the Dodson I court. This case, therefore, presented the question whether, after the *Exxon Mobil* Court's attempt to cabin the *Rooker-Feldman* doctrine, the "inextricably intertwined" language has any independent significance. He then pointed out that a majority of circuits have held that the phrase "inextricably

intertwined" language does not impose an independent test under the *Rooker-Feldman* doctrine (and especially so post-*Exxon Mobil*). See, e.g., *McCormick v. Braverman*, 451 F.3d 382, 394-395 (6th Cir. 2006); *Davani v. Virginia Dep't of Transp.*, 434 F.3d 712, 719 (4th Cir. 2006); *Bolden v. City of Topeka*, 441 F.3d 1129, 1143 (10th Cir. 2006); *States Res. Corp. v. Architectural Team, Inc.*, 433 F.3d 73, 79-80 (1st Cir. 2005); *Hoblock v. Albany County Bd. of Elections*, 422 F.3d 77, 86-87 (2d Cir. 2005); *Noel v. Hall*, 341 F.3d 1148, 1164 (9th Cir. 2003); *GASH Assocs. v. Village of Rosemont, Ill.*, 995 F.2d 726, 728 (7th Cir. 1993).

In accordance with the view of the majority of circuits, Judge Melloy would have held that the *Rooker-Feldman* doctrine did not bar jurisdiction merely because a federal claim was "inextricably intertwined" with a state-court judgment, i.e., because the federal claim is premised on a position that contradicts a state court's decision. Under Judge Melloy's view, the district court erred by dismissing the complaint as "inextricably intertwined" with previous state-court judgments. Dodson did not request relief against a state-court judgment: significantly, the federal complaint alleged that the university defendants, not the state courts, were the source of Dodson's injuries. Thus, the *Rooker-Feldman* doctrine did not bar jurisdiction since Dodson was not "complaining of injuries caused by state-court judgments". *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005).

Judge Melloy went on to explain that claim preclusion barred Dodson's claim against her ex-husband, because it was the same claim as the one decided in Dodson I. In addition, issue preclusion barred relitigation of pivotal issues raised in Dodson's Count I claims against the university defendants since those issues were decided against Dodson in Dodson II. Judge Melloy also agreed that the district court properly declined to exercise jurisdiction over the supplemental Count II claims.

Comment. The approach adopted by the *Dodson* panel majority runs the risk of transforming *Rooker-Feldman* into a jurisdictional form of preclusion doctrine that bars jurisdiction over potentially precluded claims or issues whenever the federal case commences after the state court has entered a final judgment. It will almost universally be the case that the potentially precluded claims or issues would "wholly undermine" the state court decision or that they can be described as "inextricably intertwined" with matters decided in that case. This is precisely the type of substituted-preclusion approach the Court in *Exxon Mobil* was attempting to prevent. Of course, as Judge Melloy points out, preclusion doctrine itself accomplishes all that is necessary to avoid the potential federal interference with the state court's judgment. Simply put, unless the state-court loser is complaining of injuries caused by the state court judgment, *Rooker-Feldman* does not apply. Think preclusion.

RELATED LINKS: For further information, see Moore's Federal Practice:

■ 18-133 Moore's Federal Practice (3d Ed.) § 133.30[3][c][iii]

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Consequences of Failing to Impose a Timely Litigation Hold

2010 Emerging Issues 5021

John K. Rabiej on the Consequences of Failing to Impose a Timely Litigation Hold

By John K. Rabiej

May 6, 2010

SUMMARY: In *Field Day v. County of Suffolk* the plaintiff alleged that a substantial volume of ESI was destroyed because the defendant had taken no steps to preserve ESI when it became aware of the litigation. The plaintiff relied on *Pension Comm'n of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 2010 U.S. Dist. LEXIS 4546 (S.D.N.Y. Jan. 15, 2010), a recent opinion by Judge Scheindlin, author of the *Zubulake* ESI opinions, which held that the failure to issue a written litigation hold notice and implement a litigation hold constitute "gross negligence."

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ARTICLE: John K. Rabiej on the Consequences of Failing to Impose a Timely Litigation Hold

In *Field Day v. County of Suffolk*, 2010 U.S. Dist. LEXIS 28476 (E.D.N.Y. Mar. 25, 2010), the plaintiff alleged that a substantial volume of ESI was destroyed because the defendant had taken no steps to preserve ESI when it became aware of the litigation. The plaintiff filed a motion for sanctions seeking an adverse inference against the defendant for failing to implement a litigation hold to prevent the destruction of ESI in its control. The plaintiff relied on *Pension Comm'n of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 2010 U.S. Dist. LEXIS 4546 (S.D.N.Y. Jan. 15, 2010), a recent opinion by Judge Scheindlin, author of the *Zubulake* ESI opinions, which held that the failure to issue a written litigation hold notice and implement a litigation hold constitute "gross negligence." The consequence of this latter finding becomes critical in a case seeking severe sanctions because it has the effect of switching the burden of proof from the requesting party to the producing party to prove that any destroyed or missing ESI evidence is not relevant and would not prejudice the requesting party's interests. Because it is often extremely difficult to prove the prior existence of deleted ESI, let alone its relevancy or prejudicial effect, the burden shift can be significant.

Elements for Imposing Sanctions for Violating Preservation Duty: Ordinarily, a requesting party who seeks sanctions for destruction of ESI must prove three elements, including: (1) the producing party had control over the ESI and a duty to preserve it at the time that it was lost or destroyed; (2) the producing party acted with a culpable state of mind in destroying or losing the ESI; and (3) the destroyed or missing ESI was relevant and its loss prejudicial to the requesting party's claims or defenses. In many cases, the requesting party can demonstrate that the opposing party had control over and a duty to preserve the ESI that was destroyed or lost. It can also show that the opposing party was culpable in allowing the destruction or loss of ESI. But it is the third element that usually poses the greatest procedural hurdle. The requesting party frequently fails to prove by extrinsic evidence that the ESI was relevant or that the loss of ESI was prejudicial to its claims or defenses, which precludes the imposition of the severest sanctions. The showing is

difficult to make because the requesting party typically has little or no knowledge of what ESI in the producing party's control actually existed before its destruction.

To be sure, case law recognizes certain types of circumstantial evidence that can help substantiate a finding that ESI was lost or destroyed and that it was relevant. If selected groups of documents were retained from a certain point in time, and not beyond, the inference can be drawn that the same documents existed during an earlier time but were deleted. Inferences can also be drawn from missing emails from email chains. See *John K. Rabiej on the Requesting Party's Options When Little or No ESI is Produced in Discovery*, 2009 *Emerging Issues* 3808. Though such circumstantial evidence can be helpful, it is not always available. In many cases, the requesting party simply has no clue what information was contained in the destroyed or lost ESI. The requesting party only knows that "some" ESI was destroyed either intentionally or through automatic purging programs and suspects that it was relevant and its loss prejudicial to its interests. Under these circumstances, meeting its burden to prove the relevance of lost or destroyed ESI in support of a sanctions motion is often impracticable. Judge Scheindlin describes the difficulty in the following words:

The third preliminary matter that must be analyzed is what can be done when documents are no longer available. This is not an easy question. It is often impossible to know what lost documents would have contained. At best, their content can be inferred from existing documents or recalled during depositions. But this is not always possible. Who then should bear the burden of establishing the relevance of evidence that can no longer be found? And, an even more difficult question is who should be required to prove that the absence of the missing materials has caused prejudice to the innocent party. *Id.* at *16.

Burden of Proof Shifts: *Pension Comm'n of Univ. of Montreal Pension Plan* addresses the burden of proof issue head on. Most courts limit a finding of gross negligence to relatively extreme conduct, typically involving the wilful and deliberate destruction of ESI, e.g., wiping clean a hard drive. But Judge Scheindlin's holding goes farther and finds that the failure to issue a written litigation notice and implement a litigation hold in accordance with well established ESI standards constitute "gross negligence." When a court makes this finding, the burden of proof shifts from the requesting to the producing party, at least in cases seeking severe discovery sanctions. Instead of the requesting party proving the relevance of lost or destroyed ESI and consequent prejudice to its claims or defenses, the producing party has the burden to rebut the presumption against it and prove that the lost or destroyed ESI is not relevant and would not have prejudiced the requesting party. Though the producing party typically is in a better position than the requesting party to prove the non-relevancy and non-prejudicial effects of missing or destroyed ESI, in many cases that task remains formidable.

The court agreed with the plaintiff in *Field Day* that the defendant failed to issue a written litigation hold notice and to implement a litigation hold. Despite recognizing the merits of the holding in *Pension Comm'n of Univ. of Montreal Pension Plan*, the court in *Field Day* declined to find that the defendant acted with gross negligence. It held that the defendant acted only with negligence. The court reasoned that the destruction of ESI in the case occurred prior to the 2006 amendments to the Civil Rules when the applicable case law on litigation hold notices and litigation holds was unsettled. As such, the defendant did not act willfully or in bad faith. Finding that the defendant "only" acted negligently, the burden to prove the relevancy and prejudicial effects of the lost or destroyed ESI remained with the plaintiff, who failed to meet its burden. As a result, the court declined to impose the requested severe sanction, an adverse inference, against the defendant. But the finding of negligence was sufficient to impose a monetary sanction of reasonable attorney fees and costs incurred in connection with the motion.

Litigation Hold Notices and Litigation Holds: *Pension Comm'n of Univ. of Montreal Pension Plan* underscores the critical importance of imposing a litigation hold in every ESI case. At a minimum, failure to issue a written litigation notice or to implement a litigation hold in such cases constitutes negligence. If adopted by other jurisdictions, Judge Scheindlin's shifting of the burden of proof when a litigation hold is not implemented could have profound consequences, especially because a large percentage of lawyers continue to fail to issue a written litigation hold notice and implement a litigation hold to prevent the destruction of ESI in the hands of their clients. See Rabiej, *Litigation Costs and Delay Surveys Shed Light on E-Discovery Practices*, 2009 *Emerging Issues* 4673. The defendant's failure to

implement a litigation hold in *Field Day* did not shift the burden of proof. But the defendant's excuse for failing to implement a litigation hold will have no force for a party involved in more recent litigation. Consequently, the need to understand what a litigation hold notice should contain and how to implement an effective litigation hold has become more urgent because a failure to do so may lead to severe sanctions.

Lessons: Litigation holds should routinely be implemented in an ESI case. When litigation is imminent, a client should be advised to take steps to preserve evidence and to suspend any operation that automatically deletes potential evidence, like routine purging of emails. The litigation notice should be in writing and, depending on the context of the litigation, should:

- describe in plain English the nature of the issues in the lawsuit and the relevant time period, as derived from all the pertinent pleadings, so that everyone in the organization can understand it;
- define clearly in comprehensible terms the scope of the preservation obligation, including the criteria for identifying potentially relevant ESI;
- clearly instruct employees not to delete, modify, or alter any ESI subject to the litigation hold;
- identify the likely witnesses and "key" persons with knowledge of the relevant events;
- identify the specific types of ESI that must be preserved, including email and attachments, word processing documents, spreadsheets, images, databases, instant messages, etc.;
- identify the sources and storage media for relevant evidence that must be preserved;
- address whether metadata, deleted, or fragmented data must be preserved;
- inform the employees whether the ESI should be preserved in place or transmitted to a central repository using forensically sound methods.

The scope of the litigation hold will vary depending on the circumstances because it may be unreasonable to apply the same preservation requirements to all employees, especially in large organizations. Under the particular facts in a case, it may be more reasonable to apply strict preservation requirements only to "key players" involved in the litigation, while applying looser requirements to other employees who likely will not be participants in the litigation or possess relevant ESI. More aggressive measures should be taken to identify and preserve all ESI controlled by key custodians in various storage devices, including personal digital assistants and laptop computers. A reasonable balancing approach should be adopted.

To promote compliance with the litigation hold, the notice should contain a statement of the company's commitment to preserve evidence and to cooperate with judicial requests for information. The notice should also refer to the pertinent provision of the company's record retention policy, reminding employees of their specific preservation obligations.

The measures taken in the litigation-hold process to preserve evidence should be documented as evidence of the party's good faith and reasonableness in meeting its preservation obligations. The documentation will be useful in defending against any spoliation charges and any allegations of gross negligence.

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Power of a Federal Court to Impose Sanctions for Willful Litigation Misconduct

2010 Emerging Issues 4979

Allan Ides on Carr v. Tillery -- the Seventh Circuit Rules on the Inherent Power of a Federal Court to Impose Sanctions for Willful Litigation Misconduct

By Allan Ides

April 20, 2010

SUMMARY: In *Carr v. Tillery*, 591 F.3d 909, 2010 U.S. App. LEXIS 685 (7th Cir. 2010), the Seventh Circuit, in an opinion by Judge Richard Posner, invoked the inherent common law authority of a federal court to impose sanctions on lawyers who engage in willful litigation misconduct.

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ARTICLE: *Allan Ides on Carr v. Tillery - the Seventh Circuit Rules on the Inherent Power of a Federal Court to Impose Sanctions for Willful Litigation Misconduct.*

In *Carr v. Tillery*, 591 F.3d 909, 2010 U.S. App. LEXIS 685 (7th Cir. 2010), the Seventh Circuit, in an opinion by Judge Richard Posner, invoked the inherent common law authority of a federal court to impose sanctions on lawyers who engage in willful litigation misconduct.

Factual and Procedural Background. The plaintiff, a successful class action lawyer, became involved in a controversy with his former law partners over the distribution of fees earned prior to the break up of the partnership. In 2004, the plaintiff filed several lawsuits against his former partners and they, in turn, filed an action for declaratory relief against him. As a result of these suits, the parties entered a "Memorandum of Understanding" ("Memorandum") that specified how all fees would be allocated. The Memorandum also required that the pending suits be dismissed. In the declaratory judgment action, the plaintiff (there a defendant) filed a counterclaim alleging that he had been fraudulently induced to sign the Memorandum. The Illinois court rejected this counterclaim and entered judgment pursuant to the Memorandum, dismissing with prejudice all the pending suits. This judgment was affirmed on appeal.

In 2007, the plaintiff filed four separate fee-dispute lawsuits against his former partners in Illinois state courts. While those cases were pending, he filed the immediate case in federal court, alleging RICO violations and a supplemental state law claim; these claims too involved the same fee dispute and the same former partners.

In the federal proceeding, defendants asserted res judicata as an affirmative defense and filed a Rule 12(b)(6) motion to dismiss. They also filed a motion for costs and attorneys' fees pursuant to 28 U.S.C. § 1927. The district court granted the motion to dismiss, but denied the motion for sanctions. Plaintiff appealed the dismissal, and the defendants

cross-appealed the denial of their motion for sanctions.

The Seventh Circuit Affirms the Motion to Dismiss. The Seventh Circuit opinion began by holding that the claims in the federal suit were barred under the doctrine of claim preclusion. The complaint in the federal suit repeated many of the allegations from the 2004 suits, including the assertion that the plaintiff was fraudulently induced to sign the Memorandum. While the federal complaint now characterized the wrongful acts alleged in the earlier suits as predicate acts in support of the RICO claim, as the court explained it, a party is not entitled to maintain a suit arising from the same transaction or events underlying a previous suit merely by changing the legal theory. This is "claim splitting" and is barred by the doctrine of res judicata.

In addition, the court held that plaintiff's claims were also barred by the "one refiling" rule under Illinois state law. Under that rule, a plaintiff who voluntarily dismisses a suit "may commence a new action within one year or within the remaining period of limitation, whichever is greater" [735 Ill. Comp. Stat. 5/13-217]. Illinois courts interpret this to mean that a plaintiff who voluntarily dismisses a suit may commence only one new action. This is a rule of preclusion, like res judicata, and therefore bars refiling in federal as well as state court.

After the 2004 lawsuits were resolved, the plaintiff filed four more suits in state court, and then filed the present matter in federal court, after which he voluntarily dismissed the four state-court suits. All four of these cases arose from the same fee dispute. The court of appeals treated the first of these four suits as the first in a series of identical cases, so that the second suit was the "first refiling." Hence, the Illinois one-refiling rule barred the third and fourth state suits, and the present federal suit. The fact that the federal suit was filed prior to the dismissal of the first in the series was irrelevant as a matter of Illinois law.

This second group of suits, including the federal suit, did present one new claim, namely, the payment of fees due after the Memorandum was adopted. This claim would not be barred by res judicata, but was barred by the Illinois one-refiling rule. Thus, the district court had correctly dismissed the entire suit as barred, either by res judicata or by the Illinois statute.

RICO Claim Was Properly Dismissed as Without Merit. The Seventh Circuit also agreed that the RICO claim was without merit. The claim was so meritless, in fact, that it created doubt whether the federal courts had federal question subject matter jurisdiction over the case. The presumption, however, is that the dismissal of even a very weak case should be on the merits rather than because it was too weak to establish subject matter jurisdiction.

In the appellate court's view, the RICO claim was "a complete nonstarter." This was true mainly because the claims were barred by res judicata and the one-refiling rule. These, in general, are not appropriate grounds on which to base a conclusion that a suit is so frivolous as not to engage federal jurisdiction. They are, however, affirmative defenses that form the basis of a motion to dismiss on the pleadings under Rule 12(c), which results in a dismissal on the merits. In any event, the RICO claim was properly dismissed with prejudice.

Sanctions Should Have Been Granted Under Court's Inherent Power. In a cross-appeal, the defendants argued that the district should not have denied their motion for sanctions. That motion was based on 28 U.S.C. §1927, which provides, "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." Defendants charged that the plaintiff was harassing them with repetitive litigation, and that the present suit was part of that pattern. The difficulty with their motion, however, as the court of appeals explained, was that §1927 applies only to conduct occurring within the immediate case and, therefore, not to a previous pattern of litigation abuse, which was the basis of the defendants' motion.

The Seventh Circuit explained, however, that the relatively specific focus of §1927 on conduct in the pending case does not leave parties subjected to a pattern of vexatious litigation without a remedy. A litigant is not allowed to file

repetitive, meritless suits with impunity. A court has inherent power to punish such misconduct by an award of reasonable attorney's fees or other monetary sanctions. A court may also enjoin future abusive filings by way of an injunction. Furthermore, §1927 does not in any manner limit this inherent authority.

The defendants had not invoked the inherent power to sanction as a basis for their motion, but neither had the plaintiff argued that §1927 was inapplicable. The court of appeals, therefore, saw no obstacle to relying on the inherent authority to impose sanctions, especially since the facts of the abusive litigation were fully presented to the district court in the §1927 motion and since "the common law principle, like its statutory counterpart, is as much concerned with protecting the courts from being overwhelmed by baseless litigation as with protecting litigants from harassment."

The court of appeals concluded that the lawsuit was groundless and motivated by a desire to harass. Accordingly, the panel directed the district court to assess a proper monetary sanction, and also to consider whether to enjoin the plaintiff from conducting further litigation arising from the same subject matter. The appellate court did note that such an injunction permits the person enjoined to ask the court's permission to lift the injunction for good cause; therefore, if in the future the defendants refuse to pay the plaintiff his share of fees on a ground not placed in issue in the present case or in any of the previous litigation, the plaintiff should be permitted to bring a new suit.

Comment. The Seventh Circuit broke no new ground in invoking the inherent power of a federal court to sanction willful litigation misconduct. Neither §1927 or any federal rule, including Rule 11, limits the authority of a federal court to impose sanctions on such willful misconduct, including the filing of repetitive meritless lawsuits. See generally 2 *Moore's Federal Practice* § 11.41 (Matthew Bender 3d Ed.) and *Sanctions: The Federal Law of Litigation Abuse* §§ 26-29 (4th Ed.).

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Enforceability of Forum Selection Clauses in Diversity Cases

2010 Emerging Issues 4934

Wong v. PartyGaming Ltd. and the Enforceability of Forum Selection Clauses in Diversity Cases

By Allan Ides

March 30, 2010

SUMMARY: In *Wong v. PartyGaming Ltd.*, 589 F.3d 821, 2009 U.S. App. LEXIS 27914 (6th Cir. Dec. 21, 2009), the Sixth Circuit joined six other circuits in holding that federal law governs the enforceability of forum selection clauses in diversity cases. The court also held that the doctrine of forum non conveniens was the proper vehicle through which to enforce a valid forum selection clause.

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ARTICLE: In *Wong v. PartyGaming Ltd.*, 589 F.3d 821, 2009 U.S. App. LEXIS 27914 (6th Cir. Dec. 21, 2009), the Sixth Circuit joined six other circuits in holding that federal law governs the enforceability of forum selection clauses in diversity cases. The court also held that the doctrine of forum non conveniens was the proper vehicle through which to enforce a valid forum selection clause.

Factual Background. Defendant PartyGaming, a Gibraltar-based company, operates an online poker business. According to the plaintiffs, PartyGaming represented on its website that it prevented collusion among players and that its "Collusion Prevention System" was able to detect multi-account players. PartyGaming also represented that it did not encourage gambling by minors or gambling addicts. In order to participate in its online poker games, customers of PartyGaming were required to register on the website and to consent to specified "Terms and Conditions of Use," including a condition that any disputes arising out of the agreement would be governed by the laws of Gibraltar and subject to the exclusive jurisdiction of the courts of Gibraltar. Plaintiffs were active participants in PartyGaming's online poker business.

Procedural Background. Plaintiffs, all residents of Ohio, filed a diversity suit against PartyGaming in the Northern District of Ohio. They contended that PartyGaming's representations regarding collusion, multi-player accounts, and gambling by minors and addicts were false and in violation of Ohio consumer protection laws. Plaintiffs sought certification of a class of all similarly situated individuals, which the district court provisionally certified, consisting of all persons in the state of Ohio who paid a registration fee on PartyGaming's website. The plaintiffs also sought to extend the class to include PartyGaming customers in twenty-three other states.

PartyGaming filed a motion under *Fed. R. Civ. P. 12(b)(3)* to dismiss for lack of proper venue, citing the Gibraltar forum selection clause as the basis for that motion. The district court held that the forum selection clause was valid and dismissed the action sua sponte under the doctrine of forum non conveniens. Plaintiffs filed a timely appeal.

Legal Background. In *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972), the Supreme Court held that forum selection clauses in admiralty proceedings are presumptively enforceable as a matter of federal law. The clause at issue in *Bremen* designated the court of a foreign nation as the exclusive forum. Under the *Bremen* standards, unless the party objecting to the clause "clearly show[s] that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching," or that "enforcement would contravene a strong public policy of the forum in which suit is brought," the clause must be enforced. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972).

The Court has taken a somewhat different approach to forum selection clauses that include a federal-venue option. In such cases, the proper motion is a motion to transfer to the selected forum under 28 U.S.C. § 1404(a). In this context, the forum selection clause is treated as one factor, albeit a substantial one, in the district court's discretionary determination of whether to transfer the case. *Stewart Organization, Inc. v. Ricoh, Corp.*, 487 U.S. 22, 108 S. Ct. 2239, 101 L. Ed. 2d 22 (1988). The standards of 28 U.S.C. § 1404(a) apply in both federal question and diversity cases, state law to the contrary notwithstanding.

The question addressed in *Wong v. PartyGaming Ltd.* was whether federal law also governs the enforceability of a forum selection clause in a diversity case in which there is no federal-venue option, i.e., when transfer under 28 U.S.C. § 1404(a) is unavailable. Clearly, neither *Stewart Organization* (a transfer case) nor *Bremen* (an admiralty case) directly control. Yet, the trend among the circuits, to apply federal law, i.e., the *Bremen* standards, under such circumstances. The basic reasoning is this: *Stewart Organization* established that federal law governs issues pertaining to venue in all cases filed in federal court, and *Bremen* establishes the governing federal standard with respect to the enforceability of forum selection clauses when there is no transfer option.

Opinion From Sixth Circuit. Until its decision in *Wong v. Party Gaming Ltd.*, the Sixth Circuit had not decided whether, in a diversity case without a transfer option, state or federal law governed the enforceability of a forum selection clause. Before answering that question, the court surveyed the law of other circuits and correctly noted that six other circuits had concluded that federal law governed under such circumstances. See *Fru-Con Constr. Corp. v. Controlled Air, Inc.*, 574 F.3d 527, 538 (8th Cir. 2009); *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1083 (9th Cir. 2009); *Ginter ex. rel. Ballard v. Belcher, Prendergast & Laporte*, 536 F.3d 439, 441 (5th Cir. 2008); *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 384 (2d Cir. 2007); *P & S Bus. Machs. v. Canon USA, Inc.*, 331 F.3d 804, 807 (11th Cir. 2003); *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 877 (3d Cir. 1995). One circuit remained undecided. *Rivera v. Centro Medico de Turabo, Inc.*, 575 F.3d 10, 16 (1st Cir. 2009). And one circuit, the Fourth, had potentially conflicting decisions.

The *Wong* court adopted the majority approach, in part because of "the strong federal interest in procedural matters in federal court" and in part because of the value of "maintaining harmony among the Circuits on issues of law."

As to enforceability under the federal standard, the *Wong* court described the Sixth Circuit's approach as follows:

"When evaluating the enforceability of a forum selection clause, this court looks to the following factors: (1) whether the clause was obtained by fraud, duress, or other unconscionable means; (2) whether the designated forum would ineffectively or unfairly handle the suit; and (3) whether the designated forum would be so seriously inconvenient such that requiring the plaintiff to bring suit there would be unjust. The party opposing the forum selection clause bears the burden of showing that the clause should not be enforced." (citations omitted)

Applying these standards, the court concluded that nothing in the facts indicated any fraud, duress or unconscionable means used by Party Gaming; hence, the first factor was not satisfied. As to the second factor, the plaintiffs argued that in Gibraltar they would not be entitled to a jury trial or to proceed as a class action. The court held, however, that neither deficiency rendered Gibraltar "an ineffective or unfair forum." Finally, as to the third factor, despite the obvious inconvenience to the plaintiffs, the court explained, "plaintiffs have not carried their 'heavy burden' of showing that enforcing this forum selection clause would be unjust or unreasonable."

The panel does seem to have overlooked one aspect of the *Bremen* analysis, namely, the question of whether "enforcement would contravene a strong public policy of the forum in which suit is brought." For a recent application of this principle, see *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1083 (9th Cir. 2009) (specific California policy against enforcement of forum selection clauses in particular context). In their brief on appeal, the *Wong* plaintiffs did argue that enforcement of the forum selection clause would violate Ohio's policy in favor of jury trials; the panel, however, disposed of this argument in its discussion of "an ineffective or unfair forum" - a somewhat different issue. The plaintiffs did not, however, identify any specific Ohio policy against the enforcement of forum selection clauses of the type at issue here.

Having concluded that the forum selection clause was enforceable as a matter of federal law, the court then explained that the proper method for enforcing the clause was, as the district court had done, through a forum non conveniens analysis. PartyGaming had filed a Rule 12(b)(3) motion dismiss, which, the court explained, was technically improper because a valid forum selection clause does not itself alter the propriety of the initial venue. However, given that the Rule 12(b)(3) motion brought the essential issues underlying forum non conveniens before the district court, the *Wong* court held it was not error for the district to raise and apply that doctrine sua sponte. [Note, the *Wong* court's use of forum non conveniens as the method of enforcement appears to be the majority approach, although some courts do enforce forum selection clauses under Rule 12(b)(3) or 12(b)(6) or even without reference to any particular rule. Under the forum non conveniens approach, there is a rough parity with the approach applied in § 1404(a) transfers since the forum selection clause, under both approaches, is treated as one factor, albeit a substantial one, in the analysis.]

The *Wong* court then examined the factors relevant to a forum non conveniens analysis and held that the district court had not abused its discretion in dismissing the suit.

One final point is worth considering. Since the federal law of forum selection clauses is judge-made, it falls within the general category of federal common law. As such, judges and lawyers must be attentive to potential conflicts with state law that may require an application of the *Erie* doctrine, the question being whether the choice between the federal and state standards is outcome determinative or affective within the meaning of that doctrine. *Cf. Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996).

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Adequate and Independent State Grounds Doctrine

2010 Emerging Issues 4935

Florida v. Powell and the Adequate and Independent State Grounds Doctrine

By Allan Ides

March 30, 2010

SUMMARY: In *Florida v. Powell*, the U.S. Supreme Court reviewed a decision by the Florida Supreme Court involving a potential violation of *Miranda v. Arizona* and of parallel provisions of the Florida Constitution. The focus of this commentary is on the jurisdictional issue of whether, under the adequate and independent state grounds doctrine, the U.S. Supreme Court had jurisdiction to review the state court's decision.

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ARTICLE: In *Florida v. Powell*, -- U.S. --, -- S. Ct. --, 175 L. Ed. 2d 1009, 2010 U.S. LEXIS 1898 (Feb. 23, 2010), the U.S. Supreme Court reviewed a decision by the Florida Supreme Court involving a potential violation of *Miranda v. Arizona* 384 U.S. 436, 471, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and of parallel provisions of the Florida Constitution. On certiorari, two issues were presented: whether, under the adequate and independent state grounds doctrine, the U.S. Supreme Court had jurisdiction to review the state court's decision; and, if so, whether the state court had correctly applied *Miranda*. On the jurisdictional issue, the U.S. Supreme Court concluded that it had jurisdiction since the state grounds of decision were not "independent" of the federal grounds. On the merits, the Court reversed and remanded, holding that no violation of *Miranda* had occurred. The focus of this commentary is on the jurisdictional issue.

Factual Background. Law enforcement officers arrested Powell, a previously convicted felon, in connection with a robbery investigation. In a search incident to his arrest, the officers discovered a handgun in the bedroom Powell appeared to have been using. After arresting him, the officers transported Powell to police headquarters where they informed him of his right to remain silent and of his "right to talk to a lawyer before answering any of our questions." The officers also told Powell that he could "use any of these rights at any time you want during this interview." According to the officers, Powell acknowledged and waived his rights and then made several incriminating statements regarding his ownership of the handgun. He was subsequently charged with unlawful possession of a weapon by a felon. Over his objection, the self-incriminating statements made by Powell during the interrogation were used against him at trial. The jury convicted him and he appealed.

Procedural Background. The essence of Powell's argument regarding the admissibility of his incriminating

statements was that the warnings given him by the police were deficient as a matter of both federal and state constitutional law. Specifically, he argued that the warnings did not adequately inform him of his right to have counsel present during the entire interrogation. The trial court denied his motion to suppress, but an intermediate appellate court reversed. That court then certified the following question to the Florida Supreme Court:

"Does the failure to provide express advice of the right to the presence of counsel during questioning vitiate *Miranda* warnings which advise of both (A) the right to talk to a lawyer "before questioning" and (B) the "right to use" the right to consult a lawyer "at any time" during questioning?"

The Florida Supreme Court granted review. It described the issue presented as "whether the failure to provide express advice of the right to the presence of counsel during custodial interrogation violates the principles espoused in *Miranda v. Arizona*." The state high court's analysis of this issue began with a detailed examination of federal and state precedent. Much of that analysis interwove federal and state case law, and to the extent that state law was treated separately, that treatment suggested that the content of state law had been developed under the influence of *Miranda*'s standards. The phrase "*Miranda* warnings" was used generically throughout the opinion to refer to both federal and state standards. Additionally, in applying these parallel federal and state standards to the particular facts of the case before it, the Florida court again interwove the applicable federal and state precedent. At no point in the opinion did the Florida Supreme Court expressly state that it was relying on state law as an independent grounds of decision. Indeed, the court ended its opinion with the following observation, "Both *Miranda* and article I, section 9 of the Florida Constitution require that a suspect be clearly informed of the right to have a lawyer present during questioning." On this basis, it affirmed the decision of the lower court.

Decision by U.S. Supreme Court. The U.S. Supreme Court granted certiorari [*Florida v. Powell*, 129 S. Ct. 2827, 174 L. Ed. 2d 551 (2009)], and in a 7-2 decision delivered by Justice Ginsburg, held that the advice given the defendant was sufficient under *Miranda*.

Before addressing the *Miranda* issue, however, the Supreme Court considered the defendant's contention that it lacked jurisdiction to hear this case because the state supreme court, by relying not only on *Miranda* but also on the Florida Constitution, rested its decision on an "adequate and independent" state ground.

A state ground of decision is deemed "adequate" if it fully sustains the result, regardless of what federal law requires and without itself violating any principle of federal law; a state ground of decision is deemed "independent" if the scope of the state-law principle is not in any fashion dependent on the state court's interpretation of what it thinks federal law requires. The combination of adequacy and independence insulates the federal question from review since a reversal on the federal question would not alter the result.

It is sometimes difficult to determine the extent to which a state ground of decision is both adequate and independent and this is particularly so when the state court's opinion interweaves the discussion of federal and state precedent. At one time, the Supreme Court would remand such cases to the state court for a clarification of the grounds on which the decision was made. Under standards developed in *Michigan v. Long*, 463 U.S. 1032, 1040-1041, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983), however, the Court no longer engages in this remand process. As the *Long* Court explained:

"[W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so."

The *Long* Court also advised as to how a state court might avoid the foregoing presumption: "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision" *Id.* at 1041.

The Court in *Florida v. Powell* easily concluded that the Florida Supreme Court's opinion triggered the *Long* presumption against adequacy and independence:

"Under the *Long* presumption, we have jurisdiction to entertain this case. Although invoking Florida's Constitution and precedent in addition to this Court's decisions, the Florida Supreme Court treated state and federal law as interchangeable and interwoven; the court at no point expressly asserted that state-law sources gave Powell rights distinct from, or broader than, those delineated in *Miranda*."

As the *Powell* Court saw it, the focus of the Florida Supreme Court's opinion was on "what *Miranda* demands, rather than on what Florida law independently requires." The *Powell* Court thus concluded, "We therefore cannot identify, 'from the face of the opinion,' a clear statement that the decision rested on a state ground separate from *Miranda*."

The Court's opinion represents an unremarkable application of the presumption adopted by the Court in *Michigan v. Long*. While one might doubt the wisdom of that presumption, any fair reading of the Florida Supreme Court's opinion leads to the inescapable conclusion that the federal and state issues were, at the very least, interwoven and that there was no clear statement in the state court's opinion of an intent to rely on an adequate and independent state ground in reversing the defendant's conviction. Justice Stevens was the only dissenter on this point and his dissent appears to be more of an effort to resist the logic of *Michigan v. Long* than to apply it. Perhaps the most notable thing about this decision is that the rest of the Court has completely embraced *Michigan v. Long*.

On the merits, the Court reversed the decision of the Florida Supreme Court, concluding that the advice given to the defendant reasonably conveyed his right to have counsel present during the entire interrogation within the meaning of *Miranda*. Justices Stevens and Breyer dissented on this point.

The case was remanded to the Florida Supreme Court, which, of course, remains free to re-instate its judgment on state law grounds so long as it makes clear the adequacy and the independence of any such state law determination. The state grounds are undoubtedly adequate since the enforcement of the Florida Constitution would fully sustain the result "a reversal of the defendant's conviction" and would not, under these facts, violate any provision of federal law. Whether the state law grounds are in fact independent is a question primarily of state law.

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Court Adopts Novel Alternative ESI Cost-Shifting Approach

2010 Emerging Issues 4914

Court Adopts Novel Alternative ESI Cost-Shifting Approach

By John K. Rabiej

March 18, 2010

SUMMARY: In traditional paper-based discovery, the burden to pay photo-copying costs imposed a not insignificant restraint on parties from making excessive discovery demands. Technology has removed that modest restraint. Several approaches have been taken to take account of and replace this deactivated restraint. The approach taken in CBT Flint Partners to tax the collection, search, and production of ESI as costs presents one such alternative.

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ARTICLE: As a general proposition, a party responding to a discovery request has the burden to pay the costs of producing discovery. But this burden does not include costs incurred in duplicating or photocopying documents. The requesting party typically has the burden to pay the photo-copying costs.

DUTY TO PRODUCE DISCOVERY:

Under Civil Rule 34(a), a responding party is required to give the requesting party only an opportunity to inspect, copy, test, or sample - not provide - discoverable documents. In paper-based discovery, a responding party typically provides photo-copies of discoverable documents, assessing a reasonable fee for the photo-copying costs. In the paper-based discovery world, the requesting party bears the cost of copying documents. In many of these cases, the total photo-copying fee, at about 10 cents -25 cents per page, is trivial. But in large-scale discovery cases, involving millions of pages of documents, the cost is significant. And in such large-scale discovery cases, a requesting party with not unlimited financial resources is faced with a tactical cost-benefit decision that sometimes results in a decision to limit discovery demands for documents having marginal value. The same restraint applies to a lesser or greater extent in all other paper-based discovery cases.

ELIMINATION OF PRACTICAL RESTRAINT:

The advent of ESI discovery dramatically alters the cost-benefit calculus. A party continues to be responsible under Rule 34(a) to allow an opposing party to inspect or copy discoverable information. But for the same reasons that a party declines to permit the opposing party to rummage through its cabinets containing paper files, parties do not typically permit opposing parties open access to their databases and computers. In fact, parties are loathe to permit the opposing party free access to their databases, which often indiscriminately commingle privileged and non-privileged

information.

In lieu of providing open access to its databases or computers, a party must provide ESI in the manner in which it is ordinarily maintained or in a reasonably usable form or forms (Rule 34(b)(2)(E)(ii)). ESI jurisprudence is clear that scanning ESI and providing paper copies of ESI ordinarily are not sufficient to meet the rule's requirements because imaged documents do not contain all the information, e.g., omit metadata, and because much less expensive media for providing the ESI is readily available, e.g., CD-ROMs and hard drives. The effect of this jurisprudence has altered the traditional cost-bearing roles of requesting and producing parties. It also has removed the practical historical incentive, which served to limit requests of marginally valuable discovery. The consequences are magnified because the volume of today's discoverable ESI often dwarfs the volume of traditional paper-based discovery. And as a result, the costs incurred by the responding party in collecting, reviewing, and producing ESI have risen exponentially, while the requesting party's costs in obtaining discoverable ESI have relatively declined.

LIMITS IMPOSED BY RULES:

Of course, the Federal Rules of Civil Procedure do not countenance limitless discovery. The rules impose certain restrictions on ESI discovery that are intended to restrain requests for excessive discovery. Only relevant ESI must be searched and produced in discovery. In addition, ESI that is not reasonably accessible, e.g., backup tapes, need not be searched nor produced, unless good cause is shown (Rule 26(b)(2)(B)). Most importantly, ESI discovery requests are subject to a Rule 26(b)(2)(C) proportionality test that limits requests of excessive or unreasonable discovery under a cost-benefit analysis. But its outcome is often uncertain because the application of the proportionality test involves an assessment of many competing factors, and, in many cases, the value or helpfulness of discoverable ESI is not known until it has been collected and produced. (*See Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 316 (S.D.N.Y. 2003) and its progeny.)

Because the Rule 26(b)(2)(C) evaluation is fact intensive, its outcome may remain uncertain until the judge renders a ruling. Often, courts err on the side of the party requesting discovery and require the responding party to produce the requested ESI. In cases when the costs of discovery clearly exceed its value, some courts have limited e-discovery and others have shifted the discovery cost to the requesting party. But this latter option has been limited in many jurisdictions, particularly those that prohibit cost-shifting if the ESI is reasonably accessible. *See e.g., Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 284 (S.D.N.Y. 2003) (when a discovery request "seeks accessible data ... it is typically inappropriate to consider cost-shifting") and *Peskoff v. Faber*, 244 F.R.D. 54, 62-63 (D.D.C. 2007) (cost-shifting only possible if ESI is inaccessible). These courts permit cost-shifting only when the ESI is not reasonably accessible, e.g., backup tapes. Without fully knowing the value of discoverable ESI beforehand, it is not surprising that most courts are unwilling to limit discovery absent a strong showing that the discovery is unnecessary. In light of the jurisprudence favoring discovery and absent any countervailing practical restraint, a requesting party has little incentive to limit or moderate its discovery requests.

FACTS OF CASE:

CBT Flint Partners v. Return Path, 2009 U.S. Dist. LEXIS 121188 (N.D. Ga. Dec. 30, 2009) sets out a limited option that brings back some of the practical constraints that were in place when requesting parties were responsible to pay photo-copying costs in paper-based discovery. The case adopts a novel approach that is intended "to encourage litigants to exercise restraint in burdening the opposing party with the huge cost of unlimited demands for electronic discovery." *Id.* at *15. In *CBT Flint Partners*, plaintiffs in a patent infringement action "made overly broad discovery requests that required the production of 1.4 million electronic documents and 6 versions of source code." In a separate action, the court had already awarded the defendants \$86,786.02 in attorney fees in litigating the discovery issue.

After prevailing in the underlying patent infringement action, the defendant in *CBT Flint Partners* filed a bill of costs that included \$243,453.02 in fees for costs incurred by its e-discovery vendor in collecting, searching, identifying, and producing ESI. The defendant asserted that such services were essential components of "exemplification and

copies" and qualified as taxable costs under 28 U.S.C. § 1920. The court acknowledged a "division of opinion as to whether these costs are recoverable under 28 U.S.C. § 1920 ... as being the modern day equivalent of 'exemplification and copies.'" In fact, though a few courts have treated costs incurred in *scanning and imaging* ESI as taxable "exemplification and copying" costs (see *Kellogg Brown & Root Int'l, Inc. v. Altanmia Commercial Mktg. Co.*, 2009 U.S. Dist. LEXIS 44137, at *11-12 (S.D. Tex. May 26, 2009), only one other court has extended the reach of § 1920 to the wide-ranging types of services performed by the defendant's e-discovery vendor. (See *Neutrino Dev. Corp. v. Sonosite, Inc.*, 2007 U.S. Dist. LEXIS 23464 (S.D. Tex. Mar. 30, 2007), cited in *Kellogg Brown & Root Int'l, Inc.*, *supra*, which provides an extensive discussion of the case law.) The holding's reach in *CBT Flint Partners* is significant because the e-discovery services used in the case are becoming routine in today's practice.

The court in *CBT Flint Partners* distinguished the seemingly conflicting rulings cited in *Kellogg Brown & Root Int'l, Inc.*, *supra*. It concluded that the other courts correctly identified the applicable law. Costs should not be taxed if they involved tasks that were ordinarily performed by attorneys or paralegals. See *id.* at *15 (costs not allowed by these other courts "on the grounds that assembling records for production [was] ordinarily a task done by lawyers and paralegals and [was] not a recoverable cost." But unlike the courts that found such services to be attorney related, the *CBT Flint Partners* court held that the services performed by the defendant's e-discovery vendor were not the "type of services that attorneys or paralegals are trained for or are capable of providing." It found, unlike the other courts that addressed this same issue, that these services were the "21st Century equivalent of making copies." The court awarded the defendant \$268,311.12 as taxable costs.

LESSONS:

The application of the ruling in *CBT Flint Partners* decision to other cases is limited. It applies only in cases in which a judgment has been entered when the court imposes costs (Rule 54(d)). Cases that are resolved by settlement are excluded. In addition, the award of costs is discretionary with the court. *CBT Flint Partners* also reflects a minority view, with most jurisdictions that have examined the question ruling otherwise. (See *Kellogg Brown & Root Int'l, Inc.*, *supra*.) Though the reach of *CBT Flint Partners* may be limited, its rationale is attractive and may be adopted by other courts.

In addition, the rationale of *CBT Flint Partners* could be used as a springboard for yet another alternative approach restraining excessive discovery demands. If a court is not prepared to shift costs before discovery actually takes place, a party could request the court to defer making its cost-shifting decision until the discovery is completed, when the parties and the court are in a better position to assess accurately whether the cost of the ESI that was produced outweighed its benefit. This option, if prudently calibrated by the court, would reinstate the traditional cost-bearing roles of the requesting and responding parties. It would force the requesting party to make a practical cost-benefit decision that would demonstrate its confidence that the request was reasonable and not intended solely to elicit tactical advantages.

A court has wide authority to impose conditions on discovery under Rule 26. ("Under Rules 26(b)(2) and 26(c), a court is provided abundant resources to tailor discovery requests to avoid unfair burden and expense and yet assure fair disclosure of important information. The options available are limited only by the court's own imagination and the quality and quantity of the factual information...." *Carmen Thompson v. U.S. Dept. Hous. and Urban Dev.*, 219 F.R.D. 93, 98-99 (D. Md. 2003).) There is nothing in the Civil Rules to prohibit a court from granting an ESI discovery request subject to a later cost-shifting evaluation. (See *In Re Veeco Instruments, Inc. Sec. Litig.*, 2007 U.S. Dist. LEXIS 23926, at *7 (S.D.N.Y. Apr. 2, 2007) (court ordered defendant to produce ESI subject to later cost-shifting analysis).) Such an option seems especially attractive if the initial ESI discovery request appears excessive, but not sufficiently unreasonable under the Rule 26(b)(2)(C) proportionality test to be denied outright, like the one in *CBT Flint Partners*.

The suggested "taxing costs" option runs counter to the traditional presumption that the responding party has the burden to pay discovery costs, and it should not be considered in all cases. Yet in appropriate cases, requesting the court to defer its cost-shifting evaluation until after the production of discovery may be reasonable when discovery demands appear excessive, the responding party objects to the request, substantial evidence has been furnished earlier to the

requesting party, and the ESI eventually produced turns out to have little value. It may also level the playing field and restrain excessive ESI discovery requests in future cases as contemplated by the court in *CBT Flint Partners*.

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Be Wary When Collaborating with the Opposing Party on Identifying Key Words

2010 Emerging Issues 4915

Why a Requesting Party Should Be Wary When Collaborating with the Opposing Party on Identifying Keyword Search Terms

By John K. Rabiej

March 18, 2010

SUMMARY: A party is encouraged to collaborate with the opposing party in identifying specific keywords for discovery ESI searches. Courts occasionally require the requesting party to identify search terms to be applied by the responding party. There may be good reasons to look warily at requests or orders to collaborate on identifying keyword search terms.

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ARTICLE: Keyword searching is used to locate a specific word or words in the ESI being searched regardless of context. Lawyers are familiar with the general technique, using it often in automated legal research. Keyword searching offers a useful tool to minimize the burden of reviewing ESI. It has become a standard ESI search procedure. In cases involving enormous amounts of ESI, keyword searching is indispensable.

Typically, a party responding to a discovery ESI request develops a list of keywords that will be used for search purposes. The list can be shared with the opposing party, who may raise objections with the party or the court about its effectiveness in identifying relevant evidence. Best practices recommend that parties make a good faith effort to collaborate on the use of searching methods, including agreement on the keywords. (See The Sedona Conference, *Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery* 189, 211 (2007) ("Parties should make a good faith attempt to collaborate on the use of particular search and information retrieval methods, tools and protocols (including as to keywords, concepts, and other types of search parameters."); American Bar Assoc., *Civil Discovery Standards* (2004) (Standard 31 recommends that counsel consider stipulating, where appropriate: "The use of specified key terms or other selection criteria to search some or all of the potentially responsive data for discoverable information.") But a party is not obligated to accept keywords proposed by the other party. (See *Treppel v. Biovail Corp.*, 233 F.R.D. 363 (S.D.N.Y. 2006) (party can reject list of keywords proposed by opposing party, but must proceed with its own word list rather than produce nothing.) Nor should a party rely solely on inadequate keywords stipulated by the opposing party to meet its discovery-production burden.

A handful of courts and individual judges have adopted a default discovery standard that requires the parties to agree on the method of searching, and the words, terms, and phrases to be searched. (See Local Rules, N.D. Ohio, LR-Appendix K; and Admin. Order 174, M.D. Tenn.; Order Governing Electronic Discovery, Judge Timothy Savage,

E.D. Pa.) On occasion, a court has required a party to use specific keywords to search ESI. (*See In re: Direct Southwest, Inc., Fair Labor Standards Act (FLSA) Litig.*, 2009 U.S. Dist. LEXIS 69142, at *5-6 (E.D. La. Aug. 7, 2009) (court ordered defendant to search ESI using keywords supplied by plaintiff).

Fashioning a search protocol that has been mutually agreed on by the parties has much to recommend it. The scope of discovery is better defined. Wasteful searches of irrelevant evidence is minimized. The requesting party is less likely to suffer data dumps of largely useless information. It can be a win-win proposition for both parties. The benefits of these agreements are the reason why the practice has been championed as a best practice. Unless the agreement is carefully crafted, however, the practice can have a downside, which is suggested by a recent magistrate judge opinion in *Edelen v. Campbell Soup Co.*, 2009 U.S. Dist LEXIS 125 466 (N.D. Ga. Nov. 20, 2009), *adopted by district judge*, 2010 U.S. Dist. LEXIS 18693 (N.D. Ga. Mar. 2, 2010).

Facts of Case:

In *Edelen*, the plaintiff alleged that the defendant company practiced racial and age discrimination. Discovery was prolonged, and the defendant argued that the discovery request was overly broad. The court agreed and ordered the plaintiff to narrow the scope of its discovery as to time, people, and departments. During one of several discovery hearings, the defendant repeatedly requested plaintiff "to identify reasonable search terms and the date parameters." The court again agreed that the discovery request was too broad and ordered the plaintiff to narrow its scope. The plaintiff failed to propose search terms, contending that it was the defendant's burden to identify appropriate search terms. At a later hearing, the court ordered the plaintiff "to respond with a proposal containing narrowed search terms within five business days." The plaintiff submitted a list of 55 custodians and 50 search terms. The defendant objected to the list as too broad and offered an alternative list. The plaintiff did not object. The court ordered the defendant to produce discovery using the search terms and parameters that the defendant had proposed in lieu of those proposed by the plaintiff.

Shifting Discovery Burdens:

Edelen extends a trend that started with the acceptance of keyword ESI searching, then later developed into best practices encouraging parties to collaborate on identifying search terms, and now culminates in several opinions in which the court has required the requesting party to propose the search terms. In this last development, the extension moves into uncharted territory where the potential implications and consequences may not have been fully analyzed.

Traditionally, a responding party exercises exclusive control over "how" it identifies, collects, reviews, and produces information in response to a discovery request. It is in the best position to know what information in its control is responsive and which tools, methods, and resources it believes will be effective to respond to the discovery request. The requesting party is entitled to object to the results of the search if it fails to produce all relevant information responsive to the discovery request. But the requesting party typically is not entitled to compel the responding party to employ a particular search method, and it usually does not advise the opposing party on how it should perform its discovery duties.

Edelen and other cases like it are quietly shifting the traditional discovery burdens of parties in recognition of the realities and demands imposed by the unique nature and often voluminous size of ESI. Parties requesting discovery are increasingly being expected and asked to participate directly in the development of a search protocol, including identifying search terms. As their participation increases, so too does their responsibility for the results of the discovery, which raises a host of issues.

Assuming even partial responsibility for the operation of a keyword ESI search conducted by the opposing party can be perilous. In the first place, defining a list of search terms is difficult under the best of circumstances. Identifying keywords for ESI in the control of an opposing party without actually knowing what that information may contain is much more difficult. And even if both parties work in good faith to identify the keywords, the results are likely to be

flawed.

Developing keywords to search ESI effectively is far from a precise science. As noted in an earlier commentary, keyword searches may be quick, but they are "inherently limited and can produce incomplete results that can have serious consequences." (See *John K. Rabiej on the Risks Associated with Keyword Searches*, 2009 *Emerging Issues* 3635. Studies have demonstrated the limited success performance of keyword searches. The most famous of the studies found that, though participating lawyers believed that their search captured 75% or more of the relevant ESI, in fact the results captured only 20%. Of course, substantial progress continues to be made in the improvement of keyword searches, including supplementing the searches with automated search techniques that rely on concept searches and linguistic analysis. Despite progress, the performance success of discovery performed exclusively by keyword searches is far from perfect.

Lessons:

When collaborating either voluntarily or under court order with the opposing party on developing appropriate search keywords, the requesting party must recognize the limitations of keyword searches, and it must ensure that any mutually agreed on or stipulated search protocol contains language that is sufficiently flexible to address these limitations. Inartfully drawn stipulated search protocols can have devastating effects, as shown in *In Re: Fannie Mae Secs. Litig.*, 552 F.3d 814 (D.D. Cir. 2009), where the defendants were held bound to comply with the search protocol, though it required them to expend \$6 million on discovery, approximately 9 percent of the defendant agency's entire annual budget.

It can be in the interest of the responding party to collaborate with the requesting party in developing keywords. Such collaboration makes it difficult for the requesting party to challenge the adequacy of a discovery search later because it itself had participated in formulating the keywords. In fact, the defendant in *Yeisley v. PA State Police*, 2008 U.S. Dist. LEXIS 25706, at *9 n.1 (M.D.Pa. Mar. 31, 2008), unsuccessfully attempted to coopt the requesting party from later challenging the results of an ESI discovery by obtaining the court's "imprimatur on the search criteria in order to obviate the need to conduct this search more than once." Before engaging in an effort to develop appropriate keywords with the opposing party, the requesting party should ensure that its collaboration will not be construed to constrain or otherwise waive its right to object subsequently to the results of the ESI discovery search based on flawed keywords.

The court in *Clearone Communications, Inc. v. Chiang*, 2008 U.S. Dist. LEXIS 27617 (D. Utah Apr. 1, 2008) was sensitive to this possibility when it issued its order approving the plaintiff's request to enter a protocol governing the defendant's ESI discovery search, including specific keywords. A party should consider incorporating the caveats in the court's order in every mutually agreed on ESI search protocol based on keyword searches. The court said: "This order is not the last word on key words, either. If documents are discovered which suggest that other documents exist which were not identified as potentially responsive, or if a surprisingly small or unreasonably large number of documents is identified as potentially responsive, refinement may be needed. ... This first protocol may suffice, or it may in effect be a sampling which reveals the need for more -- or less -- or different -- key words." The court order provides prudent advice to every party contemplating keyword collaboration with the opposing party.

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O'Sullivan on Schnall v. AT&T Wireless

2010 Emerging Issues 4895

Kathleen M. O'Sullivan on What the Washington Supreme Court Might Do With *Schnall v. AT&T Wireless Services, Inc.*

By Kathleen M. Sullivan

February 22, 2010

SUMMARY: Long-awaited Washington Supreme Court decision clarifies scope of Washington Consumer Protection Act and Washington's rules for certification of class actions, rejecting plaintiffs' proposed nationwide class against company "headquartered" in Washington.

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ARTICLE: *Schnall v. AT&T Wireless: Washington Supreme Court Narrows Scope of Consumer Protection Act and Tightens Rules for Certification of Class Actions*

Introduction. In a landmark and divided ruling, the Washington Supreme Court declined an invitation to turn Washington into "a locus of nationwide class action litigation" [*Schnall v. AT&T Wireless, Inc. (Jan. 21, 2010) 2010 Wash. LEXIS 61, *1*].

Factual Background in *Schnall*. The *Schnall* case was filed by individuals who claimed that certain charges violated their contracts with AT&T Wireless (by increasing a charge without notice) and violated the Washington Consumer Protection Act (by misrepresenting the nature of the charge). Plaintiffs proposed that a class of AT&T Wireless's customers from across the country be certified on these claims. The trial court declined to certify such a class, and the Court of Appeals reversed that decision [*see Schnall v. AT&T Wireless Services, Inc. (2007) 139 Wn. App. 280, 161 P.3d 395*]. The Washington Supreme Court ruled that the trial court got it right, reversing the Court of Appeals [*Schnall v. AT&T Wireless, Inc. (Jan. 21, 2010) 2010 Wash. LEXIS 61, *2*].

Choice of Law Clause Enforceable. The Washington Supreme Court first decided that the choice of law clause in the contracts-requiring disputes to be governed by the law of the state where the customer signed the contract-is enforceable. In so ruling, the Court rejected the notion that Washington law should apply to all of these customers, no matter where located, simply because AT&T Wireless is "headquartered" in Washington [*Schnall v. AT&T Wireless, Inc. (Jan. 21, 2010) 2010 Wash. LEXIS 61, *4*].

Reach of Consumer Protection Act. Second, and of equal-if not greater-significance, the Court ruled that Washington's Consumer Protection Act (CPA) does not apply "extraterritorially," i.e., beyond the borders of the State of

Washington. Thus, the Court ruled, simply because a company is based in Washington does not mean that Washington's CPA applies to the company's transactions with consumers across the country. Instead, the Washington CPA is limited to misrepresentations or other misdeeds against *Washington* residents [*Schnall v. AT&T Wireless, Inc.* (Jan. 21, 2010) 2010 Wash. LEXIS 61, *22].

Nationwide Class Not Certified. Third, the Court decided that certification of a nationwide class of AT&T Wireless's customers would be inappropriate. In so ruling, the Court relied on federal court decisions interpreting the federal class action rule on which Washington's rule is based [CR 23; *see FRCP* 23]. Both rules require that "common" issues of the class "predominate" over issues of individual class members to certify a class. The Court's conclusion that AT&T Wireless's customers' claims are governed by the law of their various home states was therefore the death knell of plaintiffs' quest for a nationwide class. Because a different body of contract law would apply to each state's citizens, the Court was not persuaded that use of "subclasses" or "special master's hearings" would make a 50-state class manageable. As a result, according to the Washington Supreme Court, such lawsuits should be litigated state by state, across the country. For plaintiffs' class action lawyers and the companies that they sue, this will greatly reduce the potential monetary damages and scope of other relief available in such a class action filed in Washington. But it may also increase the logistical burdens and costs on litigants if claims are litigated in multiple jurisdictions at once [*Schnall v. AT&T Wireless, Inc.* (Jan. 21, 2010) 2010 Wash. LEXIS 61, *8].

Evidence Required for CPA Violation. Finally, the Washington Supreme Court clarified the amount of evidence required to establish a violation of the Washington CPA, specifically proof that the plaintiff's alleged injury was caused by the defendant's misrepresentation or "unfair" act. This aspect of the ruling applies to and will significantly affect CPA claims in class action cases *and* in suits by individual private plaintiffs. Reiterating the Court's ruling in *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.* [(2007) 162 Wn.2d 59, 170 P.3d 10], the Court confirmed that causation is not established by the mere fact that plaintiffs paid the charge they now complain about. Nor is causation established by evidence of a "mere capacity to deceive" [*Schnall v. AT&T Wireless, Inc.* (Jan. 21, 2010) 2010 Wash. LEXIS 61, *28].

Rather, under the Washington CPA, plaintiffs must show that they "were *actually deceived*" and that they would not have "purchased [the] service, or paid the [charge] *but for*" the defendant's representations (emphasis added) [*Schnall v. AT&T Wireless, Inc.* (Jan. 21, 2010) 2010 Wash. LEXIS 61, *30]. In light of this causality requirement, the Washington Supreme Court remanded the case to the trial court to determine whether such evidence of causation would be so individualized that even a statewide class would not be warranted on plaintiffs' claims that AT&T Wireless misrepresented the nature of a particular charge [*Schnall v. AT&T Wireless, Inc.* (Jan. 21, 2010) 2010 Wash. LEXIS 61, *32].

Impact of *Schnall*. Although the Court's decision may fall short of the "disaster for plaintiffs"-as the dissenting opinion characterized the result-it is a sea change for plaintiffs and defendants in class action and Consumer Protection Act litigation in Washington courts [*Schnall v. AT&T Wireless, Inc.* (Jan. 21, 2010) 2010 Wash. LEXIS 61, *51 (Sanders, J., dissenting)].

Disclaimer. This commentary is for informational purposes only and not for the purpose of providing legal advice. The opinions expressed in this commentary are the opinions of the individual author and may not reflect the opinions of Perkins Coie LLP or any other individual attorney at the firm. Perkins Coie LLP represented Integra Telecom of Washington, Inc., in the *Indoor Billboard* case discussed above.

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Rabiej: Preservation of Information Contained in Web Site Linked in ESI

2009 Emerging Issues 4765

Responsibility to Preserve Information Contained in Web Sites Linked to ESI Produced in Discovery

By John K. Rabiej

December 28, 2009

SUMMARY: ESI documents can contain URL addresses that serve as hyperlinks to relevant information posted on the internet. After ESI containing a hyperlink is produced in discovery, is the producing or the requesting party responsible to preserve the information contained in the web site? The commentary looks at what lessons can be learned from a recent case that addresses some of the issues that arise under such circumstances.

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ARTICLE: INTRODUCTION: The defendants in *Ferron v. Echostar Satellite, LLC*, 2009 U.S. Dist. LEXIS 66637 (S.D. Ohio, July 29, 2009) produced hundreds of emails with hyperlinks to web sites containing embedded images that were relevant to the underlying consumer sales practice complaint. The images were the only evidence of mail advertisements, which were sent allegedly in violation of Ohio law. When the plaintiff attempted to access the hyperlinked information on the internet, the linked web sites had been disabled and the information was lost.

The plaintiff moved for an adverse instruction sanction against the defendants for failing to preserve images contained in web sites with hyperlinks in 117 of the emails. The defendants responded that: (1) the web sites had been disabled before the preservation duty arose; and (2) they had no duty or ability to reproduce the images in the web sites, which were hosted by outside parties. In addition, the defendants turned the argument around and asserted that the plaintiff was obligated to preserve the web site images once the emails were produced. Plaintiff disagreed, contending that the defendants were obligated to preserve the images in the web sites.

COURT'S ANALYSIS: Sanctions under Rule 37 were not considered, because no court order had been entered requiring the defendants to preserve ESI. Alternatively, the court concluded that it had the inherent power to sanction a party for failing to meet its preservation duty under *Chambers v. NASCO*, 501 U.S. 32, 43-50 (1991). The court recognized that under *Chambers* it could sanction a party only on a finding of bad faith. The plaintiff in *Ferron* had the burden to establish that the defendants acted in bad faith. After reviewing the evidence, the court found that it was unclear whether the web sites had been disabled before the complaint was filed and the preservation duty arose. It was also unclear whether the defendants maintained all, some, or none of the web sites. The court ruled that the plaintiff failed to establish that the web sites were active at the time that the preservation duty arose, that the defendants maintained every relevant web site, or that they had the duty to maintain the web sites. Absent a record establishing the defendants' bad faith, the court denied the motion for an adverse instruction sanction.

PRESERVATION DUTY: In the paper world, a hard-copy document may include a notation at the end of the document, signifying that other hard-copy documents are attached or enclosed. A party responding to a discovery request for a document is required to produce any attachments or enclosures, if they are also relevant. Hyperlinks are the electronic equivalents of attachments or enclosures. They both serve the same purposes. The same preservation obligations that apply to hard-copy attachments and enclosures apply with equal force to hyperlinks. It follows that a producing party is obligated to take steps to preserve relevant information contained in a web site, which is hyperlinked to ESI produced in discovery.

Ferron poses the question whether a producing party's obligations to preserve information on a hyperlinked web site continue after it has produced the requested ESI containing the hyperlink. The defendants contended that once they produced the ESI with the hyperlinks the plaintiffs had access to the web sites and were obligated to preserve the information contained in them. The court in *Ferron* found that the plaintiff failed to establish that the web sites contained the relevant information at the time that the preservation duty arose. Because the web sites could have been disabled before the defendants' preservation duty arose, the record was insufficient to establish the defendant's bad faith. Absent a showing of bad faith, the court could not impose sanctions under its inherent power. The court went on to find that bad faith also was not established because the plaintiff failed to show that the defendants maintained the web sites, suggesting that a showing of bad faith could be made only if the defendants maintained and hosted the web site.

The court's ruling denying the sanctions motion because the record lacked sufficient evidence showing that the hyperlinked web sites were active at the time of the defendant's preservation duty was unremarkable. The suggestion that bad faith could not be found if the linked web site was maintained by a third party and not by the producing party, however, raises questions. In general, a producing party's preservation duty does not end when the information is produced to the other party. It continues until the end of the litigation. In addition, a party is obligated to preserve relevant information in its control. Though the ruling in *Ferron* suggested otherwise, it is not self evident that a producing party's access to relevant information contained in a web site hosted by a third party that was linked to one of its ESI documents did not represent control sufficient to establish a duty to preserve it. The producing party certainly had sufficient control to take steps to preserve it by copying it.

Though the failure to preserve the information contained in the linked web site may not have established bad faith under the particular facts in *Ferron*, the failure to preserve such ESI in other cases might not be excused. The court denied the sanctions motion in *Ferron* primarily because it relied on the plaintiff's failure to establish that the web sites were active when the preservation duty arose. The court's subsidiary finding that the defendants may not have maintained the web sites was a secondary consideration in absolving them, and its effect on future rulings is unclear. If the facts had been different and the web sites clearly disabled after the defendants' preservation duty arose, the results may have been different.

There is another consideration that may play a role in future cases involving hyperlinks. *Ferron* quite properly focused on a party's preservation duty. In addition to possible preservation violations, however, the failure to produce relevant information in a web site in an appropriate form or forms may raise ESI production issues. Under Civil Rule 34(b)(2)(E)(ii), the defendants in *Ferron* had the duty to produce relevant ESI in a "form or forms in which it is ordinarily maintained or in a reasonably usable form or forms." Unless the defendants in *Ferron* provided the emails in native file format, an unlikely event, the defendants were required to produce the emails in a reasonably usable form.

Whether production of ESI with hyperlinks is a reasonable form of production without also providing for some type of safeguard ensuring that the information can be accessed in the future is open to question, especially when the producing party knows that the web site is hosted by a third party. A decision to impose the preservation duty on the producing party may not be appropriate because the producing party may not have any control over the deletion or

modification of a web site. At the same time, the requesting party can easily access the hyperlinked web site when it is initially produced. A decision to impose the duty on the requesting party, on the other hand, may not be appropriate because a web site can be easily disabled before the party ever has an opportunity to access it, which may be a long time depending on the amount of discovery produced that it must review.

LESSONS: The court in *Ferron* was not asked to provide precedential guidelines on preserving or producing ESI with hyperlinks to web sites. It dealt with a specific sanctions motion. So the direct lessons from *Ferron* are limited. But the case is instructional and highlights the potential problems that can arise with ESI that contain hyperlinks to web sites. When the lines of responsibility are not entirely clear, prudent counsel should collaboratively address these issues early in the case. Rule 26(f) conferences are designed to provide such an opportunity for mutual consultation. At these conferences, counsel can agree, for example, that if the producing party hosts the hyperlinked web site, it need only ensure that the site remains active and unaltered. If the producing party does not maintain the hyperlinked web site, counsel should agree on what steps should be taken to ensure that the information contained in the web site either will remain on the web site or, if that is not possible, that steps that must be taken to copy or otherwise preserve the information in the web site.

As with many other ESI issues, addressing this matter early in the case can eliminate difficult problems from developing later in the case. One practical solution is to include discussion of the preservation of hyperlinked web sites on the Rule 26(f) checklist.

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Georgene Vairo on In re Pharmacy Benefit Managers Antitrust Litig.

2009 Emerging Issues 4768

Georgene Vairo on In re Pharmacy Benefit Managers Antitrust Litig.

By Georgene Vairo

December 28, 2009

SUMMARY: To what extent does the law of the case doctrine apply after a case has been transferred by the Judicial Panel on Multidistrict Litigation for coordinated pretrial proceedings? In *In re Pharmacy Benefit Managers Antitrust Litigation*, the Third Circuit considers the issue, and in this Emerging Issues Analysis, Professor Georgene Vairo evaluates the Third Circuit's approach.

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ARTICLE: Summary. In *In re Pharmacy Benefit Managers Antitrust Litig.*, 582 F.3d 432, 2009 U.S. App. LEXIS 21125 (3d Cir. Sept. 24, 2009), the Third Circuit ruled that after transfer by the Judicial Panel on Multidistrict Litigation, the transferee court's discretion to modify or vacate orders of the transferor court is limited by the law of the case doctrine. The Multidistrict Litigation statute does not provide a transferee court any special power to alter the rulings of the transferor court.

Facts and Procedural Background. This action was one of several antitrust actions transferred and assigned by the Judicial Panel on Multidistrict Litigation to a district judge for coordinated pretrial proceedings [see 28 U.S.C § 1407]. The plaintiffs were a group of retail pharmacies that contracted with the defendant to provide prescription drugs and other services for drug benefit plans. They alleged that the defendant used the combined economic power of its plan sponsors to reduce the contractual amount it paid them below competitive market levels, and that their actions constituted an unlawful conspiracy among the defendant and its plan-sponsors in violation of antitrust law.

The contracts contained an arbitration clause, and before transfer the original court granted the defendant's motion to compel arbitration, and stayed the action pending arbitration. The plaintiffs filed a motion to lift the stay and dismiss the complaint so that they could pursue an appeal of the district court's orders and represented that they did not intend to arbitrate their claims, but rather desired to obtain appellate review of the orders compelling arbitration. Before the court could rule on this motion, the action was transferred by the Judicial Panel on Multidistrict Litigation.

The transferee court heard argument on the plaintiffs' motion to lift the stay and dismiss the complaint, and vacated the orders compelling arbitration and staying the litigation. The transferee court explained that the transferor court's order compelling arbitration was clearly appropriate under the Federal Arbitration Act and the Congressional policies reflected in that statute. However, noting that the action of the Multidistrict Litigation Panel clearly assumed that the

stay or proceedings did not preclude coordinated pretrial proceedings, the transferee judge reasoned that he could therefore diverge from the transferor judge's rulings to the limited extent of considering whether any useful purpose would be served in submitting all preliminary determinations to the arbitrator. To fulfill his role as transferee judge, the court decided that he ought expedite the decision which he thought would necessarily have been reached by the arbitrator. The transferee court then found that the case was not subject to arbitration, and the defendant appealed.

Appellate Jurisdiction. Before beginning its analysis, the Third Circuit noted that it had jurisdiction pursuant to Sections 16(a)(1)(A) and (B) of the Federal Arbitration Act, 9 U.S.C. " 16(a)(1)(A) and (B), which provide that appeals may be taken from orders denying motions to compel arbitration and denying stays of proceedings pending arbitration.

Law of the Case Doctrine. Rather than engage whether the transferor court got the question of whether the case was arbitrable correct, the Third Circuit ruled that transferee judge could not properly vacate the original judge's orders because of the law of the case doctrine. The Third Circuit delved into an extensive analysis of the law of the case doctrine.

It noted that "law of the case" is an amorphous concept that posits that when a court decides on a rule of law that decision should continue to govern the same issues in subsequent stages in the same case. Law of the case rules have developed to maintain consistency and avoid reconsideration of matters, once decided, during the course of a single continuing lawsuit.

Nonetheless, the law of the case doctrine is not absolute. It does not restrict a court's power, but rather governs its exercise of discretion. A court has the power to revisit prior decisions of its own or of a coordinate court, although as a rule courts should be loath to do so in the absence of extraordinary circumstances. Such circumstances exist when the initial decision was clearly erroneous and would work a manifest injustice.

Other extraordinary circumstances include when new evidence is available or when a supervening new law has been announced. Moreover, the law of the case doctrine does not preclude a court from clarifying or correcting an earlier, ambiguous ruling. Generally, a court should exercise its discretion to reconsider an issue and should exercise that discretion whenever it appears that a previous ruling might lead to an unjust result.

Finally, as a matter of process, if a court decides to change or explain an earlier ruling, it should state the reasons on the record and take appropriate action so that the parties are not prejudiced by reliance on the prior ruling.

The MDL Statute Does Not Provide an Exception to Law of the Case Doctrine. The transferee judge had announced that he had the authority to vacate the order compelling arbitration notwithstanding the law of the case doctrine because: "As a general proposition, a transferee judge under the Multidistrict statute may vacate or modify any order of a transferor court bearing upon pretrial matters." [*Bellevue Drug Co. v. Advance PCS*, 2006 U.S. Dist. LEXIS 91390, at *3 (E.D. Pa. Dec. 19, 2006)]. The Third Circuit disagreed, finding that there was nothing in the text of the Multidistrict litigation transfer statute [*see* 28 U.S.C. § 1407], authorizing a transferee judge to vacate or modify an order of a transferor judge.

The Third Circuit noted that Section 1407 does allow the Panel on Multidistrict Litigation to "prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure," [*see* 28 U.S.C. § 1407(f)], but there is nothing in the rules it adopted that authorizes a transferee judge to vacate or modify the order of a transferor judge. Moreover, the Third Circuit stated: "we do not believe that Congress intended that a 'Return to Go' card would be dealt to parties involved in MDL transfers." Rather, the court must comply with law of the case principles.

Comment. To the extent that the transferee court based its decision to revisit the transferor court's ruling on the arbitration issue on the purpose of the Multidistrict Litigation statute, i.e., to promote pretrial efficiencies, its decision may be justified. However, the Third Circuit's analysis of the law of the case doctrine trumped any such justification. Although none of the law of the case opinions cited in the Third Circuit's analysis were multidistrict litigation cases, the

rationale for needing extraordinary circumstances to revisit earlier rulings applies to MDL cases as well. Accordingly, the transferee judge should have looked to the recognized exceptions to the law of the case doctrine. Indeed, looking to the MDL statute as a basis for an expansion of the law of the case doctrine could actually undermine the efficiency purposes of the statute. As the Third Circuit put it: "If this broad interpretation were accurate, litigation could begin anew with each transfer," and, there could be an endless number of pretrial orders that would be fair game for re-litigation.

Manual For Complex Litigation 4th Does Not Provide Authority to Vacate Transferor Court Orders. The transferee court also believed that he had the authority to vacate the order based on the Manual for Complex Litigation, § 20.132 (4th ed. 2004), which states broadly that "the transferee judge may vacate or modify any order of a transferor court, including protective orders; unless altered, however, the transferor court's orders remain in effect." However, the Third Circuit reminds us that the Manual does not have the force of law. Additionally, the Manual's statement is based on *In re Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig.* [664 F.2d 114, 118 (6th Cir. 1981)]. That case, the Third Circuit said, merely held that a transferee court can modify a transferor court's protective order when necessary to "harmonize activity relating to discovery." It does not, however, support a claim that a transferee court has the power to vacate or modify any order of a transferor court.

Additionally, *Upjohn* indicates that the power of the transferor court passes to the transferee court. Accordingly, if the transferor court is bound by the law of the case doctrine, the transferee court must be similarly bound. Nothing in the transfer statute suggests that Congress intended to confer more power on the transferee court than the transferor court would have had absent the transfer.

Transferee Court Erred by Vacating Orders. The transferee court did not rely on any of the recognized exceptions to the law of the case doctrine when it vacated the original judge's order compelling arbitration. Nor did the transferee court find any extraordinary circumstances that would have justified vacating the order. Additionally, as the Third Circuit pointed out, the transferee judge had noted that the transferor judge's order "clearly appropriate" under the FAA. And, it was also clear to the Third Circuit that the transferee judge had misread the transferor court's opinion in support of the order compelling arbitration.

The Third Circuit concluded that, absent "extraordinary circumstances" that would justify an exception to the law of the case doctrine, a transferee court simply does not have the power to vacate or modify an existing order. Because the order vacating the earlier order compelling arbitration violated the law of the case doctrine, the Third Circuit vacated it and remanded with directions to reinstate the order compelling arbitration and staying the case pending arbitration.

Comment. The Third Circuit is correct that the transferee court interpreted *Upjohn* far too liberally. Considering the multiplicity of parties and issues in a multidistrict litigation, construing the MDL statute to provide broad authority to revisit any order of either the transferor or transferee court could be counterproductive to the purpose of the statute and visit "havoc and potential delay and confusion . . . on parties involved in multidistrict litigation." Thus, it is not surprising that the *Upjohn* court cautioned: "The rule of the law of the case . . . is particularly applicable to multidistrict litigation." [664 F.2d at 119.]

RELATED LINKS: For further information, see Moore's Federal Practice

■ 17 Moore's Federal Practice (3d Ed.) " 112.07[1][b];

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Georgene Vairo on Bauman v. DaimlerChrysler Corp.

2009 Emerging Issues 4769

Georgene Vairo on Bauman v. DaimlerChrysler Corp.

By Georgene Vairo

December 28, 2009

SUMMARY: When can a United States subsidiary's contacts with the forum state be imputed to the foreign parent for personal jurisdiction purposes? The Ninth Circuit addresses this important question in *Bauman v. DaimlerChrysler Corp.*, and in this Emerging Issue Analysis, Professor Georgene Vairo analyzes and critiques the Ninth Circuit majority's approach.

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ARTICLE: Summary. Clarifying its precedent on an increasingly important issue, the Ninth Circuit held that a United States subsidiary's contacts with the forum state cannot be imputed to its foreign parent for personal jurisdiction purposes unless the parent exerts "pervasive control" over the subsidiary. The majority opinion explained that to be subject to personal jurisdiction in the United States, a foreign parent corporation must exert control over its U.S. subsidiary that is so pervasive and continual that the subsidiary may be considered an agent or instrumentality of the parent [*see Bauman v. DaimlerChrysler Corp.*, 579 F.3d 1088, 2009 U.S. App. LEXIS 19360 (9th Cir. Aug. 28, 2009)]. A strong dissent argued that the majority imposed an inappropriately stringent test.

Facts and Procedural Background. Residents of Argentina sued a German company in the Northern District of California under the Alien Tort Claims Act, alleging human rights violations by the defendant's subsidiary in Argentina. Another subsidiary of the defendant was a Delaware company, which had offices in California and was undisputedly subject to general personal jurisdiction in California. This subsidiary was responsible for marketing and distributing the defendant's automobiles in the U.S. The German company moved to dismiss for lack of personal jurisdiction on the ground that the U.S. subsidiaries' contacts with California could not be imputed to it for personal jurisdiction purposes. The district court granted the defendant's motion to dismiss.

The court's ruling, however, was tentative and it ordered limited jurisdictional discovery on two issues: (1) whether an agency relationship existed between the German parent and the U.S. subsidiary, and (2) whether the plaintiffs could pursue their claims in Germany or Argentina. In their response to the motion, the plaintiffs also argued that jurisdiction should be conferred upon the German parent because of its contacts with the United States as a whole, pursuant to *Fed. R. Civ. P. 4(k)(2)*. Plaintiffs also requested, in the alternative, that the district court transfer the case to Michigan if it found that it did not have personal jurisdiction over the parent.

The district court concluded that its earlier ruling was correct and granted the motion to dismiss, finding specifically that the U.S. subsidiary was not the parent's agent for the purpose of conferring general jurisdiction, and that both Germany and Argentina provided an adequate forum for appellants' claims. However, it did not reach the Rule 4(k)(2) and change of venue arguments because both exceeded the scope of its supplemental briefing order. The plaintiffs timely appealed.

Procedural Issues on Appeal. Besides the personal jurisdiction issue, the Ninth Circuit had to deal with a number of different procedural issues. First, the parties had disputed whether there was subject matter jurisdiction over the plaintiffs' claim pursuant to the Alien Tort Claims Act and the Torture Victims Protection Act [see 28 U.S.C. § 1350]. The district court held that it would resolve the question of personal jurisdiction first.

The Ninth Circuit appropriately ruled that this exercise of discretion was proper under the Supreme Court's rulings that provide the district courts with discretion in the sequencing of jurisdictional issues [see *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 588, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999)].

Next, the Ninth Circuit rejected the plaintiffs' assertion that the district court had improperly converted the defendant's motion to dismiss for lack of personal jurisdiction into a de facto dismissal on forum non conveniens grounds.

Then, the Ninth Circuit discussed the district court's failure to address the plaintiffs' assertion that the court had jurisdiction over the German parent pursuant to *Fed. R. Civ. P. 4(k)(2)*, and their request for transfer, because both exceeded the scope of the supplemental briefing order. The Ninth Circuit quoted a Local Court Rule: "once a reply is filed, no additional memoranda, papers or letters may be filed without prior Court approval" [see N.D. Cal. Civ. R. 7-3(d)].

Finally, the Ninth Circuit found that the plaintiffs had waived the opportunity to appeal these matters. If a party first raises an issue "in a motion which the district court refused to consider because it was untimely and *in contravention of local rules*," and does not appeal the district court's procedural ruling, the issue is waived. The Rule 4(k)(2) argument and request for transfer were made in contravention of the local rules, and because plaintiffs merely repeated their substantive argument rather than address the procedural ruling in their appellate brief, these arguments were waived.

Comment. The procedural aspects of the Ninth Circuit's opinion are important to keep in mind. While the court was correct on the procedural sequencing issue - the Supreme Court has provided district courts with considerable discretion to determine whether to tackle subject matter jurisdiction, personal jurisdiction or venue issues first - it is also true that by not adhering to the district court's local rules, and by not carefully preserving the right to appeal, the plaintiffs lost the opportunity to put forth what may have been a winning Rule 4(k)(2) argument or motion to transfer to another U.S. court as opposed to the dismissal.

Additionally, putting off the question of subject matter jurisdiction in favor of personal jurisdiction makes a great deal of sense. The contours of jurisdiction under the Alien Tort Claims Statute are murky at best.

Jurisdiction May Be Based on Agency Theory. The plaintiffs argued that the U.S. subsidiary's continuous and systematic contacts with the forum should be attributed to the defendant, its parent, because the U.S. subsidiary was the parent's agent for purposes of personal jurisdiction. The Ninth Circuit agreed that an agency relationship may provide the basis for personal jurisdiction. However, it also stated that the mere existence of a parent/subsidiary relationship is not sufficient to establish personal jurisdiction over the parent on the basis of the subsidiary's contacts with the forum.

Rather, the subsidiary's contacts may be imputed to the parent, under an agency theory, only if the plaintiff makes a prima facie showing that the subsidiary represents the parent by performing services sufficiently important to the parent that if it did not have a representative to perform them, the parent would undertake to perform substantially

similar services [*see Doe v. Unocal Corp.*, 248 F.3d 915, 928-931 (9th Cir. 2001)].

The Ninth Circuit noted that the *Unocal* court also distinguished an agency relationship between a parent and its subsidiary from that of a holding company and its subsidiary. A holding company parent involved in one business could hold another type of business as a subsidiary. Because the business of the parent is the business of investment, its subsidiaries do not conduct business as agents. On the other hand, according to the Ninth Circuit, when subsidiaries are created by the parent for tax or corporate finance purposes, there is no basis for distinguishing between the business of the parent and the business of the subsidiaries.

Agency doctrine supports the exercise of jurisdiction when the local subsidiary performs a function that is compatible with, and assists the parent in the pursuit of, the parent's *own* business. Therefore, appropriate parental involvement includes monitoring the subsidiary's performance, supervising the subsidiary's finance and capital budget decisions, and articulating general policies and procedures. Directors of a parent may serve as directors of a subsidiary without exposing the parent corporation to liability based on the subsidiary's contacts. Similarly, consolidated reports are not dispositive and do not necessarily establish an agency relationship.

Comment. There are two curious aspects to the Ninth Circuit's analysis. First, the question of the extent to which a subsidiary's contacts may be imputed to a parent is an important one in the domestic context and increasingly in the international context. It is laudable, therefore, that the Ninth Circuit seeks to clarify the applicable standards for imputing subsidiary contacts to a parent corporation. However, it is curious that it picked the *Unocal* case, another Alien Tort Claims statute ("ATS") case, as its guide. As discussed above, it made sense for the district court to defer consideration of the subject matter jurisdiction issues under the ATS. The use of the statute is controversial and one can easily understand why the federal courts would avoid discussions over its reach. However, the personal jurisdiction question raised in this case arises in all kinds of cases. Thus, to the extent that the Ninth Circuit takes a relatively restrictive approach to when the subsidiary's contacts count, one wonders whether the ATS was part of the driver of the strict approach.

This is important because under Rule 4(k)(1)(A), a federal court borrows the personal jurisdiction law of the state in which it sits. To the extent that the Ninth Circuit seeks to clarify the law on the agency theory of personal jurisdiction, it makes little sense for it to rely so heavily on another ATS case rather than California personal jurisdiction cases or other Ninth Circuit cases that involved commercial or other issues of broader application.

Second, one wonders whether *Unocal* analysis should lead to the opposite conclusion. Why should it matter what the form of the parent corporation is? Whether the parent is a holding company or not, the subsidiary exists as part of a whole. In either case, the subsidiary is engaging in some business that the parent would need to engage in itself if it chooses to profit from that business.

Parent Must Exert "Pervasive Control" Over Subsidiary. Additionally, the plaintiff also must establish parental control over the subsidiary to confer agency jurisdiction over the parent based on the subsidiary's contacts. The Ninth Circuit noted that its earlier decision in *Doe v. Unocal Corp.* had given rise to some confusion on this issue. That opinion had referred to the need for control, but had not discussed it further. Some district courts, therefore, had concluded that control was not required [*see Modesto City Sch. v. Riso Kagaku Corp.*, 157 F. Supp. 2d 1128, 1133 (E.D. Cal. 2001)].

The court of appeals rejected this interpretation. "We write to clarify our law in the area of agency jurisdiction because the *Modesto* court misinterpreted *Unocal*. A determination of agency jurisdiction requires a two-step analysis. First, the parent must exert control that is so pervasive and continual that the subsidiary may be considered an agent or instrumentality of the parent, notwithstanding the maintenance of corporate formalities. Control must be over and above that to be expected as an incident of ownership. Second, the agent-subsidiary must also be sufficiently important to the parent corporation that if it did not have a representative, the parent corporation would undertake to perform substantially similar services."

The Ninth Circuit did not view this as a new rule. Rather, it noted that control has always been relevant to an agency determination. "[B]efore *Unocal* and consistent with it, this court had already indicated that a high degree of control is necessary to confer agency jurisdiction. . . . Secondly, under common law principles, control is the *sine qua non* of agency. Finally, other circuits considering the issue have held that the right to control is of consequence to agency jurisdiction, although the cases vary as to what precise role it plays."

Comment. The corporate structure and the degree of parental control required to establish agency for jurisdictional purposes has baffled the courts. Other circuits considering the issue have held that the right to control is of consequence to agency jurisdiction, but the cases vary as to what precise role it plays. For example, the Seventh Circuit requires the plaintiff to prove that the parent "exerts an unusually high degree of control [see *Purdue Research Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 788 (7th Cir. 2003)]. The Second Circuit suggests that the concept of control is one of many factors to be balanced [see *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 185 (2d Cir. 1998)]. The Fifth Circuit conflates agency theory with alter ego theory, but requires an element of control no matter what theory is used [see *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1160 (5th Cir. 1983)].

Parent's Control Was Insufficient to Confer Jurisdiction. Looking at the relationship between the German parent and the U.S. subsidiary, the court determined that the parent did not exert control that was so pervasive and continual that the subsidiary could be considered its agent. The subsidiary was required to provide detailed information and comply with certain general marketing standards, but these requirements were permissible as "monitoring" and "articulation of general policies." Furthermore, the contractual relationship between the two was terminable, the subsidiary's goals were negotiated, and title to the automobiles that were to be sold passed from the parent to the subsidiary in Germany. The parent had no control over the product's ultimate destination within the U.S.

Additionally, the plaintiffs failed to make a prima facie showing that the parent would undertake to perform substantially similar services in the absence of the U.S. subsidiary (although this question was close). The subsidiary was not owned merely as an investment, but performed functions that assisted the parent in its business, selling automobiles. However, there was some evidence that the parent had used independent distributors, which militated against a finding that without the U.S. subsidiary, the parent would personally market its automobiles in the U.S.

The court concluded that, because there was insufficient control and because the subsidiary did not serve as the parent's representative, the subsidiary's contacts could not be imputed to the parent and there was therefore no basis for jurisdiction over the parent in the California forum.

Comment. In addition to avoiding the ATS issues, the Ninth Circuit's opinions obviated the need to consider a related service of process issue that had been raised in the district court. Had the Ninth Circuit made it relatively easier to obtain personal jurisdiction over the German parent based on the U.S. subsidiary's contacts, future plaintiffs might be tempted to serve a foreign parent through its U.S. subsidiary. Under *Federal Rule of Civil Procedure* 4(h)(2) and (f)(1), a party served outside of the United States generally must be served under the provisions of the Hague Convention on Service Abroad. However, in *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 108 S. Ct. 2104, 100 L. Ed. 2d 722 (1988), the United States Supreme Court held that when a foreign parent has a U.S. subsidiary, service on the subsidiary is proper in lieu of service under the Hague Convention. The saga of service in the *Bauman* case [see *Bauman v. Daimlerchrysler AG*, 2005 U.S. Dist. LEXIS 31929 (N.D. Cal. Nov. 22, 2005)] shows why this is an important issue.

The plaintiffs originally believed that the German parent had its sole headquarters in Stuttgart, Germany. They used the procedures set forth by the Hague Convention for international service of process to serve the parent through the German courts. The German district court authorized service of process upon the parent, but the German appellate court halted service to determine whether service would violate Germany's sovereignty rights. If so, the requested service could potentially be refused according to the Hague Convention. The issue languished in the German high court in an unrelated case involving Napster and Bertelsmann AG, which posed similar issues.

Later, the plaintiffs learned from reading a proxy statement to shareholders regarding the 1998 merger of Chrysler Corporation with the parent, Daimler-Benz AG, that the parent purported to maintain operational headquarters at the subsidiary's headquarters in Michigan. The plaintiffs then applied for and were issued an amended summons for the parent at the Michigan location.

Plaintiffs' process server first attempted to serve the parent at the subsidiary's headquarters but was unsuccessful because the service of process paralegal for the subsidiary explained to the server that she and the subsidiary were not authorized to accept service of process on behalf of the parent. Other attempts resulted in similar lack of success. Ultimately, the plaintiffs' process server left the papers there for the parent, but the service papers were returned to plaintiffs' counsel.

Next, plaintiffs mailed copies of the summons and complaint, addressed to the CEO of the parent, to the subsidiary headquarters by registered mail, and also mailed copies to the Michigan Corporation Securities Bureau. The parent, in disagreement with the plaintiffs, contended that the CEO had no office in Michigan.

After all this maneuvering, the parent filed a motion to dismiss for insufficiency of service of process, as well as to dismiss for lack of personal jurisdiction. However, in response to plaintiffs' opposition, the parent withdrew its challenge to service of process, but continued on with its successful motion to dismiss the complaint for lack of personal jurisdiction.

Surely if the Ninth Circuit found that there was a sufficient agency relationship between the parent and the subsidiary, the service issue would have been simpler: Under *Schlunk*, the plaintiff simply had to serve the subsidiary as the agent for the parent. Such service would be valid for U.S. jurisdictional purposes. However, given the stance of the German courts, one wonders whether the German courts would have enforced an American judgment against the parent.

Additionally, the question remains whether the subsidiary remains the agent for service even if its contacts cannot be imputed to the parent for personal jurisdiction purposes. Even if so, however, plaintiffs seeking to avoid the difficulties of service that the plaintiffs faced in *Bauman* need to think twice: even if the service is deemed valid, will the foreign court enforce the judgment if it believes that service should have been made under the Hague Convention? In other words, plaintiffs should not be penny-wise and pound foolish.

Dissent. The dissenting judge characterized the majority's opinion as formulating "a stringent new test" for determining whether an agency relationship exists for the purposes of establishing personal jurisdiction. "Although the majority's goal of providing some clarity to our rather muddled case law on the subject is laudable, the test it imposes goes too far, requiring a much stronger relationship between parent and subsidiary than is necessary or desirable. The result is to shield foreign corporations from actions in American courts-although they have structured their affairs so as to reap vast profits from American markets-and to deprive plaintiffs, including those who allege grave human rights abuses, of access to justice."

The dissent argued that the majority had conflated two tests. Contacts of a subsidiary may be imputed to the parent if one is the "alter ego" of the other, and this test is predicated on a showing of control. The agency test, by contrast, is predicated on a showing of the special importance of the services performed by the subsidiary; that is, that the services are sufficiently important to the parent that it would undertake those duties if it did not have a subsidiary to perform them. "The majority's 'pervasive and continual' control standard compounds this confusion by conflating the alter ego and agency tests, with the result that it is difficult to conceive of a situation in which the subsidiary would be the agent of its parent and not the alter ego."

The dissent agreed that parental control should play some role, but when determining whether personal jurisdiction exists it should be a secondary one. The dissent explained that although control is a traditional element of agency under common law principles, even at common law, agents exercise a considerable amount of discretion in performing their functions. Not only is pervasive and continual control not a requirement, according to the dissent, at common law, the

principal need not *exercise* control at all in order to preserve an agency relationship. Rather, the only relevant inquiry is whether the principal has the *right* to control.

The level of control required by the majority, the dissent said, was excessive even for purposes of considering *liability* under an agency theory, while the test for jurisdictional purposes should be *less* stringent. Jurisdictional tests are really shorthand devices for defining what constitutes "fair play and substantial justice." "Fairness is not well served in such cases by a stringent test based on a narrow, overly formalistic conception of day-to-day corporate control. . . . Our inquiry should be flexible enough to allow us to determine, on the basis of corporate realities rather than formalistic legal rules, whether it is *fair* to bring a parent company into court in the United States."

The dissent concluded that, under this more flexible approach, the degree of control the parent exercised over the subsidiary was more than sufficient for the purposes of establishing personal jurisdiction. The parent was involved in, and had the power to exert control over, key aspects of the U.S. subsidiary's operations.

The dissent also disagreed with the majority's formulation of the "sufficient importance" test for agency jurisdiction. "The law does not require that the parent would undertake to perform the services if they were no longer to be performed by a subsidiary. Rather the question is whether these important services would be performed by a representative if the company did not perform them itself." Because the services performed by the U.S. subsidiary were sufficiently important to the parent that it would undertake to perform them through other means if the subsidiary did not exist (whether through a non-subsidiary distributor or by using its own personnel) the agency test had been met. Thus, the majority's reliance on the fact that the parent had previously used independent distributors was irrelevant.

The dissent concluded that the parent had the necessary contacts with the forum to support personal jurisdiction because of the agency relationship, and that the exercise of jurisdiction was entirely reasonable and consistent with due process. "I would not have dismissed Bauman's claims for want of personal jurisdiction over DCAG. The majority's overly stringent test for agency in this context erroneously allows foreign corporations that benefit tremendously from American markets to evade judicial process through creative corporate structuring. It denies the plaintiffs, out of hand, a judicial forum and the opportunity to seek redress of grievous wrongs. There is a vast disconnect between the majority's decision today and the foundational principles of fair play and due process that underlie our personal jurisdiction doctrine. For these reasons, I dissent."

Comment. The dissent makes compelling points. One might argue that it is inefficient to separate the idea of agency in the jurisdictional context from the liability context. In other words, what good does it do the plaintiff if it can exercise jurisdiction in a U.S. court, but then cannot use agency to prove liability? There are several responses: First, in the context of a case like *Bauman*, the plaintiffs do not need to show an agency relationship to prove liability under the ATS. Second, as the dissent points out, in an increasingly complex and globalized economy, corporations such as the parent reap enormous profits from the sale of their goods in the United States, achieved through the use of distributors, frequently in the form of subsidiaries. Like many other multinational companies that organize their corporate structure and acquire subsidiaries for the sole purpose of obtaining a maximal benefit from the American market, the parent here earned 45% of its annual revenue from its sales in the United States, and 2.4% of its total sales in 2004 were in California.

Accordingly, given these realities, the dissent is correct to fault the majority's over-emphasis on control. Rather, given that the question is whether there is personal jurisdiction over the parent, the inquiry should be on whether it is *fair* to bring a parent company into court in the United States. As the dissent suggested, a layperson likely would think it absurd that our courts could not obtain jurisdiction over a billion dollar multinational which is exploiting the critical American markets. "The law ignores the common sense of a situation at the peril of becoming irrelevant as an institution."

RELATED LINKS: For further information, see Moore's Federal Practice
 ■ 16 Moore's Federal Practice (3d Ed.) " 108.41

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Reasonableness Std. for ESI: Rabiej on Bellinger v. Astrue Comm'r of Soc. Sec.

2009 Emerging Issues 4726

Reasonableness Std. for ESI: Rabiej on Bellinger v. Astrue Comm'r of Soc. Sec.

By John K. Rabiej

December 15, 2009

SUMMARY: Legal treatises, e-discovery instructional materials, and court discovery protocols provide extensive information on the potential locations of ESI, search techniques to ferret out all relevant ESI, and ESI production options. Why shouldn't a party be able to rely on these resources as a template for its discovery requests? *Bellinger v. Astrue, Comm'r of Soc. Sec.*, offers an instructive decision highlighting some of the relevant considerations.

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ARTICLE: INTRODUCTION: One of the many problems with the discovery of electronically stored information (ESI) is that it can be stored in many different places, which makes preserving it in all locations difficult and conversely susceptible to very broad discovery requests. For example, ESI that is located originally in an employee's personal computer may only be a starting point for a discovery search. The same ESI may have transmigrated into the company's network server, the company's back-up server, other employees' computers as an email, the employee's personal lap-top computer, personal data devices, like flash drives, and a host of other exotic places. Legal treatises, ESI standards developed by authoritative groups, and even some courts' local rules and discovery protocols catalogue in excruciating detail all the potential places where ESI may reside.

Lawyers are constantly warned to take affirmative steps as part of their professional responsibilities to safeguard and preserve relevant ESI in all places where it is located, and careful lawyers are urged to leave no stone unturned in ferreting out relevant ESI in all potential sites. The dual responsibilities require lawyers to make difficult judgment calls advising clients on what steps must be taken to preserve relevant ESI and how far they can force the other party to search all potential ESI sites.

The Federal Rules of Civil Procedure provide some guidance and protection. Rule 26(b)(2)(B) & (C) lay out familiar cost-benefit factors that limit the scope of discovery, and Rule 37(e) sets out a limited safe harbor for the routine destruction of ESI. But the provisions of these rules are subject to court interpretation, and are rendered after the fact, which gives the lawyers little comfort in making their initial judgment calls.

FACTS OF THE CASE: In *Bellinger v. Astrue, Comm'r of Soc. Sec.*, 2009 U.S. Dist. LEXIS 71727 (E.D.N.Y. Aug. 14, 2009), the plaintiff claimed that the defendant Social Security Administration discriminated against her because of her gender by promoting two less qualified males to Grade-13 positions instead of her. She filed a Title VII

complaint and moved to compel answers to interrogatories requesting certain ESI information.

The interrogatories contained questions about ESI that are typically suggested in popular legal treatises and instructional materials. One set of interrogatories requested the identity and location of all computers, network servers, hard drives, mainframe storage media, backup tapes, disks, and every other type of storage medium used by five employee custodians during a nine-year period. In addition, the interrogatories requested detailed information about the ESI that was identified by the defendant, including the make-up of the records (type of documents, number of documents, dates, addresses, and subjects), each form of backup, the formatting of each data, the protocol followed to preserve the integrity of the data and prevent its deletion, the effect, if any, of any litigation hold in protecting against possible deletion, and any modifications or deletions to the data and, if so, by whom and when. A later interrogatory went further and requested information about the dates of use for each software and hardware identified, brand and version number of the network operating system in use, including the hardware server used for email system and all word processing documents, quantity and configuration of the network servers and work stations, identity of the person responsible for the operation, maintenance, expansion and upkeep of each network identified, the programs used to backup each user's email, and manner of backup for each network.

The court denied the plaintiff's motion to compel answers to the interrogatories because the burden was heavy and the likely benefit of the discovery slight. Substantial discovery had been provided earlier to the plaintiff consisting of about 10,000 documents, and the plaintiff failed to show any prejudice as a result of the defendant's failure to respond fully to the interrogatories. The court reprimanded the lawyers for the "manner in which counsel have litigated their repeated disagreements over the proper scope of discovery."

BOILERPLATE ESI DISCOVERY REQUESTS: The plaintiff in *Bellinger* argued that she was entitled to discovery of the requested information about ESI. Similar types of information are commonly found in model forms and interrogatories published in many legal treatises and standard ESI instructional materials. In fact, several courts have promulgated protocols governing ESI discovery, which contain similar, if not more comprehensive, informational ESI laundry lists. Perhaps the most prominent among the court protocols is the District of Maryland's *Suggested Protocol for Discovery of Electronically Stored Information* (www.mdd.uscourts.gov/news/news/ESIProtocol.pdf).

The enumeration of potential locations of ESI and descriptions of its creation, storage, and use in standard treatises and instructional materials were never intended to serve as model interrogatories for use in all cases. As in many other areas of discovery dispute, the scope of discovery must be calibrated under a reasonableness standard in light of all the circumstances in a particular case. (See *2009 Emerging Issues* 4250, Rabiej, *Reasonableness Standard Governing Discovery Obligations and Preservation Duty*.)

The preamble to Maryland's *Suggested ESI Discovery Protocol* lists factors to be considered when applying this reasonableness standard: "While this *Protocol* is intended to provide the parties with a comprehensive framework to address and resolve a wide range of ESI issues, it is not intended to be an inflexible checklist. The Court expects that the parties will consider the nature of the claim, the amount in controversy, agreements of the parties, the relative ability of the parties to conduct discovery of ESI, and such other factors as may be relevant under the circumstances."

Determining what ESI must be preserved and how much effort should be expended in searching for relevant ESI under an objective reasonableness standard requires a certain degree of subjectivity and leaves a party vulnerable to second guessing of its decisions. Cautious lawyers may preserve or seek discovery of too much ESI, as happened in *Bellinger*. Absent a court order, however, there is only one way to be confident that a party's planned ESI preservation measures or a party's search for ESI are reasonable. That degree of confidence can only be attained when the parties discuss and agree among themselves what preservation and search measures are appropriate before discovery actually commences. The Federal Rules of Civil Procedure establishes an ESI discovery framework that envisions such mutual cooperation and consultation between the parties in accordance with Rule 26(f) conferences.

One of the primary purposes that legal treatises, instructional materials, and court ESI discovery protocols provide

extensive information on the potential locations of ESI and on search and production techniques is to facilitate discussions at a Rule 26(f) conference. These resources are designed to provide a comprehensive list that parties should consider during discovery, but should not necessarily pursue in every case. Parties, like the plaintiff in *Bellinger*, should not assume that the cataloguing of all potential ESI locations and searching techniques in these informational resources necessarily entitles the parties in every case to the full array of discovery catalogued in these resources. The extent is tempered by a reasonableness standard under all the circumstances of a case.

Notwithstanding *Bellinger*, there is evidence that lawyers are taking reasonable approaches to address and handle these difficult ESI issues at pretrial discussions. The Federal Judicial Center (FJC), the research and educational arm of the federal judiciary, issued a preliminary report of a national, case-based Civil Rules survey in October 2009. (See *2009 Emerging Issues 4673*, Rabiej, *Litigation Costs and Delay Surveys Shed Light on E-Discovery Practices*.) It found that disputes over ESI were relatively uncommon, with about 75 percent of the respondents reporting no such disputes in their case. The moderate rate of ESI discovery disputes may be attributable in part to pretrial discussion of these matters. More than 30 percent of the survey respondents said that they discussed e-discovery issues at a discovery planning conference, which were held in about 80 percent of the cases in which some discovery was requested. In addition to considering these issues at discovery planning conferences, parties likely rely on informal exchanges of discoverable information, which may also explain the moderate rate of e-discovery disputes. Cooperation between parties is most likely in cases when both parties have discoverable ESI. Reaching an agreement in cases when only one side possesses the bulk of discoverable ESI may be more challenging.

LESSON: There is also a concern that many lawyers may still be unaware of the ESI implications and the potential for severe consequences, and that the moderate rate of ESI disputes may result more from this neglect than from conscious deliberations. The lesson in all cases is that parties should talk about ESI discovery issues as early in the case as possible to limit unnecessary discovery preservation and searching and to seek judicial intervention when necessary to resolve any conflicts.

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Litigation Costs and Delay Surveys Shed Light on E-Discovery Practices

2009 Emerging Issues 4673

Litigation Costs and Delay Surveys Shed Light on E-Discovery Practices

By John K. Rabiej

December 3, 2009

SUMMARY: Two recent surveys address the effects of e-discovery on litigation delay and costs. One survey paints an alarming picture of rising costs and growing disenchantment with the litigation process in general and discovery in particular. The other survey acknowledges problems with the litigation process, including e-discovery, but concludes with a positive overall assessment. What did these surveys find and can the findings be reconciled?

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ARTICLE: INTRODUCTION

The American College of Trial Lawyers Task Force on Discovery (ACTL) and the Denver-based Institute for the Advancement of the American Legal System (IAALS) collaborated on a joint project exploring problems with litigation and discovery. They issued an interim report on August 1, 2008, that contained the results of an extensive survey of American College members. A follow-up final report, which analyzed the survey results in the interim report, was issued on March 11, 2009, and revised on April 15, 2009. The reports can be found at www.actl.com. The Federal Judicial Center (FJC), the research and educational arm of the federal judiciary, issued a preliminary report of a national, case-based Civil Rules survey in October 2009. The report can be found at www.fjc.gov. The survey is similar to an earlier survey conducted by the FJC in 1997.

RESULTS OF AMERICAN COLLEGE AND ADVANCEMENT OF AMERICAN LEGAL SYSTEM INSTITUTE SURVEY.

ACTL and IAALS analyzed survey responses to questions dealing with many aspects of civil litigation from 1,494 American College of Trial Lawyer members. A majority of the responses indicated that: (1) though the civil justice system is not broken, it is in need of serious repair; (2) the discovery system is, in fact, broken; (3) judges should take more active control of litigation from the beginning; and (4) local rules are routinely described as "traps for the unwary."

The report's discussion of discovery noted that about 85% of the respondents believed that litigation, in general, and discovery, in particular, was too expensive. Sixty-four percent of the respondents said that law firms encouraged more discovery than was necessary. And nearly half (45%) of the respondents believed that discovery abuse occurred in

almost every case. A majority (53%) of the respondents agreed that the effect of all the discovery-rule changes since 1976 did not reduce discovery abuse. An overwhelming majority of the respondents (87%) agreed that electronic discovery was too costly and 76% of the respondents noted that judges do not understand e-discovery issues well.

The survey contained specific questions addressing e-discovery issues. Nearly 60% of the respondents reported litigating a case that involved e-discovery. Though 66% of the respondents believed that the 2006 e-discovery rule amendments improved the efficiency and effectiveness of e-discovery, 87% of the respondents concluded nonetheless that e-discovery increased litigation costs. More than 75% of the respondents said that discovery costs, as a percentage of total litigation expenses, had increased disproportionately because of e-discovery. The use of outside vendors to facilitate e-discovery was viewed by 71% of the respondents as raising costs without providing commensurate value to the client. And 63% of the respondents claimed that e-discovery was being abused by counsel.

RESULTS OF FEDERAL JUDICIAL CENTER SURVEY.

Unlike the ACTL/IAALS survey, which questioned lawyers about their general experiences in federal court, the Federal Judicial Center survey questioned lawyers about their experiences in a specific case that they had recently completed. The FJC identified a sample of 3,550 civil cases closed in federal courts in the last quarter of 2008 and contacted lawyers involved in those cases. The FJC sent a survey to both plaintiff and defense attorneys asking detailed questions about their case and their litigation experience in it. They received responses from 2,690 lawyers, consisting of 836 lawyers representing primarily plaintiffs, 1,159 lawyers representing primarily defendants, and 634 lawyers representing both plaintiffs and defendants. The respondents represented a wide cross section of small and large law firms.

More than 30% of the respondents said that they discussed e-discovery issues at discovery planning conferences, which were held in about 80% of the cases in which some discovery was requested. More than half of the respondents (57%) said that they did not discuss electronically stored information (ESI) issues at the discovery planning conference. When ESI issues were discussed at discovery planning conferences, the most common issues discussed were:

- legitimacy of routine practices governing ESI retention (46% of plaintiff's lawyers and 55% of defendant lawyers);
- ESI preservation issues (36% of plaintiff's lawyers and 37% of defendant's lawyers);
- ESI production issues (34% of plaintiff's lawyers and 36% of defendant's lawyers);
- limiting scope of ESI discovery (32% of plaintiff's lawyers and 42% of defendant's lawyers);
- determining whether ESI was reasonably accessible (22% of plaintiff's lawyers and 15% of defendant's lawyers);
- ESI search methods, including key word searches (17% of plaintiff's lawyers and 19% of defendant's lawyers);
- phased ESI discovery (12% of plaintiff's lawyers and 10% of defendant's lawyers);
- culling techniques (8% of plaintiff's lawyers and 11% of defendant's lawyers), and
- ESI sampling (4% of plaintiff's lawyers and 6% of defendant's lawyers);

Disputes over ESI were *not* common (72% of plaintiff lawyers and 78% of defendant lawyers reported *no* disputes). (This result compares with 48% of the lawyers who reported discovery problems in the 1997 FJC study -- the data in that study was not broken down further to specifically identify e-discovery issues.) In the minority of cases in which an ESI dispute was reported, the most common disputes involved issues about:

- the burden of production, arising in 10% (reported by plaintiffs) and 12% (reported by defendants) of the cases;
- the specific production format, arising in 11% (reported by plaintiffs) and 7% (reported defendants) of the cases;
- challenges that the production format was not reasonably usable, arising in 9% (reported by plaintiffs) and 4% (reported by defendants) of the cases;
- challenges that ESI was not reasonably accessible, arising in 9% (reported by plaintiffs) and 8% (reported by defendants) of the cases; and
- spoliation claims, arising in 8% (reported by plaintiffs) and 5% (reported by defendants) of the cases.

In cases with one or more reported discovery event, 63% of lawyers representing plaintiffs said that their client did *not* place a "litigation freeze," while 37% of the lawyers representing defendants said that their client did *not* place a

litigation freeze in the case. ESI was used most commonly to prepare and depose witnesses, interview client's employees, and evaluate settlement possibilities.

ESI production was requested in 36% of the cases by lawyers representing plaintiffs and in 39% of the cases by lawyers representing defendants. In the cases in which ESI production was requested, the study gives a rich account of the types of issues related to ESI production that were reported by plaintiff's and defendant's lawyers, including the following:

- ESI production format issues, e.g., TIFF, PDF, native format (51% of plaintiff's lawyers and 46% of defendant's lawyers);
- privileged ESI material (38% of plaintiff's lawyers and 36% of defendant's lawyers);
- type of media production, e.g., DVD, hard drive (32% of plaintiff's lawyers and 36% of defendant's lawyers);
- privilege log issues (29% of plaintiff's lawyers and 26% of defendant's lawyers);
- indexing or organizing production of ESI (14% of plaintiff's lawyers and 13% of defendant's lawyers);
- claw-back agreements (13% of plaintiff's lawyers and 17% of defendant's lawyers);
- production of metadata (11% of plaintiff's lawyers and 13% of defendant's lawyers);
- load files (11% of plaintiff's lawyers and 9% of defendant's lawyers); and
- quick-peek agreements (3% of plaintiff's lawyers and 2% of defendant's lawyers).

More than 60% of the respondents reported that discovery generated the right amount of information and more than half said that discovery costs were the right amount. A majority of the respondents said that they were able to reduce discovery costs and burdens by cooperating with opposing counsel. A majority of the respondents also concluded that the discovery costs had no effect on the likelihood of settlement.

The survey asked several questions about *total* litigation costs, which included discovery costs and attorney fees. The median total litigation cost was \$15,000 for plaintiffs and \$20,000 for defendants. The costs for plaintiffs ranged from \$1,600 at the 10th percentile to \$280,000 at the 95th percentile. The costs for defendants ranged from \$5,000 at the 10th percentile to \$300,000 at the 95th percentile. Median costs were higher in cases involving e-discovery.

The median estimate of the percentage of total litigation costs spent on all discovery was 20% for plaintiffs and 27% for defendants (compared with the results of the 1997 FJC study, which found that discovery expenses represented 50% of litigation expenses). E-discovery costs were 5% of total discovery costs at the median for plaintiff's lawyers and 10% at the median for defendant's lawyers. The median estimate of the stakes for plaintiffs was \$160,000, ranging from \$15,000 at the 10th percentile to nearly \$4 million at the 95th percentile. The median estimate of the defendant's stakes was \$200,000, ranging from \$15,000 at the 10th percentile to \$5 million at the 95th percentile. Plaintiff's lawyers spent 1.6% of the estimated stakes on discovery, including attorney fees, while defendant lawyers spent 3.3%. This last result is comparable to the results of the 1997 FJC study, which reported that discovery expenses represented about 3% of the amount at stake in the litigation.

More than 66% of the respondents agreed with the statement that "the procedures employed in the federal courts are generally fair," and a majority disagreed with the statement that "discovery is abused in almost every case in federal court." Plaintiff attorneys tended to disagree and defendant lawyers tended to agree with the statement that rules should be revised to limit electronic discovery.

RECONCILING THE RESULTS OF THE TWO SURVEYS

The results of the ACTL/IAALS survey raise serious concerns about the entire litigation process in federal courts and call for fundamental reforms. In fact, the IAALS is promoting such a fundamental reform movement based on the survey's results. On the other hand, the results of the FJC survey paint a more benign picture, supporting, at most, modest reform. Putting aside the effect of the differences in how questions were phrased in the two studies, the surveys' results appear to give inconsistent messages, making it difficult for rulemakers to act.

One possible explanation for the apparent inconsistencies is that the ACTL/IAALS survey asked lawyers about their general experience with litigation in the federal courts, while the FJC asked lawyers about a specific case. In recalling past experiences of many cases, the respondents in the ACTL/IAALS survey might have unconsciously focused on particular events or cases that colored their overall assessment. That phenomenon might explain some of the differences in the results found in the surveys.

An alternative, and more likely, explanation of the different results is suggested in one of the 1997 FJC survey findings. That survey found that "high levels of discovery problems and high expenses were more likely to occur in cases with high stakes, high levels of contentiousness, high levels of complexity, or high volume of discovery." The lawyers surveyed in the ACTL/IAALS study consist of some of the most prominent litigation lawyers in the country. Many of the lawyers routinely are involved in high-stakes cases, in the type of cases that the 1997 FJC survey identified as having the most problems. Conversely, the FJC survey involved lawyers dealing with cases of all stripes, including big and small cases, where e-discovery disputes were less common. The FJC survey may have painted a more benign picture because the litigation process in these smaller cases may, in fact, be functioning more smoothly, as found in the 1997 FJC survey.

The results of both surveys are being carefully analyzed by federal rulemaking committees. It is possible that e-discovery concerns raised by the ACTL/IAALS survey are mostly limited to "big" cases, while e-discovery is working relatively well in "smaller" cases. If so, the focus of any rule changes should be on the problematic cases.

But why are e-discovery problems less likely in smaller cases? One of the findings of the 1997 FJC survey suggests an answer. That survey found that "independent of the rules, there was a considerable amount of informal exchange of discoverable information." Perhaps there is greater cooperation between lawyers in such cases. Or perhaps a large segment of the bar remains unaware of ESI, its potential uses, and dangers. How else to explain the significant percentage of lawyers who fail to place a litigation hold on ESI and risk claims of spoliation? *See Green v. McClendon*, 2009 U.S. Dist. LEXIS 71860, at *18 (S.D.N.Y. Aug. 13, 2009) (case law cited for the proposition that failure to implement litigation hold amounts to gross negligence). Still another possibility is that lawyers in smaller cases make a cost-benefit analysis and decide to ignore the e-discovery rules' requirements. Whatever the answers are, the two surveys provide a trove of data, which will be scrutinized along with other data being gathered at the Duke Law School conference on litigation reform hosted by the Judicial Conference's Advisory Committee on Civil Rules in May 2010. In addition, the two surveys provide a good picture of the extent, issues, and costs of federal litigation, and useful insights into today's e-discovery practice.

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Fraudulent Joinder: Georgene Vairo on Schur v. L.A. Weight Loss Ctrs., Inc.

2009 Emerging Issues 4556

Fraudulent Joinder: Georgene Vairo on Schur v. L.A. Weight Loss Ctrs., Inc.

By Georgene Vairo

November 10, 2009

SUMMARY: Schur v. L.A. Weight Loss Ctrs., Inc. resolves the somewhat confusing interrelationship of the fraudulent joinder doctrine, Fed. R. Civ. P. 15, and the standard for when a court may permit the joinder of additional parties under 28 U.S.C. § 1447(e). The Seventh Circuit ruled that fraudulent joinder is a factor in determining whether to permit a post-removal amendment to add a non-diverse defendant, but it is not necessarily dispositive.

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ARTICLE: Summary. *Schur v. L.A. Weight Loss Ctrs., Inc.*, 577 F.3d 752, 2009 U.S. App. LEXIS 18238 (7th Cir. Aug. 14, 2009), resolves the somewhat confusing interrelationship of the fraudulent joinder doctrine, *Fed. R. Civ. P. 15*, and the standard for when a court may permit the joinder of additional parties under 28 U.S.C. § 1447(e). The Seventh Circuit ruled that fraudulent joinder is a factor in determining whether to permit a post-removal amendment to add a non-diverse defendant, but it is not necessarily dispositive. Additionally, it joined the Fifth, Fourth and Eighth Circuit's approach to deciding whether to permit joinder under 28 U.S.C. § 1447(e).

Facts and Procedural History. An Illinois woman died of liver failure after participating in a program at a weight loss center. On behalf of her estate, her sister sued the center in Illinois state court. The center, which was incorporated in Delaware and had a principal place of business in Pennsylvania, removed the case to the Southern District of Illinois on the basis of diversity jurisdiction.

A little over a year later, a magistrate judge granted leave to amend the complaint under Rule 15 to add claims against three additional defendants, including two center employees, both of whom were Illinois citizens. The newly added defendants did not move to dismiss for failure to state a claim and the center did not object to or otherwise challenge the magistrate judge's order permitting joinder. At that time, apparently neither the magistrate judge, nor the defendants, realized that the joinder of the two Illinois defendants had destroyed complete diversity. The estate then moved to remand the case to state court because the addition of the two employees as defendants destroyed diversity jurisdiction.

Applying the fraudulent joinder doctrine, the district court found that the non-diverse defendants had been improperly joined. It therefore struck the amended complaint and denied the motion to remand. The district court eventually granted summary judgment for the defendants. The Seventh Circuit vacated the district court's orders striking

the amended complaint and granting summary judgment and remanded to that court with instructions to remand the matter to the state court.

Severing the Gordian Knot: Was it Proper for the District Court to Review the Magistrate Judge's Remand Order? Before beginning its analysis, the Seventh Circuit had to untangle the procedural history of the case. The plaintiff argued that by the time it moved to remand the case, the magistrate judge's order permitting joinder was final and, therefore, the district court had no choice but to remand the case.

The Seventh Circuit disagreed, noting that there was no indication that the magistrate judge conducted the appropriate jurisdictional analysis before permitting joinder of the non-diverse parties, and that the district judge had not had an opportunity to rule on the propriety of joinder either. Under the circumstances, the district judge was permitted to reconsider the order granting leave to add the non-diverse parties.

Although the magistrate judge possessed the initial authority to grant Schur's motion to amend -- a non-dispositive pretrial matter, [28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(a); S.D. Ill. R. 72.1(a)], a magistrate judge's recommendation on a dispositive matter is not a final order, and the district judge makes the ultimate decision to adopt, reject, or modify it [28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3)]. Moreover, upon objection, the district judge must review the relevant part of the magistrate judge's decision, but the standard of review varies depending on whether the matter was dispositive. If there are no objections to the magistrate judge's action, the district judge may simply accept it. But, because the district judge remains the final authority in the case, he or she may reconsider *sua sponte* any matter determined by a magistrate judge [see, e.g., *Allen v. Sybase, Inc.*, 468 F.3d 642, 658 (10th Cir. 2006) ("[A] party's failure to seek timely review does not strip a district court of its power to revisit the issue.")]. This is particularly true when the issue involves subject matter jurisdiction.

The twist in *Schur* is that the magistrate judge permitted joinder of nondiverse parties, potentially destroying the court's diversity jurisdiction. And, the defendant did not oppose the motion to amend, nor did it object to the magistrate judge's order permitting joinder. The jurisdictional issue arose only when Schur moved to remand the case to Illinois state court. The Seventh Circuit ruled that the defendant's failure to object to the magistrate judge's order did not divest the district court of the power to do so *sua sponte*. Most importantly, the record indicated that the magistrate judge engaged in no meaningful analysis. Schur's motion to amend stated the names of the nondiverse parties. But, it did not, as Rule 8(a)(1) requires, allege their citizenship. The magistrate judge held no hearing on the motion's merits and did not actually make a joinder determination, as required by § 1447(e). The defendant L.A. Weight Loss should have known the citizenship of its own employees and objected. However, by failing to do so, it lost its right to request that the district judge review the order. But, that did not prevent the district judge from addressing the jurisdictional issue *sua sponte*.

The Seventh Circuit noted that other courts of appeals have reached a similar conclusion, namely that when a district court was previously unaware that joinder would destroy diversity, it may reconsider its prior decision granting leave to amend a complaint [see, e.g., *Bailey v. Bayer Crop Science L.P.*, 563 F.3d 302, 307 (8th Cir. 2009); *Mayes v. Rapoport*, 198 F.3d 457, 462 n.11 (4th Cir. 1999); *Hensgens v. Deere & Co.*, 833 F.2d 1179, 1182 (5th Cir. 1987)]. The Seventh Circuit correctly reasoned that if a district judge may reconsider his or her *own* order permitting joinder because the judge did not recognize the jurisdictional implications of an order, the judge may certainly reconsider a similar order by a magistrate judge.

Comment. The jurisdiction problem in *Schur* arose because nobody paid attention to subject matter jurisdiction. The plaintiff did not allege the citizenship of the parties she sought to join; the defendant's notice of removal apparently ignored the citizenship of its own employees; and the magistrate judge, apparently as a routine matter, with no analysis of the propriety of joining two non-diverse parties, decided to permit the joinder. The defendants could have objected within 10 days [see Fed. R. Civ. P. 72], but they did not do so. Moreover, the district court judge could have reviewed the magistrate judge's order *sua sponte* [see S.D. Ill. R. 73.1(a)], but did not consider whether there was subject matter jurisdiction until the plaintiff moved to remand the case to state court, after the non-diverse parties had been joined.

In other words, courts have a duty to determine whether they have subject matter jurisdiction. And, when parties are proposed to be joined in diversity cases, the courts need to consider whether complete diversity will be destroyed. Article III requires a federal court to satisfy itself of its jurisdiction over the subject matter before it considers the merits of a case [*see Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999)].

Notwithstanding *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 117 S. Ct. 467, 136 L. Ed. 2d 437 (1996), in which the Supreme Court held that a district court's error in failing to remand a case improperly removed is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered, the rule remains that a district court must remain vigilant regarding the basis for its subject matter jurisdiction. Indeed, in *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 124 S. Ct. 1920, 158 L. Ed. 2d 866 (2004), the Supreme Court again made clear that subject matter jurisdiction can not be taken lightly, and in *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998), the Court adhered to the rule that a federal court may not hypothesize subject-matter jurisdiction for the purpose of deciding the merits. Recalling "a long and venerable line of our cases," *Steel Co.* reiterated that: "The requirement that jurisdiction be established as a threshold matter . . . is 'inflexible and without exception,'" [*see* 523 U.S. at 94-95] for "jurisdiction is power to declare the law," and "'without jurisdiction the court cannot proceed at all in any cause,'" [*see* 523 U.S. at 94]. In other words: we -- the court and the parties -- all need to pay attention to subject matter jurisdiction.

Two Options When Joinder Would Destroy Diversity. The Seventh Circuit then turned from one procedural quagmire to the next: whether the district judge, vested with authority to review the magistrate judge's decision, properly conducted the inquiry. If one seeks to amend to add parties when complete diversity might be an issue, 28 U.S.C. § 1447(e) should be considered, as well as *Fed. R. Civ. P. 15*. Perhaps the magistrate judge was correct to allow the amended complaint if the case had not been removed. But, because it had been removed, the court needed to consider § 1447(e). Section 1447(e) is designed to provide the court with only two options when a plaintiff seeks to amend a complaint that may destroy complete diversity: (1) deny joinder, or (2) permit joinder and remand the action to state court.

In deciding whether to permit joinder, the court should balance the equities, because the necessary result of permitting the joinder will be a remand to state court. The Seventh Circuit adopted the following list of factors for consideration in making the decision: (1) the plaintiff's motive for seeking joinder, particularly whether the purpose is to defeat federal jurisdiction; (2) the timeliness of the request to amend; (3) whether the plaintiff would be significantly injured if joinder were not allowed; and (4) any other relevant equitable considerations. The court expressly followed the approach of the Fourth, Fifth and Eighth Circuits [*see Bailey v. Bayer CropScience L.P.*, 563 F.3d 302, 309 (8th Cir. 2009); *Mayes v. Rapoport*, 198 F.3d 457, 462 (4th Cir. 1999); *Hensgens v. Deere & Co.*, 833 F.2d 1179, 1182 (5th Cir. 1987)].

Fraudulent Joinder Is Not Necessarily Dispositive in Post-Removal Context. A plaintiff typically may choose its own forum, but it may not join a nondiverse defendant simply to destroy diversity jurisdiction. [*Schwartz v. State Farm Mut. Auto. Ins. Co.*, 174 F.3d 875, 878 (7th Cir. 1999); *Gottlieb v. Westin Hotel Co.*, 990 F.2d 323, 327 (7th Cir. 1993)]. The "fraudulent joinder" doctrine thus permits a district court "to disregard, for jurisdictional purposes, the citizenship of certain nondiverse defendants, assume jurisdiction over a case, dismiss the nondiverse defendants, and thereby retain jurisdiction" [*see Mayes v. Rapoport*, 198 F.3d 457, 461 (4th Cir. 1999) (citing *Cobb v. Delta Exports, Inc.*, 186 F.3d 675, 677-678 (5th Cir. 1999))]. Because the district court had vacated the remand order because the plaintiff had "fraudulently joined" the additional defendants, the Seventh Circuit considered the role of the fraudulent joinder doctrine after a case has been removed. The court explained that the doctrine permits a district court to retain jurisdiction by disregarding, for jurisdictional purposes, the citizenship of certain non-diverse defendants, assuming jurisdiction over a case, and dismissing the non-diverse defendants. However, it is not clear how or whether the doctrine applies to post-removal joinder.

Some courts have held that the doctrine has no effect once the district court actually has jurisdiction, including after the case has been removed. For example, in a case in which the district court had the opportunity in the first

instance to determine whether post-removal joinder was appropriate, the Fifth Circuit held that once the court permitted joinder of non-diverse defendants, it lost subject matter jurisdiction and had no power even to consider whether the defendants were fraudulently joined [*Cobb v. Delta Exports, Inc.*, 186 F.3d 675, 678 (5th Cir. 1999)]. In a case in which the plaintiff added the non-diverse defendant after removal without court approval, because the original defendants had not yet answered, the Fourth Circuit held that the fraudulent joinder doctrine is not directly applicable after removal, but that it can be a factor in the district court's determination of the propriety of joinder under 28 U.S.C. § 1447(e) [*Mayes v. Rapoport*, 198 F.3d 457, 463 (4th Cir. 1999)]. The Seventh Circuit agreed with this approach, particularly with respect to cases in which the district judge did not have an opportunity to analyze the propriety of joining non-diverse defendants when the plaintiff amended the complaint.

Comment. The Seventh Circuit's approach is a sensible balance. Usually, when a plaintiff wants to amend the complaint, *Fed. R. Civ. P. 15* is the operative rule. And, the standard for allowing the amendment is a liberal one -- leave to amend should be freely granted when justice so requires. When a case is commenced in federal court, that makes sense. When a case is removed to federal court, however, the equation changes a bit. By reminding courts that they must look to § 1447(e), which tells a district court what to do if a plaintiff seeks to add nondiverse parties, the Seventh Circuit ensures that the district court will balance the factors that the courts are applying when deciding whether to allow the joinder. Unfortunately for plaintiffs seeking a remand, the test enumerated by the Fourth, Fifth and Eighth Circuits, which the Seventh joins, may load the deck too far in the opposite direction because, among other things, it allows the district court to divine the plaintiff's motive for attempting to join the nondiverse parties.

However, by incorporating the fraudulent joinder doctrine as part of the balance, the Seventh Circuit actually helps to push the pendulum back towards the plaintiff. The bar is set quite high, as discussed below, for the defendant in persuading a court that a plaintiff is seeking to fraudulently join a party to destroy subject matter jurisdiction. To the extent that a defendant cannot prove that the standard for fraudulent joinder is met, it will be easier for the plaintiff to counter that its motive for joining the nondiverse party is a proper one -- i.e., to obtain a remedy.

Fraudulent Joinder Doctrine Misapplied by District Court. Next, the Seventh Circuit considered whether the district court properly applied the fraudulent joinder doctrine. The Seventh Circuit explained that a non-diverse defendant is not fraudulently joined if there is any reasonable possibility the plaintiff could prevail against the defendant under state law. The district court had concluded that the plaintiff could not prevail against the non-diverse defendants because the employer would be vicariously liable for their conduct and, therefore, they could not be held individually liable. This was incorrect. Under Illinois law, an employee may be individually liable for his or her own conduct even if the employer is also vicariously liable for that conduct. The Seventh Circuit concluded that the plaintiff sufficiently alleged that the defendants owed a duty to the decedent that was independent of the duties they owed to their employer. Therefore, the court could not conclude that the plaintiff had no reasonable possibility of success against the non-diverse defendants.

Motion To Amend Was Timely. Finally, the Seventh Circuit considered the timeliness of the plaintiff's motion to amend the complaint. The district judge had found that the timing of the motion weighed against granting it because the plaintiff knew the identity of the non-diverse defendants almost a year before she sought to join them. The Seventh Circuit disagreed, reasoning that the plaintiff did not learn of these defendants' roles in the events leading to the decedent's death until she obtained the center's discovery responses. She sought to amend the complaint to join the defendants within two months of learning of their roles, which actually supports her position rather than detracts from it.

Conclusion. The Seventh Circuit opinion is important because it:

(1) clarifies that a magistrate judge's ruling with subject matter jurisdiction implications is reviewable by the district court *sua sponte*;

(2) emphasizes that the operative rule when considering the joinder of nondiverse parties is 28 U.S.C. § 1447(e), and not the standard for allowing amended pleadings under *Fed. R. Civ. P. 15*;

(3) rules that § 1447(e) allows a district court only two choices -- allow the amended pleading and remand, or refuse to allow the amended pleading;

(4) requires a balancing of the plaintiff's motive for seeking joinder, specifically whether the purpose is to defeat federal jurisdiction, and the timeliness of the request to amend, with whether the plaintiff would be significantly injured if joinder were not allowed, and any other relevant equitable considerations;

(5) permits a proper consideration of the fraudulent joinder doctrine, which is not directly applicable to post-removal joinder.

The Seventh Circuit found that the district court improperly applied the fraudulent joinder doctrine by errantly concluding that Illinois law did not support at least some of the plaintiff's claims against the non-diverse defendants; and it also wrongly concluded that the motion to amend was untimely. As a result, the district judge improperly struck the second amended complaint and denied remand. The district court lacked jurisdiction to grant summary judgment and should have remanded the case to Illinois state court.

RELATED LINKS: For more information see Moore's Federal Practice

■ 16 Moore's Federal Practice (3d Ed.) 107.14[2][c][iv][D]

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Vairo on the Aftermath of Iqbal: Brooks v. Ross and Moss v. U.S. Secret Serv.

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Georgene Vairo on the Aftermath of Iqbal: Brooks v. Ross and Moss v. U.S. Secret Serv

By Georgene Vairo

November 10, 2009

SUMMARY: Brooks v. Ross and Moss v. U.S. Secret Serv. are two cases that have been decided since the U.S. Supreme Court rendered its landmark pleading decision in *Ashcroft v. Iqbal*. In this Emerging Issues Analysis Georgene Vairo, professor and author, takes a look at both of these recent cases and how the different Circuit courts interpreted *Iqbal*.

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ARTICLE: Summary. *Brooks v. Ross*, 578 F.3d 574, 2009 U.S. App. LEXIS 18711 (7th Cir. Aug. 20, 2009), and *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 2009 U.S. App. LEXIS 15694 (9th Cir. July 16, 2009), are two of thousands of cases that have been decided since the United States Supreme rendered its landmark pleading decision in *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). In *Bell Atlantic v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), the Supreme Court announced a new "plausibility" standard for pleading in the context of an antitrust case. And, it "retired" the venerable old *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957), "no set of facts" standard and set out a more stringent standard for evaluating the sufficiency of a complaint.

This term, *Iqbal* picked up where *Twombly* left off: the Supreme Court held that in deciding a motion to dismiss a complaint, a district court need not accept as true assertions that are no more than recitals of the elements of a cause of action, supported by mere conclusory statements. Rather, only well-pleaded factual allegations are entitled to an assumption of veracity, and a district court should then determine whether such allegations plausibly give rise to an entitlement to relief. The 5-4 opinion significantly raised the Supreme Court's "plausibility" pleading standard that it had announced in *Twombly*, and expressly announced that the new standards apply in all civil cases, not simply antitrust cases.

In *Brooks*, the Seventh Circuit interpreted *Ashcroft v. Iqbal* as consistent with a liberal notice-pleading regime. Yet, it took a very strict look at the plaintiff's allegations and, relying on *Iqbal*, affirmed the dismissal of the civil rights claims alleged. In *Moss*, on the other hand, the Ninth Circuit, after reviewing the "plausibility" standard developed by the Supreme Court in *Twombly* and in *Iqbal*, concluded that the plaintiffs had not alleged a plausible claim of discrimination in violation of the First Amendment. However, it afforded the plaintiffs the opportunity to replead. Taken together, these decisions show that *Iqbal* is having a rather dramatic impact on plaintiffs' attorneys, significantly raising the bar as to what is expected from plaintiffs who hope to defeat a motion to dismiss for failure to state a claim.

Although the Seventh Circuit is technically correct that notice pleading remains the rule -- *Rule 8 of the Federal Rules of Civil Procedure* has not been amended -- as a practical matter, these cases show that notice pleading is all but dead.

Brooks Background and Procedural History. A member of the Illinois Prison Review Board was indicted for official misconduct and wire fraud in connection with a parole hearing. He was acquitted, and later filed the present lawsuit alleging a variety of claims against various state employees who were involved in the proceedings against him. The district court dismissed all the claims for failure to state a claim.

The Seventh Circuit ruled that some of the plaintiff's claims were properly dismissed because they were barred by the statute of limitations. Other claims were barred by sovereign immunity under state law. This left only a § 1983 due process claim.

The primary ground on which the district court had dismissed the § 1983 claim was that the plaintiff had failed to plead personal involvement, as his complaint stated that "one or more of the Defendants" had engaged in certain acts or deprived him of his constitutional rights. The district court was correct, the Seventh Circuit said, that this language did not adequately connect specific defendants to illegal acts. Some parts of the complaint, however, did specify a particular defendant as having engaged in certain acts. The question before the court of appeals, then, was whether these factual allegations were sufficient to provide notice to the defendants of the plaintiff's claims.

Seventh Circuit's Take on Pleading Standards After *Twombly* and *Iqbal*. The Seventh Circuit began by stating that Rule 8 provides that a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The Seventh Circuit then stated the common understanding of Rule 8: that it reflects a liberal notice-pleading regime, intended to focus litigation on the merits of a claim rather than on technicalities that might keep plaintiffs out of court [*citing Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)].

Having stated the common understanding of what Rule 8 means, the Seventh Circuit then turned to the recent landmark Supreme Court pleading cases. Its purpose here was to explain how these decisions have affected the way that courts and litigators must now approach pleading practice. First, the court discussed *Bell Atlantic Corp. v. Twombly* [550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)], noting the "plausibility" standard the Court announced in the case. In *Twombly*, the Supreme Court had concluded that plaintiffs' "[f]actual allegations must be enough to raise a right to relief above the speculative level." The claim need not be probable, but must be "plausible." Thus, the standard calls for the pleader to allege enough facts to raise a reasonable expectation that discovery will reveal evidence supporting the plaintiff's allegations.

Looking to *Erickson v. Pardus* [551 U.S. 89, 93, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)], a third recent Supreme Court pleading case, the Seventh Circuit explained that *Twombly* did not intend to repudiate the general notice-pleading regime of Rule 8. The Seventh Circuit noted that two weeks after *Twombly*, in *Erickson*, the Supreme Court had reiterated that "[s]pecific facts are not necessary; the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." The Seventh Circuit took *Twombly* and *Erickson* together to mean that "at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8" [*Airborne Beepers & Video, Inc. v. AT&T Mobility LLC*, 499 F.3d 663, 667 (7th Cir. 2007)].

According to the Seventh Circuit, the Supreme Court's most recent pleading case, *Ashcroft v. Iqbal*, -- U.S. --, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), then clarified that *Twombly*'s plausibility requirement applies across the board, not just to antitrust cases. In addition, *Iqbal* gave further guidance to lower courts in evaluating complaints by noting that a court need not accept as true legal conclusions, or threadbare recitals of the elements of a cause of action, supported by mere conclusory statements. "We understand the Court in *Iqbal* to be admonishing those plaintiffs who merely parrot the statutory language of the claims that they are pleading (something that anyone could do, regardless of what may be prompting the lawsuit), rather than providing some specific facts to ground those legal claims, that they must do more. These are the plaintiffs who have not provided the showing' required by Rule 8."

Comment. Whether one is happy about the import of the recent Supreme Court pleading cases or not, the Seventh Circuit *Brooks* case provides a neat summary of the collective import of the cases and how those decisions ought to be implemented. As the Seventh Circuit put it: "So, what do we take away from *Twombly*, *Erickson*, and *Iqbal*? First, a plaintiff must provide notice to defendants of her claims. Second, courts must accept a plaintiff's factual allegations as true, but some factual allegations will be so sketchy or implausible that they fail to provide sufficient notice to defendants of the plaintiff's claim. Third, in considering the plaintiff's factual allegations, courts should not accept as adequate abstract recitations of the elements of a cause of action or conclusory legal statements."

This recitation confirms that notice pleading remains the rule, but it also confirms that much more than notice of a wrong will do. Notice means that the defendant must be provided with more specific facts constituting the wrong than had historically been deemed to be enough. This is another way of saying, and showing how important, that the venerable *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), "no set of facts" standard has been retired. Rather than rely on the possible existence of facts to defeat summary judgment, a plaintiff must allege those facts when the plaintiff's story is "sketchy" or "implausible."

The problem, of course, is that what one court believes may be sketchy and implausible, would not be to another. Regardless of what the Supreme Court and the Seventh Circuit say, the Court's pleading cases have injected an element of subjectivity into the analysis. The district court judge becomes a gate-keeper in the sense that the court gets to decide which complaints merit more specific pleading. Instead of Rule 9(b) directing the district court to require heightened pleading, the Supreme Court has done so in the guise of providing the defendant with "notice."

Allegations Were Not Sufficiently "Plausible." So, how did the Seventh Circuit apply its iteration of the pleading cases to the case before it? The plaintiff had alleged that the defendants had engaged in a variety of activities such as producing investigative reports and being involved in interviews. However, the Seventh Circuit concluded that most of this alleged conduct was just as consistent with lawful conduct as with wrongdoing. Accordingly, without more, the allegations were too vague to provide notice to the defendants of the contours of claims. All such allegations could be ignored because they did not give the defendants notice of what they had done that amounted to a due process claim.

One paragraph, in contrast, did not suffer from such deficiencies. It read: "Plaintiff is informed, believes and alleges that the Defendants while acting in concert . . . did knowingly, intentionally and maliciously prosecute Plaintiff . . . in retaliation for Plaintiff . . . exercising rights and privileges under the Constitutions and laws of the United States and State of Illinois." Thus, in that paragraph, the plaintiff had specifically pleaded personal involvement by specifying all the defendants and describing the allegedly unlawful conduct. Nonetheless, the Seventh Circuit found that the paragraph failed under *Iqbal* because it was merely a formulaic recitation of the cause of action and nothing more. It did not put the defendants on notice of what they actually might have done to violate the plaintiff's rights.

Because the plaintiff had failed to ground his legal conclusions in a sufficiently plausible factual basis, the district court was correct to dismiss the claims. The court of appeals affirmed the judgment of the district court.

Comment. The Seventh Circuit's analysis makes clear that conclusory allegations of wrongdoing will not do. However, a plaintiff is left with a huge problem. The plaintiff will need to prove that he was fired in retaliation for expressing his view of support of a candidate for parole, a right that would appear to be protected by the First Amendment. To a layman, it would seem that the defendants ought to know what the plaintiff thinks they did wrong. The layman's response would be something like -- no: you were fired for other legitimate reasons. So, what more does the court want to see? And, more importantly, how can the plaintiff get that "more" without discovery into the materials that will lead to the thought process of the defendants?

The Seventh Circuit's articulation of the Supreme Court's cases is correct, and its application of them in *Brooks* is unsurprising given its articulation. In sum, therefore, what is most important about this case is that it shows that the Seventh Circuit will apply *Twombly* and *Iqbal* faithfully.

The Ninth Circuit's Take on Post-*Iqbal* Pleading. In *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 2009 U.S. App. LEXIS 15694 (9th Cir. July 16, 2009), the Ninth Circuit adopts an approach to the "plausibility" standard developed by the Supreme Court in *Twombly* and in *Iqbal*, and concludes that under this standard the plaintiffs had not alleged a plausible claim of discrimination in violation of the First Amendment. However, in contrast to the Seventh Circuit, it provides a bit more guidance in terms of how a plaintiff can comply with the standard, and also clarifies that courts should be sensitive to the need to provide plaintiffs with the opportunity to plead as they adjust to the post-*Iqbal* world.

Background and Procedural History. *Moss* was a civil rights class action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* [403 U.S. 388, 397, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)]. The plaintiffs alleged that U.S. Secret Service agents violated their constitutional rights when they forcibly relocated a demonstration critical of then-President George W. Bush, while leaving a nearby pro-Bush demonstration undisturbed. They claimed that the Secret Service agents acted pursuant to an official but secret policy. The complaint sought both damages and prospective relief.

The defendants filed a motion to dismiss based on qualified immunity, or in the alternative for summary judgment. The district court dismissed some of the claims and defendants, but concluded that the plaintiffs had pleaded a violation of clearly established First Amendment law by the individual Secret Service agents.

Pleading Standard Under *Twombly* and *Iqbal*. The Ninth Circuit began by reviewing the recent developments in the Supreme Court's pleading jurisprudence. First, it discussed *Bell Atlantic Corp. v. Twombly*, in which the Supreme Court held that an antitrust plaintiff must plead a set of facts "plausibly suggesting (not merely consistent with)" a Sherman Act violation to survive a motion to dismiss. The Court cautioned that it was not outright overruling *Conley v. Gibson* [355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)] but explained that *Conley's* oft-cited maxim that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," was "best forgotten" as an incomplete, negative gloss on an accepted pleading standard.

The Ninth Circuit then turned to *Iqbal*, which elaborated on *Twombly's* applicability in the context of a motion to dismiss based on qualified immunity. *Iqbal* made clear that *Twombly's* "plausibility" standard applies to pleadings in civil actions generally and is not limited to the antitrust context. The Ninth Circuit picked up on the Supreme Court's admonishment that bare assertions amounting to nothing more than a "formulaic recitation of the elements" of a cause of action are not entitled to the assumption of truth that is afforded the plaintiff's allegations when deciding a motion to dismiss. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. This standard asks for more than a sheer possibility that a defendant has acted unlawfully --facts that are "merely consistent" with a defendant's liability are not sufficient.

In sum, the Ninth Circuit said, for a complaint to survive a motion to dismiss, the non-conclusory "factual content," and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.

Claims Were Not "Plausible." The plaintiffs alleged that the agents engaged in unconstitutional viewpoint discrimination—that is, they were attempting to suppress a particular view about a subject—when they ordered state and local police to move the anti-Bush demonstrators. The question, then, was whether the plaintiffs' allegations that the agents ordered the relocation because of its message were "plausible." Following *Iqbal*, the Ninth Circuit began by "identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." The complaint here contained a bald allegation of impermissible motive that, standing alone, was conclusory. The same was true of the plaintiffs' allegation that, in ordering the relocation of the demonstration, the agents were acting under a secret policy of suppressing speech critical of the President. These allegations did nothing to enhance the plausibility of the viewpoint discrimination claims.

The complaint presented two separate non-conclusory factual allegations in support of the claims. First, the plaintiffs alleged that the agents ordered the relocation of their demonstration, but left a similarly situated pro-Bush demonstration undisturbed. However, the facts in the complaint showed that the agents instructed state and local police to move the anti-Bush protestors to a location situated about the same distance from the venue where the President was dining as the other demonstrators, thereby establishing a consistent perimeter around the President. This was not a plausible allegation of disparate treatment. The complaint also alleged that the demonstrators were subjected to abusive police tactics by the state and local police, but nowhere did the complaint allege that the federal agents had anything to do with this behavior. Second, the complaint alleged that diners and guests inside the dining venue were not subjected to security screening or asked to leave the premises, despite their close proximity to the President. However, differential treatment of diners and guests in the dining venue, who did not engage in expressive activity of any kind, offered little if any support for an inference of improper motive by the agents.

The Ninth Circuit concluded that the complaint failed to plead facts plausibly suggesting a colorable *Bivens* claim against the agents. The facts did not rule out the possibility of viewpoint discrimination, and thus were consistent with a viable First Amendment claim, but mere possibility is not enough under the *Twombly/Iqbal* standard.

Plaintiffs Were Granted Leave to Amend. The plaintiffs argued that, because intervening Supreme Court decisions had significantly changed pleading standards, they should be given leave to amend to meet the new standards. The Ninth Circuit agreed. Prior to *Twombly*, a complaint would not be found deficient if it alleged a set of facts *consistent* with a claim entitling the plaintiff to relief. Under the Court's latest pleadings cases, however, the facts alleged in a complaint must state a claim that is plausible on its face. This is a significant change, the Ninth Circuit said, with broad-reaching implications. Having initiated the present lawsuit without the benefit of the Court's latest pronouncements on pleadings, the Ninth Circuit appropriately allowed the plaintiffs to supplement their complaint with factual content required by *Twombly* and *Iqbal*.

Comment. Like the Seventh Circuit, the Ninth Circuit noted that the Supreme Court in *Erickson* had reiterated that notice pleading is still the rule. At the same time, however, the Ninth Circuit seems to take a somewhat more restrained approach to the scope of *Iqbal* and *Twombly*, than the Seventh Circuit had. Indeed, it stated that *Twombly* should not be read as effecting a sea change in the law of pleading. Perhaps the *Moss* case was an easier case for dismissal than *Brooks* in the sense that it might not have survived a motion to dismiss in the pre-*Iqbal* age. Looking at the facts, it appeared that the plaintiffs were treated no differently than other groups that turned out that day, thereby seriously undercutting their claims of unconstitutional conduct. Additionally, no facts linking the federal officials' conduct to the state officials' wrongful conduct were alleged. What other observable facts might be alleged that would not undercut the claims? Perhaps witnesses could have provided the facts such as that the federal officials were heard or seen ordering the state officials to act in certain ways. Or, perhaps they observed the state officials acting unlawfully but failed to take action to protect the plaintiffs.

Additionally, the Ninth Circuit opened the door to the possibility that the plaintiffs may be able to replead successfully by pulling out more facts that show viewpoint discrimination.

Nonetheless, just as it would be necessary to take discovery of the defendants to obtain the type of facts needed to draft a complaint that meets the new pleading test in *Brooks*, the plaintiffs in *Moss* might need such discovery as well. Thus, the conundrum confronting plaintiffs.

Putting it All Together. Perhaps *Twombly* and *Iqbal* can be seen as special cases where public policy considerations give rise to heightened concerns about ensuring the "plausibility" of the cases before letting them go forward. In *Twombly*, the concern was about the enormous resources involved in defending against an antitrust case. In *Iqbal*, it was national security concerns, and, perhaps, a judicial hostility to *Bivens* actions. It might have been possible to think that *Twombly* and *Iqbal* will affect only cases where these types of public policy considerations are in issue. However, district court judges now have an approach that enables them to play the gatekeeper by using their judgment that allegations are not sufficient to be entitled to the presumption of truth, and even if they are, they do not present a

plausible claim for relief, or that they are "sketchy," as the Seventh Circuit put it.

Although both *Brooks* and *Moss* are civil rights cases, like *Iqbal*, it is noteworthy that Seventh and Ninth Circuits did not mention the types of policies that were enunciated by the Supreme Court. They were both rather short opinions. In that sense, they go beyond any limiting factor that could be gleaned from the Supreme Court's opinions. Now that the Supreme Court has endorsed a variable standard of specificity that depends on policy concerns, it is likely that any case involving intent, or any case in which important relevant evidence is in the hands of the defendant, may well fall prey to *Iqbal* and its progeny.

Iqbal and *Twombly* clearly appear to be a defendant's dream come true. Amendments to Rule 11 in 1983 had an impact on cutting back on frivolous cases, and the Supreme Court's 1986 Trilogy of summary judgment cases made it easier for defendants to get summary judgment. But, plaintiffs still had the opportunity for discovery. Moreover, some judges remained reluctant to grant summary judgment. Additionally, Rule 11 was watered down a bit again in 1993. So, the costs of discovery to defendants still loom large. The Supreme Court made clear in both *Twombly* and *Iqbal* that it believed that consideration of costs was relevant even at the pleading stage. The Court is saying -- why let plaintiffs take up defense and judicial resources when they aren't likely to win? The problem is that this approach turns the notice pleading/liberal discovery regime on its head. Stay tuned as the Court, the federal rule making process and Congress deal with whether we can still afford this regime.

RELATED LINKS: For more information see Moore's Federal Practice

- 2 Moore's Federal Practice (3d Ed.) 8.04[1];
- 2 Moore's Federal Practice (3d Ed.) 12.34[1]

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Baskauskas: Should a Pending State Appeal Prevent the Rooker-Feldman Doctrine

2009 Emerging Issues 4532

Edward L. Baskauskas on Why a Pending State-Court Appeal Should Not Prevent Application of the Rooker-Feldman Doctrine

By Edward L. Baskauskas

November 3, 2009

SUMMARY: The Eleventh Circuit has held that if an appeal from a state-court judgment remains pending in state court when the loser in the state trial court commences a federal suit, the Rooker-Feldman doctrine does not bar the federal suit. This holding ignores the basic principle underlying the Rooker-Feldman doctrine: the Supreme Court is the only federal court authorized to exercise appellate jurisdiction over state courts.

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ARTICLE: *Rooker-Feldman Doctrine*

The *Rooker-Feldman* doctrine embodies the general principle that lower federal courts lack jurisdiction over claims seeking review of state-court judgments. See *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923); see also 28 U.S.C. §§ 1257(a), 1291, 1331 (among federal courts, only Supreme Court has appellate jurisdiction over state courts). In *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, the Supreme Court described *Rooker-Feldman* as a narrow doctrine, confined to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005).

Eleventh Circuit's Position

In two recent decisions, the Eleventh Circuit has held that, for *Rooker-Feldman* purposes, a state-court judgment is not "rendered before the district court proceedings commenced" if a state-court appeal remains pending when the state-court loser files a federal suit.

Nicholson v. Shafe, 558 F.3d 1266 (11th Cir. 2009), began with a state-court action seeking an accounting under state law of profits relating to a copyright claim. After the state trial court entered judgment for the defendants, the plaintiffs appealed. While that appeal was pending, the state-court plaintiffs filed suit in federal court, seeking an accounting under federal law. The district court dismissed the action *sua sponte* based on lack of jurisdiction, applying

the *Rooker-Feldman* doctrine. A panel of the Eleventh Circuit reversed. The appellate panel noted that the Supreme in *Exxon Mobil* made it clear that, for *Rooker-Feldman* to apply, the state court must have rendered judgment before the district court proceedings commenced. In *Exxon Mobil*, it was easy to see that this requirement had not been met, because the federal action was filed before the jury verdict in the state-court action. In *Nicholson*, however, the federal action was filed after the state trial court had entered judgment but not before the end of the state appeal process. Stating that "the relevant inquiry is whether the state proceedings have ended," the Eleventh Circuit panel held that state proceedings have not ended for purposes of *Rooker-Feldman* if an appeal from the state court judgment remains pending at the time the plaintiff commences the federal-court action. Accordingly, because the proceedings in the state courts remained pending on appeal when federal action was filed, the Eleventh Circuit panel concluded that the *Rooker-Feldman* doctrine did not deprive the federal district court of jurisdiction. The court of appeals therefore reversed the district court's judgment of dismissal and remanded for further proceedings. *Nicholson v. Shafe*, 558 F.3d 1266, 1275-1279 (11th Cir. 2009).

A different panel of the Eleventh Circuit applied the same reasoning in *Green v. Jefferson County Commission*, 563 F.3d 1243 (11th Cir. 2009). In that case, a group of county employees filed suit in state court against the county and county retirement system, seeking declaratory and injunctive relief against the defendants' adoption of a resolution that reduced the plaintiffs' health benefits and sick-leave retirement credits. The state trial court granted the defendants' motion for summary judgment, and the plaintiffs appealed to the state supreme court. While that appeal was pending, the plaintiffs filed suit in federal district court, again seeking relief from the defendants' resolution. The district court granted summary judgment in favor of the defendants, citing the *Rooker-Feldman* doctrine as well as the *Younger* abstention doctrine. A panel of the Eleventh Circuit disagreed with the trial court on the applicability of *Rooker-Feldman*. Applying the holding of *Nicholson*, the appellate panel concluded that, because the state-court appeal was still pending when the *Green* plaintiffs filed their federal suit, "this case was not a *de facto* appeal from a final state court judgment and the *Rooker-Feldman* doctrine did not divest the federal district court of jurisdiction." *Green v. Jefferson County Commission*, 563 F.3d 1243, 1250 (11th Cir. 2009). (The appellate panel did, however, affirm the district court's judgment on res judicata grounds. *Green v. Jefferson County Commission*, 563 F.3d 1243, 1252-1254 (11th Cir. 2009).)

The First and Tenth Circuits had come to similar conclusions in cases cited by the *Nicholson* panel. See *Guttman v. Khalsa*, 446 F.3d 1027, 1031-1032 (10th Cir. 2006) (under *Exxon Mobil*, *Rooker-Feldman* does not bar federal suit filed before all state-court appeals have been exhausted); *Federacion de Maestros de Puerto Rico v. Junta de Relaciones del Trabajo de Puerto Rico*, 410 F.3d 17, 24-27 (1st Cir. 2005) (state proceeding ends for *Rooker-Feldman* purposes when (1) highest state court in which review is available has affirmed judgment and nothing is left to be resolved; (2) state action has reached point where neither party seeks further action; or (3) state-court proceedings have finally resolved all federal questions in litigation, and only state-law questions or purely factual questions remain to be litigated). An Eighth-Circuit case cited by the *Nicholson* panel had not really faced the same issue. See *Dornheim v. Sholes*, 430 F.3d 919, 924 (8th Cir. 2005) (*Rooker-Feldman* is inapplicable if state litigation is ongoing when federal plaintiff commences action; one state trial-court final judgment was entered on same day federal suit was filed, another state trial-court disposition was filed 13 days later, and both rulings were appealed).

The Problem with the Eleventh Circuit's Analysis

The Eleventh Circuit's analysis in *Nicholson* and *Green* overlooked the underlying principle (noted in both opinions, but not used in either panel's analysis) that the Supreme Court is the only federal court authorized to exercise appellate jurisdiction over state courts. See 28 U.S.C. § 1257(a). If a federal action truly alleges an injury caused by a state trial court's judgment and asks the federal district court to review and reject that judgment (in contrast to a federal suit that simply reasserts a claim that the defendant's conduct injured the plaintiff), then such review should be outside the jurisdiction of the federal district court, regardless of whether the state-court judgment is the subject of a concurrent state-court appeal. See 18 *Moore's Federal Practice* (3d Ed.) § 133.30[3][c][ii] (taking the position that lower federal courts lack jurisdiction to review interlocutory state-court decisions and judgments of lower state courts as well as judgments of state courts of last resort); see also Thomas D. Rowe, Jr., & Edward L. Baskauskas, "Inextricably

Intertwined" Explicable at Last? Rooker-Feldman Analysis After the Supreme Court's Exxon Mobil Decision, 1 Fed. Cts. L. Rev. 367, 390 (May 2006) (same).

The Eleventh Circuit's formulation of the issue in *Nicholson* ("the relevant inquiry is whether the state proceedings have ended," *Nicholson v. Shafe*, 558 F.3d 1266, 1277 (11th Cir. 2009)) glosses over a subtle difference between two descriptions of the scope of *Rooker-Feldman* set forth in *Exxon Mobil*. The Supreme Court's *Exxon Mobil* opinion describes the limited scope of *Rooker-Feldman* twice, first referring to "state-court judgments rendered before the district court proceedings commenced" and later referring to the filing of a "suit in federal court after the state proceedings ended." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 291, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005) (emphasis added). It remains to be seen which of these descriptions more precisely captures the Supreme Court's meaning. However, the more plausible reading of *Exxon Mobil* would be that "state proceedings" (second description) refers to proceedings in the state trial court that culminate in a "judgment[]" of the trial court (first description). Under that reading of *Exxon Mobil*, a lower federal court would lack jurisdiction over a suit seeking to review and overturn a state trial court's judgment, whether or not state-court appeals are pending--a result that would be in keeping with the basic principle that lower federal courts have no appellate jurisdiction over state courts. See *Field Auto City, Inc. v. General Motors Corp.*, 476 F. Supp. 2d 545, 552-553 (E.D. Va. 2007) ("Simply put, there is no sound reason to preclude the operation of *Rooker-Feldman* where a state trial court has rendered judgment, but state appeals are not yet complete when the federal action is filed.").

In both *Nicholson* and *Green*, the federal plaintiffs had also been the plaintiffs in state court, and in federal court they alleged injuries resulting not from the state-court judgments, but from the acts of the defendants. So in each case the Eleventh Circuit could have reached the same result simply by recognizing that the federal suit in each case was not an impermissible de facto appeal that would implicate *Rooker-Feldman*. See *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 291, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005) (*Rooker-Feldman* applies only to federal actions complaining of injuries caused by state-court judgments).

Lesson

For counsel representing a federal defendant, *Nicholson* and *Green* illustrate the importance of making precise arguments tethered to the policies and principles underlying the *Rooker-Feldman* doctrine. Historically, the doctrine has not been well-understood by lower courts; the Supreme Court's *Exxon Mobil* decision was an attempt to clarify the doctrine and to rein in some of the lower courts' far-reaching and controversial applications of the doctrine. See *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 283, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005). But even though it emphasized the limited scope of *Rooker-Feldman*, *Exxon Mobil* did not erase the underpinning of the doctrine: Lower federal courts still lack appellate jurisdiction over state courts. Logically, therefore, *Exxon Mobil* should not be read as creating an opening for a lower federal court to hear a de facto appeal from a state trial-court judgment whenever a state-court appeal is pending.

Thus, when faced with a contention that *Rooker-Feldman* is inapplicable because of the pendency of a state-court appeal, counsel for the federal defendant should take pains to focus the district court's attention on the basic principle that lower federal courts have no appellate jurisdiction to review any state-court judgment. See 28 U.S.C. §§ 1257(a), 1291, 1331. Also, defendant's counsel should explain very clearly why the federal suit should be classified as a de facto appeal of the state trial court's judgment, i.e., a suit in which the plaintiff is essentially complaining of an injury caused by the state-court judgment, rather than an injury caused by the defendant's conduct and not remedied by the state court. See *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 291, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005) (*Rooker-Feldman* applies only to federal actions complaining of injuries caused by state-court judgments).

For counsel representing a federal plaintiff, opposition to a dismissal motion under *Rooker-Feldman* is more solidly grounded if counsel can show that the federal action is not a de facto appeal, rather than focusing on whether a state-court appeal of the state trial court's judgment is pending. Counsel should explain, for example, that the federal suit complains of an injury caused by the defendant's conduct, rather than an injury caused by the state court's judgment.

This is typically the case when the federal plaintiff was also the plaintiff in state court.

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Mark Vespole on Stengart v. Loving Care Agency, 408 N.J. Super. 54 (2009)

2009 Emerging Issues 4340

Mark Vespole of Tressler LLP on *Stengart v. Loving Care Agency, 408 N.J. Super. 54 (App. Div. 2009)*: Employee Emails Through Personal Email Account Protected by Attorney-Client Privilege

By Mark Vespole

September 25, 2009

SUMMARY: What should an attorney do if, in the course of forensic preservation of electronic discovery for a pending lawsuit, communications between a former employee and his attorney regarding the very same lawsuit are discovered? According to *Stengart*, regardless of the existence or specific text of a published electronic communications policy, such communications will almost always be protected by the attorney-client privilege.

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ARTICLE: What happens when a 20-year-old technology, electronic communication, clashes with a venerable 400+ year-old legal principle, the attorney-client privilege? In *Stengart v. Loving Care Agency, 408 N.J. Super. 54, 973 A.2d 390, 2009 N.J. Super. LEXIS 143 (App. Div. 2009)*, appeal granted, *200 N.J. 204, 976 A.2d 382, 2009 N.J. LEXIS 922 (2009)*, the Appellate Division reversed a trial court ruling that a former employee had no expectation of privacy in email correspondence to her attorney from a personal, password-protected, web-based email account, because it was sent through her employer's computer and network server. This case has enormous ramifications, particularly in employment litigation.

Background. Plaintiff was the Director of Nursing for Loving Care Agency, a home care services company, from its inception in 1994 until December 2007, when she resigned from her position. In February 2008, plaintiff sued her former employer and several of its directors and officers for constructive discharge, based upon a hostile work environment. In April 2008, for the purpose of preserving potentially relevant electronic discovery, Loving Care's attorneys arranged to obtain a copy of the hard drive of the laptop computer that had been issued to plaintiff while she was an employee. The forensic imaging process disclosed the contents of temporary internet files, which included emails sent by plaintiff to her attorney before her resignation through her personal, password-protected Yahoo email account. The emails contained information about her anticipated lawsuit against Loving Care.

The employer's counsel took the position that these emails did not have to be disclosed and returned to plaintiff's attorney because of Loving Care's electronic communications policy, published in its employee handbook. That policy, among other things, stated that: "Email and voice mail messages, internet use and communication and computer files are considered part of the company's business and client records . . . [and] are not to be considered private or personal to any individual employee." The policy also stated that occasional personal use of email is permitted, except to solicit for

outside business ventures. *408 N.J. Super. at 60.*

Loving Care first disclosed its possession of plaintiff's emails to her attorney when answering plaintiff's interrogatories. In response to the disclosure, plaintiff's counsel asserted the attorney-client privilege and demanded the return and/or destruction of all copies of the emails between him and his client, in accordance with Rule 4.4 of the New Jersey Rules of Professional Conduct and N.J. Court Rules R. 4:10-2(e)(2). Citing to the employee handbook, Loving Care's attorney refused to return or destroy the emails, taking the position that plaintiff waived the attorney-client privilege by using the company's computer, notwithstanding her knowledge of the electronic communications policy. The issue came before the trial court on an Order to Show Cause filed by plaintiff's attorney, which was eventually converted into a notice of motion. The motion sought return and destruction of all copies of the attorney-client emails, the disqualification of Loving Care's counsel and sanctions.

Trial Court Decision: Privilege Waived. The trial court held on February 5, 2009 that "when an employee has knowledge of the employer's electronic communication policy which adequately warns that any and all internet use and communication conducted on the employer's computer is not private to the employee and warns that E-mail, internet use and communication and computer files are considered part of the company's business and client records, such communications are not protected by such attorney client privilege and are not considered to be private or personal to any individual employee." In support of its decision, the trial court relied upon decisions by New Jersey and New York courts holding that the attorney-client privilege does not apply to employees' email to their attorneys sent through an email account issued by their employer and over their employer's servers, if the employer has a policy warning employees that email from company accounts is subject to review. The trial court also relied upon a New York federal district court decision, which decided that employee/attorney email sent via a personal, password-protected, web-based email account, but through the employer's computer and server, is not protected by the attorney-client privilege, while acknowledging a contrary holding by a Massachusetts trial court. The employee's use of a personal, password-protected, web-based email account makes Stengart a case of first impression for any New Jersey court.

The trial court stated that "whether an employee has a reasonable expectation of privacy in a communication made on a work issued computer is based upon the degree of notice the employer has provided to its employee regarding their right to privacy in electronic communications." The trial court cherry picked snippets of Loving Care's electronic policy to support its conclusion that plaintiff had no reasonable expectation of privacy. The trial court found Loving Care's policy to be restrictive because, while not prohibiting personal use altogether, it put employees on notice that all internet based communications were not private, that the employer's technology resources were to be used for business related purposes, particularly during work hours, and specifically prohibited use of email to conduct job searches or other employment activities that were not company related.

Plaintiff argued on the motion before the trial court that she was not aware of the company's electronic communications policy, and that even if she was aware of the policy, it did not apply to executive employees such as herself. The trial court found, however, that plaintiff at least must have had constructive knowledge of the policy, because of her long tenure with the company since its inception, and based upon opposing certifications stating that plaintiff was partially responsible for creating, drafting and distributing the employee handbook. With regard to plaintiff's claim that she was exempt from any policy because it only applied to administrative staff, the trial court found this to be "implausible", based upon the absence of any language in the employee handbook exempting executive employees, and an opposing affidavit from the company's CEO that the employee handbook applied to all company employees.

Finally, the trial court addressed plaintiff's application for sanctions against the employer's law firm based upon its alleged noncompliance with N.J. R.P.C. 4.4. In light of its ruling that plaintiff's emails waived the attorney-client privilege by virtue of her knowledge of Loving Care's electronic communications policy, the Court found no basis for a violation of R.P.C. 4.4 or sanctions against the employer's attorneys. Specifically, the trial court held that this case did

not present the kind of inadvertent disclosure of privileged documents contemplated by R.P.C. 4.4(b), nor did it encompass the kind of malicious method of obtaining evidence prohibited by R.P.C. 4.4(a).

Appellate Division Reverses. Undoubtedly given the gravity and novelty of the issues, plaintiff's motion for leave to appeal was granted by the Appellate Division, which reversed the trial court's ruling in a lengthy reported opinion on June 26, 2009. In short, the Appellate Division rather vociferously disagreed with the trial court on almost every issue. The Appellate Division tersely summed up the issue before it as well as its holding, as follows:

"In this appeal, we address whether workplace regulations converted an employee's emails with her attorney--sent through the employee's personal password-protected, web-based email account, but via her employer's computer--into the employer's property. Finding that the policies undergirding the attorney-client privilege substantially outweigh the employer's interest in enforcement of its unilaterally imposed regulation, we reject the employer's claimed right to rummage through and retain the employee's emails to her attorney." *408 N.J. Super. at 58-59.*

The Appellate Division chastised the trial court reaching conclusions regarding disputed factual issues without holding an evidentiary hearing with live testimony. The Appellate Division decision recounted a significantly broader rendition of the facts than what was reported in the trial court opinion. The Appellate Division noted that the record on appeal included several drafts or versions of the company's electronic communications policy without any certainty as to which, if any, applied to the plaintiff. This scenario was found to support plaintiff's certification that there were at least 5 versions of the employee handbook, none of which had been adopted as of the date of her resignation. The Appellate Division was also bothered by the fact that the employer did not produce a signed acknowledgement from plaintiff that she had received and understood the employee handbook, which is a customary practice by employers. The Court acknowledged that while the current CEO submitted proof that the employee handbook applied to plaintiff, plaintiff produced a certification from a former executive which supported her contrary position.

Despite the Court's careful rendition of multiple factual disputes, it proceeded under the assumption that the electronic communications policy proffered by the employer was in effect and applied to the plaintiff, and went on to examine whether the policy applied to the emails at issue. Again, squarely rejecting the trial court's interpretation, the Appellate Division found that the policy's statement that email, computer files and internet use are not private or personal was irreconcilable with that portion of the policy which permitted occasional personal use of the company's email system. The Appellate Court further recognized that while many portions of the policy objectively vindicated legitimate business interests, there was nothing in the policy which clearly conveyed the proposition that emails on the company computer through a personal, password-protected, web-based email account become company property.

Despite its vehement disagreement with the trial court, the Appellate Division proceeded under the assumption that the lower court's interpretation of the electronic communications policy was correct, and determined the enforceability of the policy by weighing the employer's right to impose rules for conduct in the workplace against the public policy rationale for the attorney-client privilege.

The Court explored the relatively recent history of judicial enforcement of employers' unilateral rules and regulations by means of an employee handbook, and came to the conclusion that "the salutary nature of employee handbooks has never been limitless." *Id. at 68.* In order to be enforceable by New Jersey courts, the conduct sought to be regulated through an employee handbook must be reasonably related to the legitimate business interests of the employer. On this issue the Court held that:

"A policy imposed by an employer, purporting to transform all private communications into company property--merely because the company owned the computer used to make private communications or used to access such private information during work hours--furthers no legitimate business interest. . . . We thus reject the philosophy buttressing the trial judge's ruling that, because the employer buys the employee's energies and talents during a certain portion of each workday, anything that the employee does during those hours becomes company property. Although we recognize the considerable scope of an employer's right to govern conduct and communications in the workplace, the

employer's interest in enforcing its unilateral regulations wanes when the employer attempts to reach into purely private matters that have no bearing on the employer's legitimate interests." *408 N.J. Super. at 72-73*.

Finally, the Appellate Division balanced the employer's improbable interest in plaintiff's private communications against the attorney-client privilege. The Court concluded that when the attorney-client privilege applies, it must be given as broad a scope as its rationale requires. The Appellate Division found no basis for the trial court's conclusion that plaintiff's use of her employer-issued laptop constituted a waiver of the attorney-client privilege. Finding that the trial "judge exhibited inadequate respect for the attorney-client privilege" the Court held:

"Even when we assume an employer may trespass to some degree into an employee's privacy when buttressed by a legitimate business interest, we find little force in such a company policy when offered as the basis for an intrusion into communications otherwise shielded by the attorney-client privilege." *408 N.J. Super. at 74-75*.

The Appellate Division remanded to the trial court to decide the issue of whether or not the employer's attorney should be disqualified or sanctioned for failing to abide by N.J. R.P.C. 4.4(b). The Appellate Court also ordered that Loving Care return all emails between plaintiff and her attorney, and delete all electronic copies of the emails.

As it turned out, shortly after the employment discrimination lawsuit was filed, there was a separate Chancery lawsuit filed by Loving Care Agency against Stengart and her new employer for engaging in a competing business in violation of a restrictive covenant. The Appellate Division took the somewhat peculiar step of specifically ordering that the remand issues be decided by the Chancery judge in the restrictive covenant case, because the motion judge on the attorney-client privilege issues "may yet retain a commitment to the determination she previously made on the issues we have now decided differently." *408 N.J. Super. at 77*.

Motion for Leave to Appeal Granted. For defense counsel in this scenario, the moral of the story thus far appears to be that it is better to err on the side of compliance with N.J. R.P.C. 4.4(b) and disclose any attorney-client emails sooner than later. However, the New Jersey Supreme Court granted leave to appeal in *Stengart* on July 29, 2009, and thus we may not have heard the last word yet on the electronic communications policy vs. attorney-client privilege dispute.

RELATED LINKS: For additional discussion of employee emails and attorney-client privilege, see

- MB 1-2A Computer Law § 2A.12;
- Note: Clicking Away Confidentiality: Workplace Waiver of Attorney-Client Privilege, 60 Fla. L. Rev. 1179 (2008).

For additional LexisNexis Emerging Issues Analyses on this subject, see

- John K. Rabiej on Discovery of Employee Privileged Communications Sent or Stored Using Employee's Computer System, 2009 Emerging Issues 4195 (Sept. 1, 2009);
- Bisceglie on Privilege Issues in E-discovery under New York Law in *Scott v. Beth Israel Medical Center Inc.*, 2007 NY Slip Op. 27429, 847 N.Y.S.2d 436, 2008 Emerging Issues 2112 (Aug. 7, 2008);
- Harrison and Ong on E-mail Monitoring, 2008 Emerging Issues 1949 (Feb. 26, 2008).

See also generally

- Mark R. Vespole, 1-7 LexisNexis Practice Guide New Jersey Civil Discovery § 7.06 (2009).

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Reasonableness Standard Governing Discovery Obligations and Preservation Duty

2009 Emerging Issues 4250

John K. Rabiej on the Reasonableness Standard Governing Discovery Obligations and Preservation Duty

By John K. Rabiej

September 10, 2009

SUMMARY: A standard of reasonableness should guide both lawyers in complying with ESI preservation duties and judges in ruling on disputes regarding the preservation of ESI. However, since there are no concrete standards governing the preservation duty, it is left to a judge's individual assessment of reasonableness. Two recent cases highlight the tensions involved in such high-stakes decision-making.

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ARTICLE: Case law is replete with holdings requiring parties to comply strictly with preservation duties. But preserving all non-privileged electronically stored information (ESI), especially ESI that is not reasonably accessible, like ESI on backup tapes, can be extraordinarily burdensome and costly. In recognition of the burden and the likelihood that not-reasonably-accessible ESI typically is marginally valuable, the federal rules block or temper the imposition of spoliation sanctions if: (1) the deleted ESI is not relevant; (2) the deleted ESI is available from other sources; or (3) the ESI is deleted in accordance with routine, good-faith business operations. Lawyers and judges are required to exercise much care when applying these three conditions in determining what ESI must be or should have been preserved. None of the three conditions sets out a bright-line test, and a "wrong" assessment of any of the three conditions, which is evaluated in hindsight, can have serious consequences. The two following cases highlight some of the tensions involved in such high-stakes decision-making.

Facts of Both Cases: In *Southeastern Mech. Serv., Inc. v. Brody*, 2009 U.S. Dist. LEXIS 69830 (M.D. Fla. July 24, 2009), the court denied defendant's request to impose a sanction of an adverse instruction on the plaintiff for failing to adopt an appropriate litigation hold and failing to suspend overwriting of its backup tapes. The defendant company claimed that the plaintiff's former employee deleted relevant emails immediately before leaving the company. The plaintiff's information technology manager testified at a deposition that he had examined the former employee's accounts a few days after the employee departed and noted that emails had been deleted from his computer. At a later proceeding, the plaintiff company admitted that all of the employee's Outlook email files had been deleted. The plaintiff also acknowledged that backup tapes on its company servers were automatically overwritten every two weeks. Though it should have been aware that the backup tapes would contain all emails deleted by the employee within two weeks of his departure, the plaintiff failed to take any steps to suspend the overwriting program, which would have prevented the permanent destruction of the employee's emails.

The court found that the former employee was a key player in the litigation, his deleted emails may have been relevant, and the plaintiff company had a duty to preserve relevant evidence at the time its employee departed. It further ruled that the plaintiff "should have put in place a litigation hold for key employees to ensure the preservation of relevant documents and to prevent the automatic overwriting of backup tapes every two weeks." *Id.* at *10. Nonetheless, the court declined to sanction the plaintiff because the defendant showed neither that the plaintiff acted in bad faith nor that any of the deleted emails contained crucial evidence. It also ruled that the defendant's later specific request to suspend the overwriting of backup tapes made several months after the employee departed was too late to demonstrate the plaintiff's bad faith because any potentially relevant emails deleted by the former employee would have been permanently lost two weeks after his departure.

The apparent lesson from *Southeastern* is that the defendant waited too long to request the plaintiff to suspend its overwriting program. It should have made the request soon after commencing the lawsuit. If it had done so promptly, the plaintiff would have been on notice, and its failure under those circumstances to suspend its overwriting program immediately would have demonstrated bad faith, making itself vulnerable to sanction.

Now we turn our attention to *Bellinger v. Astrue, Comm'r of Soc. Sec.*, 2009 U.S. Dist. LEXIS 71727 (E.D. N.Y. Aug. 14, 2009). In *Bellinger*, the court denied the plaintiff's motion to compel a response to interrogatories and a motion to sanction the defendant for its failure to respond. Plaintiff was seeking detailed information on the location of ESI and information regarding the defendant's litigation hold. As part of its interrogatories, the plaintiff requested information on the defendant's protocol to preserve ESI. In particular, it asked the defendant whether it was aware of any deletion of ESI and, if so, what efforts were made to recover the deleted ESI--the same type of information that would have helped inform the defendant in *Southeastern* to demand that the plaintiff suspend its overwriting of backup tapes. The court in *Bellinger* declined to grant the plaintiff's motion for such information because, among other things, it found the information to be "both very detailed and technically complex and it is clear that responding to them would be extremely burdensome."

Tension between cases: The defendant in *Southeastern* was unsuccessful because it waited too long to notify the plaintiff of its duty to preserve and recover deleted ESI. The defendant learned too late that ESI on both active databases and backup tapes had been deleted. It should have requested information, similar to the information requested in *Bellinger*, about the plaintiff's computer systems and record-retention practices early in the litigation. The types of information requested in the interrogatories of the plaintiff in *Bellinger* would have informed the defendant in *Southeastern* of any ongoing deletion of ESI on active databases and backup tapes. In much the same way, this type of information would have helped the plaintiff in *Bellinger* decide whether potentially relevant ESI was being deleted and whether it should request the defendant to suspend its overwriting of backup tapes. But the court denied the plaintiff's motion to compel a response because the interrogatories requested too much information.

In *Southeastern*, the defendant could not demonstrate the plaintiff's bad faith in failing to comply with its preservation duty because it did not have sufficient information to request the plaintiff to suspend overwriting the ESI backup tapes of a key player. In *Bellinger*, the plaintiff's request for information that would have put it in a position to place the defendant on notice by explicitly demanding suspension of overwriting programs--sufficient to demonstrate bad faith had the defendant continued to proceed deleting relevant ESI--was denied. The juxtaposition of both cases suggests that a party must notify the opposing party promptly to suspend automatic overwriting programs despite being handicapped with little information on which to base the request.

The facts in each case support the respective holdings and explain the apparent anomaly. In *Southeastern*, the overwriting program was part of a routine business operation, subject to the protection of Rule 37(f). In addition, the defendant did not show that it suffered substantial prejudice from the deletion of the ESI. Moreover, no evidence was presented that showed when the ESI was deleted by the departing employee, who could have deleted it well before the preservation duty arose. In *Bellinger*, the plaintiff submitted extensive boilerplate interrogatories that requested virtually all information regarding the defendant's computer system and its operation. Such "standard form" interrogatories can be found in many treatises and manuals on ESI and reflect a comprehensive list of questions, many of which might

individually be potentially valuable in any given case. But, as the court ruled, such comprehensive interrogatories were not appropriate in the instant employee sexual discrimination case, especially because the plaintiff had been provided extensive ESI from earlier discovery requests (amounting to more than 10,000 pages). The court suspected that the filing of the detailed interrogatories in this case was a tactical maneuver, reflecting an underlying antipathy between the parties. Because of these actions, the court went on to admonish the parties to act with greater civility toward each other.

Reconciling both cases: The separate holdings in *Southeastern* and *Bellinger* can be reconciled on the individual facts. Still, the juxtaposition of the two cases highlights the tension between a party's virtually absolute duty to preserve relevant non-privileged ESI and case law that requires the opposing party to specifically alert the other party to preserve selected ESI that is not reasonably accessible as a precondition to imposing a spoliation sanction. On the one hand, the deletion of ESI resulting from automatic overwriting of backup tapes may be proper as part of ongoing routine business operations as recognized under Civil Rule 37(f). On the other hand, the protection against sanctions afforded by the rule is significantly limited to overwriting of backup tapes done in "good-faith." Once a party becomes aware that relevant ESI of a key player on an active database has been destroyed and that the ESI is unavailable from other sources, the responsibility to suspend overwriting of backup tapes containing the ESI is part of its good-faith duty. How can the opposing party alert the party to suspend its overwriting operations without adequate information?

Suspending all or part of the overwriting of backup tapes can be burdensome and is not required in most cases. ESI available on active databases typically is sufficient to satisfy discovery requests and recourse to ESI that is not reasonably accessible, like backup tapes, is the exception. Accordingly, a party must have good reason justifying its request that the opposing party suspend the overwriting of backup tapes. But without adequate information about the other party's computer system and its record retention policies and operations, it may be difficult in many cases to make the proper showing. *Bellinger* and *Southeastern* highlight the tension between the parties' competing interests and duties and provide a fundamental lesson to the bar. Until the limits on a party's preservation duty are more clearly and explicitly delineated by law or rules, the key touchstone remains "reasonableness." And reasonableness can only be determined under the circumstances of each case, which will always vary.

The courts in both *Bellinger* and *Southeastern* applied a standard of reasonableness to decide the ESI issues before them. The information sought in the interrogatories in *Bellinger* can be found in model ESI guidelines of some courts, most notably the District of Maryland, which set out much the same information as the information requested in *Bellinger*. Such extensive information may be appropriate in a complex lawsuit involving large business adversaries, massive amounts of ESI, and potentially huge awards. But the court in *Bellinger* wisely applies a reasonableness standard to the plaintiff's interrogatories. It rejects the party's overly inclusive requests because substantial evidence had already been produced and no showing was made that the requesting party would be substantially prejudiced without receiving the requested information. In *Southeastern*, the plaintiff had a duty to suspend its routine operations overwriting the backup tapes of a key player whose ESI had been deleted on the active database. Sanctioning the plaintiff for failing to comply with its duty was not reasonable under the facts of the case because the plaintiff had not acted in bad faith and no showing was made that the defendant had been substantially prejudiced.

Lessons: Strict compliance with the common-law preservation duty in cases involving ESI can result in unreasonable requirements and unfair outcomes. A standard of reasonableness should guide both lawyers in complying with ESI preservation duties and judges in ruling on disputes regarding the preservation of ESI. It is true that some courts continue, however, to apply the rules governing preservation obligations strictly, resulting in significant awards or sanctions against lawyers who wrongly assess the case. It is very likely, for example, that any number of courts would have ruled contrary to the ruling in *Southeastern* under the facts of the case.

A serious national debate is emerging over the need to develop bright-line, concrete standards governing the preservation duty, instead of relying on an individual's assessment of reasonableness in a particular case. Until that debate is resolved, lawyers and judges will continue to be confronted with difficult judgment calls on what constitutes reasonableness when evaluating what ESI must be preserved and how much information can be asked in a discovery

request. Because no bright-line tests have been uniformly adopted or followed, the developing case law of the jurisdiction in which a lawsuit has been filed will continue to be the dominant source of guidance on the meaning of "reasonableness."

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Discovery of Employee Privileged Communications Using Employer's Computer

2009 Emerging Issues 4195

John K. Rabiej on Discovery of Employee Privileged Communications Sent or Stored Using Employee's Computer System

By John K. Rabiej

September 1, 2009

SUMMARY: Courts have developed an analytical framework to determine whether an employee's expectation of privacy in workplace e-mails is reasonable and sufficient to protect the e-mails from discovery. *Sprenger v. The Rector and Bd. of Visitors of Virginia Tech* used the analysis, but also included a twist that provides a cautionary tale to parties seeking production of an employee's e-mails subject to the confidential marital communications privilege.

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ARTICLE: Employees routinely send or store private e-mails using their employer's computer system. Some of these communications may be privileged and include confidential e-mails to an attorney, a spouse, or a physician. These communications may be subject to a discovery request in litigation involving the employee or, more likely, the employer. *Sprenger v. The Rector and Bd. of Visitors of Virginia Tech*, 2008 U.S. Dist. LEXIS 47115 (W.D. Va. June 17, 2008), offers a good illustration of the issues and analysis that courts rely on to determine whether such employee communications are protected from discovery under the work-product doctrine or under an evidentiary privilege, including the attorney-client, spousal, or patient-physician privilege. It also contains a twist that arises in cases involving confidential marital communications.

Facts of the Case: In *Sprenger*, the plaintiff alleged that the defendant violated the Americans with Disabilities Act because it failed to provide adequate accommodations for her migraine headaches. The plaintiff moved to quash a subpoena issued under Civil Rule 45 for relevant electronically stored information "on all computers, laptops, PDA's, portable media or other devices" used by the plaintiff's spouse, including devices controlled by the spouse's employer, a public agency. The plaintiff asserted that her communications with her spouse were confidential and protected under the federal common-law spousal privilege. The court determined that the "confidential marital communications privilege" rather than the "adverse spousal testimony privilege" applied in the case.

Under established jurisprudence, marital communications are presumed to be confidential, unless the nature and circumstances surrounding the communications show that they are not intended to be confidential. When examining the nature and circumstances regarding e-mail correspondence in a workplace environment, courts, like the court in *Sprenger*, typically apply a multi-factor analysis to determine whether an employee's claim that personal e-mails on an employer's computer are confidential is reasonable. The analysis that applies to the spousal privilege applies to other

evidentiary privileges and the work-product doctrine, though the twist in *Sprenger* is that the defendant has the burden to defeat the privilege.

Multi-Factor Analysis of Objectively Reasonable Privacy Expectation: Though the Fourth Amendment's right of reasonable expectation of privacy does not apply directly to non-governmental intrusions, the same standard applies to determining the confidentiality of e-mail communications. Thus, an employee's e-mails sent or stored on an employer's computer system are confidential and protected from discovery only if the employee has a reasonable expectation of privacy. In making this determination, an employer's e-mail policy often plays a crucial role in the analysis.

Typically, an employer has a policy explicitly asserting the employer's right to examine e-mail communications stored on the employer's computer system, and the employee tacitly or overtly agrees to abide by the policy as a condition of employment, which may amount to an intentional waiver of any privilege or protection. Knowing that an employer does not keep e-mails confidential provides strong evidence that the employee's reliance on the employer to keep the e-mails confidential is not reasonable, especially if the employer took additional steps--either opening the e-mails or making them available to others. In individual cases, courts look to the extent that an employer monitors employees' communications, the employees' awareness of such monitoring, and the employees' acknowledgment as a condition of employment that the employer can monitor communications.

In Re Asia Global Crossing, Ltd., 322 B.R. 247 (Bankr. S.D.N.Y. 2005), which is cited in *Sprenger*, specifies the factors used by courts in this analysis:

- does the corporation maintain a policy banning personal or other objectionable use;
- does the corporation monitor the use of the employee's computer or e-mail;
- do third parties have a right of access to the computer or e-mails; and
- did the corporation notify the employee, or was the employee aware, of the use and monitoring policies.

The court in *Sprenger* quashed the defendant's subpoena because the defendant failed to show that the employee's expectation of privacy regarding e-mail communications was unreasonable. In this case, the defendant's burden was heavier than in other cases where the person asserting a privilege has the burden to substantiate it, because, unlike other privileges, communications between spouses are presumed confidential, requiring the defendant to demonstrate that it had been waived

What lessons can be drawn from *Sprenger* about discovery of employee e-mails sent or stored on an employer's work computer and other cases like it? The employer in *Sprenger* maintained the following e-mail policy governing employee communications using the employer's computer system: "no user should have any expectation of privacy in any message, file, image, or data created, sent, retrieved, or received by use of the Commonwealth's equipment and/or access," and state agencies have the "right at any time, without notice, and without the user's permission to monitor e-mail sent or received by agency users." Though the policy is explicit, clear, and seemingly comprehensive, it was insufficient in itself because the defendant failed to substantiate it. The defendant merely proffered a copy of the policy without evidence or affidavit showing how the policy was implemented or circulated to employees.

The court in *Sprenger* noted, in particular, that no evidence was provided showing that the plaintiff's spouse actually received notice of the policy. Employers typically use several means to notify their employees of a privacy policy, including posting a notice banner on the employee's computer screen, which appears every time an employee logs on the system, or publishing the policy in an employee handbook. The court found an automated "flash screen," which warns an employee of the privacy policy, an especially effective means of notifying an employee. But none of these means of notification was established in *Sprenger*. Thus, despite a clear policy rejecting any claim of privacy expectations, the subpoena requested by the defendant in *Sprenger* was quashed, because the defendant failed to connect the policy with the plaintiff's spouse employee.

The defendant in *Sprenger* failed to offer any evidence based on the factors listed in *In Re Asia Global* that would

have raised doubts about the plaintiff's privacy expectations. The defendant did not offer any evidence that the employer actually monitored the e-mail communications. Nor did the defendant offer any evidence showing that an authorized third party had the right to access the e-mail communication system. Evidence that an employer or third party routinely or frequently monitored employee communications or accessed e-mails may have been sufficient to undermine the reasonableness of an employee's privacy expectation. But in *Sprenger*, no evidence substantiating either factor was offered that would have called into question the confidentiality of the e-mail communications.

If an employee does not offer any contrary evidence, establishing the existence of an employer e-mail policy that rejects any employee privacy expectation to e-mails sent on the employer's computer might be enough to defeat a privilege claim--other than a confidential marital communications privilege claim. But because the defendant has the burden to show that the confidential marital communications privilege was waived, the defendant was required to provide evidence demonstrating that the employee's expectation of privacy in the e-mails was unreasonable to meet the defendant's burden.

Best Practices: In most cases, an employee's private confidential e-mail communications stored on an employer's computer system will not be relevant in the underlying litigation. Though subject to discovery, such e-mails are unlikely to be relevant and need not be disclosed. But if an employee who stores e-mail on an employer's computer system is a party to the litigation, privilege issues are more likely to arise. Under such circumstances, an employee who resists a discovery request or subpoena for confidential and privileged e-mails stored on an employer's computer system can defend the privileged status of the e-mails by asserting a reasonable expectation of privacy based on the nonexistence of a privacy e-mail policy or on an asserted ignorance of such an employer policy.

It is important to note that an employee has the burden to show that the privacy expectation was reasonable in privilege and protection cases, except in a case involving the confidential marital communications privilege. The ruling in *Sprenger* provides a good cautionary tale to parties who seek the production of e-mails that are subject to the marital communications privilege. Unlike other privilege cases, the requesting party has the burden to show that the employee's expectation of privacy in e-mails is not objectively reasonable by providing evidence that the employee was aware of the employer's privacy-e-mail policy and that the employer actually took steps to monitor or make available to others the employee's e-mails.

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Using Mandamus to Transfer Venue: Vairo on In re Genentech, Inc.

2009 Emerging Issues 4181

Using Mandamus to Transfer Venue: Vairo on In re Genentech, Inc.

By Georgene Vairo

August 27, 2009

SUMMARY: *In re Genentech, Inc.*, 566 F.3d 1338, 2009 U.S. App. LEXIS 10882 (Fed. Cir. May 22, 2009), is another recent example of the emerging aggressive use of mandamus as a vehicle for challenging unsuccessful motions to transfer under 28 U.S.C. § 1404(a). In *In re Genentech, Inc.*, the Federal Circuit ruled that mandamus was available to order transfer of venue when the plaintiffs chosen forum had no connection to any of the witnesses or evidence.

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ARTICLE: Georgene Vairo on In re Genentech, Inc.

Summary. *In re Genentech, Inc.*, 566 F.3d 1338, 2009 U.S. App. LEXIS 10882 (Fed. Cir. May 22, 2009), is another recent example of the emerging aggressive use of mandamus as a vehicle for challenging unsuccessful motions to transfer under 28 U.S.C. § 1404(a). In *In re Genentech, Inc.*, the Federal Circuit ruled that mandamus was available to order transfer of venue when the plaintiff's chosen forum had no connection to any of the witnesses or evidence.

Facts and Procedural Background. The plaintiff, a German company, brought a patent infringement action against two California companies in the Eastern District of Texas. The California companies then filed a reactive declaratory judgment action seeking a declaration of invalidity and non-infringement of the plaintiff's patents in the Northern District of California. The California companies also sought transfer of venue under 28 U.S.C. § 1404 to the Northern District of California. All parties agreed that the Eastern District of Texas had no connection to any of the witnesses or evidence relevant to the case.

When the district court denied the motion to transfer venue, the defendants sought a writ of mandamus from the court of appeals directing the district to vacate its order and transfer the case. The Federal Circuit ruled that mandamus was appropriate because the district court had committed clear error, and it therefore ordered transfer of the case to the Northern District of California.

Standard for Granting Motions to Transfer. Section 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." The Federal Circuit began by enunciating the standard for granting a motion to transfer under § 1404: the motion should be granted if the movant shows that the transferee venue is "clearly more convenient"

than the venue chosen by the plaintiff. In assessing whether a defendant has met its burden of demonstrating the need to transfer, courts apply a number of private interest and public interest factors.

Comment. The Federal Circuit adopted the test and approach for reviewing denials of motions to transfer under § 1404(a) that were announced in a recent, divided *en banc* Fifth Circuit case, *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 310 (5th Cir. 2008) ("the precedents are clear that mandamus is entirely appropriate to review for an abuse of discretion that clearly exceeds the bounds of judicial discretion"; granting mandamus and ordering the district court judge for the Eastern District of Texas to transfer a product liability case). The Eastern District of Texas has become known as a plaintiff-friendly "rocket docket" and the Fifth Circuit's decision in *VW* has been viewed as an attempt to rein in blatant forum shopping.

The *VW* opinion purports to adhere to the relatively stringent test for granting mandamus, but it applied the mandamus test somewhat expansively to enable the defendant to escape the so-called "rocket docket." See Lonny Hoffman, *Transfer Venue: Lonny Hoffman on In re Volkswagen of America, Inc.*, 2009 *Emerging Issues* 3274 (LexisNexis January 1, 2009). *In re Genentech, Inc.*, and an earlier Federal Circuit case, *In re TS Tech United States Corp.*, 551 F.3d 1315 (Fed. Cir. 2009), followed the Fifth Circuit's lead in allowing mandamus to order the district court to transfer cases.

Although it did not expressly so state, the Federal Circuit was correct to apply the *VW* test. In reviewing district court judgments in patent cases, the Federal Circuit applies its own law with respect to patent law issues, but with respect to nonpatent issues, it generally applies the law of the circuit in which the district court sits. *Midwest Industries, Inc. v. Karavan Trailers, Inc.*, 175 F.3d 1356 (Fed. Cir. 1999); see *Atari, Inc. v. JS & A Group, Inc.*, 747 F.2d 1422 (Fed. Cir. 1984) (in banc). The Federal Circuit applies its own law to patent issues to serve one of the principal purposes of the court: to promote uniformity in the law with regard to patent and other matters within its exclusive appellate jurisdiction. See S. Rep. No. 97-275, at 5 (1981), reprinted in 1982 U.S.C.C.A.N. 11, 15. The Federal Circuit applies regional circuit law to nonpatent issues "to avoid the risk that district courts and litigants will be forced to select from two competing lines of authority based on which circuit may have jurisdiction over an appeal that may ultimately be taken, and to minimize the incentive for forum-shopping by parties who are in a position to determine, by their selection of claims, the court to which an appeal will go." See *Atari*, 747 F.2d 1422, at 1439.

Application of § 1404(a) Convenience Factors. The court of appeals then discussed the convenience factors on which the district court had relied. In virtually every instance, it found that the district court had committed "clear error."

Convenience of the Witnesses and Parties. The Federal Circuit correctly found the convenience of the witnesses and parties to be the most significant factor. Because it generally becomes more inconvenient and costly for witnesses to attend trial the further they are away from home, the Fifth Circuit (whose law the Federal Circuit was applying) established a "100-mile" rule, which requires that when the distance between an existing venue for trial of a matter and a proposed venue under § 1404(a) is more than 100 miles, the factor of inconvenience to witnesses increases in direct relationship to the additional distance to be traveled.

The defendants identified at least ten witnesses within the Northern District of California, including at least three nonparty witnesses who had knowledge of material facts. In addition, they identified at least four additional witnesses residing in other parts of California. No witnesses resided in the Eastern District of Texas. Accordingly, the Federal Circuit said that the district court clearly erred by finding that this factor "only slightly" favored transfer. The district court had found that the defendants had failed to identify any "key witnesses." According to the Federal Circuit, this was a higher standard than required: "Requiring a defendant to show that the potential witness has more than relevant and material information at this point in the litigation or risk facing denial of transfer on that basis is unnecessary."

The district court had also emphasized that the Eastern District of Texas would be a more convenient forum for several potential witnesses from Europe. The court of appeals noted that, under the 100-mile rule, inconvenience

increases in direct relationship to the additional distance traveled. However, the court said that this rule should not be too rigidly applied. The European witnesses would be required to travel a significant distance in any case, while a significant number of witnesses would not have to travel far from home if the case was transferred to the Northern District of California. Thus, the district court should not have given such significant weight to the inconvenience of the European witnesses.

The district court had also relied on the Eastern District of Texas's central location as convenient for potential witnesses in Iowa and the east coast of the United States. The court of appeals, however, did not view this centrality as a proper consideration when no witnesses actually resided in or near the chosen forum. Because a substantial number of material witnesses resided in or near the transferee venue, and none near the Eastern District of Texas, the district court clearly erred in not determining this factor to weigh substantially in favor of transfer.

Concerning the convenience of the parties, the court of appeals noted that one defendant was headquartered in the Northern District of California and the other was headquartered in San Diego, California. The plaintiff was a German corporation that would have to travel a great distance to either venue, and therefore would be only slightly more inconvenienced by the case being tried in California rather than Texas. Thus, the parties' convenience factor clearly favored transfer.

Comment. The Federal Circuit is correct that the lack of any witnesses in the district clearly militates in favor of transfer. However, its approach will present plaintiffs seeking to stay in a particular court with a problem. Defendants will be able to point to witnesses without any test in terms of their significance or relevance. To the extent that this approach invites gaming, it is problematic. On the other hand, the Federal Circuit did favorably cite a case argued by the plaintiff that would credit the plaintiff's choice of forum so long as any credible witnesses resided in the forum state.

Availability of Compulsory Process. A substantial number of witnesses resided in the Northern District of California, and were therefore subject to the transferee court's subpoena power. No witnesses were within the subpoena power of the Eastern District of Texas. Thus, this factor also strongly favored transfer.

Access to Evidence. Most of the relevant documentary evidence was in the hands of the defendants, either in the Northern District of California or in San Diego. Evidence held by the plaintiff was in Europe and Washington, D.C. These documents would have to be transported in any event, so that it was only slightly more inconvenient or costly to transport them to California than to Texas. Keeping the case in Texas would impose a significant and unnecessary burden on the defendants. The district court therefore clearly erred in finding that this factor was neutral.

The district court had also minimized the importance of this factor by noting that the notion that physical location of some relevant documents should play a substantial role in the venue analysis was somewhat antiquated in the era of electronic storage and transmission. This reasoning, the court of appeals said, would render this factor superfluous.

Comment. The plaintiff certainly had a problem convincing the Federal Court that a German corporate plaintiff would be more inconvenienced in any respect by being required to litigate in California rather than Texas. Indeed, the foreign status of the plaintiff may well have been a factor, just as it is when a defendant moves for dismissal under *forum non conveniens*. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S. Ct. 252, 70 L. Ed. 2d 419, 1981 U.S. LEXIS 133; 50 U.S.L.W. 4055 (1982) (the strong presumption in favor of the plaintiff's choice of forum applies with less force when the plaintiff is foreign). This is somewhat ironic, however, because the Fifth Circuit in *VW* criticized the district court for employing the higher standard for granting a dismissal on *forum non conveniens* grounds.

Practical Problems. The district court had cited two issues regarding the practicality of the two venues. First, the court had reasoned that, because one of the defendants had filed a different suit in the Eastern District of Texas two years earlier, it could not be heard to complain that it was an inconvenient forum. Consideration of this prior case, according to the Federal Circuit, was clear error: a § 1404 analysis requires individualized consideration of convenience and fairness, and there was no suggestion that the prior case involved the same parties, witnesses, evidence, and facts.

The district court also had stated that the possibility that the Northern District of California lacked jurisdiction over the plaintiff was a critical problem. This was also clear error, as there is no requirement that the transferee court have jurisdiction over the plaintiff or that there be sufficient minimum contacts with the plaintiff.

Comment. The Federal Circuit was clearly correct to ignore the prior litigation. The law is also clear that the court of appeals is correct that whether the transferee court has personal jurisdiction over the plaintiff is irrelevant. As a matter of policy, however, it may be problematic to allow transfer of a case to a district that the plaintiff did not choose that would otherwise lack jurisdiction over that party had it been sued there. Even though black letter law also says that a plaintiff cannot complain that the forum it chose would lack personal jurisdiction over a counterclaim against it, should it be so clear that if the plaintiff has not chosen the forum, as in the *Genentech* case, that the question of jurisdiction over the plaintiff be disregarded so cavalierly? In *Genentech*, this was not an issue because the California companies had no affirmative claims to assert against Genentech. But, what if the defendants had claims to assert against the plaintiff?

The Federal Circuit noted that there is no requirement that there be personal jurisdiction over plaintiffs; all that is required is that the party seeking transfer has the burden of proving that the action could have been brought originally in the transferee district. It cited *Hoffman v. Blaski*, 363 U.S. 335, 343344, 80 S. Ct. 1084, 4 L. Ed. 2d 1254 (1960) (party seeking transfer has burden to establish that transferee court would have had subject-matter jurisdiction, defendants would have been subject to personal jurisdiction, and venue would have been proper at time the action was originally filed), for this point. In *Hoffman*, however, it was the defendants arguing that they would have waived their objections to the lack of personal jurisdiction in their preferred transferee court. And, the Court was concerned about allowing defendants to unfairly game plaintiffs out of their choice of forum:

The thesis urged by petitioners would not only do violence to the plain words of § 1404, but would also inject gross discrimination. That thesis, if adopted, would empower a District Court, upon a finding of convenience, to transfer an action to any district desired by the *defendants* and in which they were willing to waive their statutory defenses as to venue and jurisdiction over their persons, regardless of the fact that such transferee district was not one in which the action "might have been brought" by the plaintiff. Conversely, that thesis would not permit the court, upon motion of the *plaintiffs* and a like showing of convenience, to transfer the action to the same district, without the consent and waiver of venue and personal jurisdiction defenses by the defendants. Nothing in § 1404, or in its legislative history, suggests such a unilateral objective and we should not, under the guise of interpretation, ascribe to Congress any such discriminatory purpose.

Hoffman at 344. It would seem appropriate to allow a plaintiff to flip the Court's argument to prohibit transfer to a district where there would be no personal jurisdiction over a plaintiff if claims could be asserted against it.

Court Congestion. The district court had also found that administrative difficulties caused by court congestion weighed against transfer. The court cited statistics arguably showing that cases that proceeded to trial reached disposition somewhat more quickly in the Eastern District of Texas as opposed to the Northern District of California. The defendants argued that if all cases were considered, not just those that were tried, cases were disposed of more quickly in the Northern District of California. The court of appeals noted that the speed with which a case can be resolved may be a factor in the analysis, but that this factor was speculative, and in any event this single factor should not alone outweigh all the other factors.

Local Interest. Finally, the district court had noted that the Northern District of California had an interest in having the case resolved there, as one of the defendants was headquartered there. This factor therefore also favored transfer even though, as the Federal Circuit conceded, the people in the Eastern District of Texas had an interest in the outcome because allegedly infringing products were sold in the district.

Defendants Were Entitled to Mandamus Relief. The Federal Circuit, like all others, noted that mandamus is available only in extraordinary situations to correct a clear abuse of discretion or usurpation of judicial power. The party seeking mandamus must show that it has no other means of obtaining the relief desired, and that the right to issuance of the writ is clear and indisputable. The Federal Circuit noted that mandamus is available in appropriate cases to correct a patently erroneous denial of transfer.

Here, the convenience to the witnesses and parties, availability of compulsory attendance, and access to evidence factors all weighed significantly in favor of transfer. The local interest factor also weighed in favor of transfer. There was no reasonable argument that other factors outweighed these. The clearly more convenient forum was the Northern District of California. "In denying transfer, the district court clearly abused its discretion and produced a patently erroneous result. The district court (1) improperly applied the 100-mile' rule; (2) improperly substituted its own central proximity for a measure of the convenience of the witnesses and parties, and documents; (3) rigidly applied the law to prevent transfer to the more convenient forum; (4) glossed over the compulsory process factor; and (5) erroneously weighed two essentially irrelevant considerations."

Additionally, the defendants had demonstrated that they had no other means of obtaining relief. A party seeking mandamus for a denial of transfer has no adequate remedy by appeal because the party would not be able to show that it would have won the case had it been litigated in the other venue. Accordingly, the court of appeals granted the petition for writ of mandamus and ordered transfer to the Northern District of California.

Comment. *In re Volkswagen* made clear that when a trial judge issues a patently erroneous ruling, mandamus is available. And, in *VW*, the Fifth Circuit suggested that the district judge reached a patently erroneous decision that amounted to a clear abuse of discretion because he set the bar for granting the motion too high. The district judge had required Volkswagen to show that the § 1404(a) factors must "substantially outweigh" the plaintiffs' choice of venue. This was the proper standard because only if the balance of convenience and justice substantially weighs in favor of transfer should the plaintiff's choice of venue be trumped. The Fifth Circuit also noted that a writ should not issue to correct a "mere" abuse of discretion, but that a writ is appropriate to correct a "clear abuse of discretion." This distinction may not be susceptible to sharp definition in all cases, as the Fifth Circuit itself acknowledged.

Was the error in *Genentech* as clear as in *VW*? Is there anything else in *VW* that helps clarify the elusive distinction? As a general rule, the plaintiff's choice of forum is given significant weight and will not be disturbed unless the other factors weigh substantially in favor of transfer. At the same time, it is clear that even though the § 1404 transfer statute is derived from the common-law doctrine of *forum non conveniens*, the plaintiff's choice of venue is given less weight under § 1404 than was afforded under the common law doctrine because all that at stake is a transfer to another court in the federal system, as opposed to a dismissal that might result in having to bring a new suit in a foreign court.

The *VW* district court's "substantial weight" standard reflected the stricter *forum non conveniens* dismissal standard, and is therefore inappropriate in the § 1404 context. Instead, the plaintiff's choice of forum should be treated as a burden of proof matter. In other words, the weight given to the plaintiff's choice corresponds to the burden the moving party must meet to show that a transfer should be granted. The Fifth Circuit, concluded that this burden is merely "good cause." To show "good cause" means that a moving party, in order to support its claim for a transfer, must satisfy the statutory requirements and clearly demonstrate that a transfer is for the convenience of the parties and witnesses, in the interest of justice. Thus, "when the transferee venue is not clearly more convenient than the venue chosen by the plaintiff, the plaintiff's choice should be respected. When the movant demonstrates that the transferee venue is clearly more convenient, however, it has shown good cause and the district court should therefore grant the transfer." In *Genentech*, it would seem that the Federal Court correctly applied this standard.

Nonetheless, if the Fifth Circuit's approach, as embraced by the Federal Circuit, migrates to other courts of appeals, it is less likely that venue forum selection battles will be decided in the district courts. The party on the losing end of a motion to transfer will want to lobby the court of appeals to grant the writ. If other courts of appeals begin to more

freely grant the writ, we are certain to see higher litigation costs and delay. Perhaps Congress ought to consider amending the convenience transfer statute to preclude appellate review, as it did in the case of removal. Under 28 U.S.C. § 1447(d), a decision by a district court to remand to state court may not be reviewed.

RELATED LINKS: For more information, see Moore's Federal Practice

- 17 Moore's Federal Practice (3d ed.) § 111.13[1];
- 17 Moore's Federal Practice (3d ed.) § 111.61

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Claim Preclusion: Vairo on Travelers Indem. Co. v. Bailey

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Claim Preclusion: Vairo on Travelers Indem. Co. v. Bailey

By Georgene Vairo

August 27, 2009

SUMMARY: In *Travelers Indem. Co. v. Bailey*, the Supreme Court applied principles of claim preclusion to bar a collateral attack on the subject-matter jurisdiction of a bankruptcy court that had entered an order two decades earlier enjoining certain lawsuits against a debtors insurer. This Emerging Issues Analysis, written by Georgene Vairo, professor and author, summarizes this important decision.

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ARTICLE: *Georgene Vairo on Travelers Indem. Co. v. Bailey*

Summary. In *Travelers Indem. Co. v. Bailey*, -- U.S. --, 129 S. Ct. 2195, 174 L. Ed. 2d 99, 2009 U.S. LEXIS 4537, 77 U.S.L.W. 4523 (June 18, 2009), the Supreme Court applied principles of claim preclusion to bar a collateral attack on the subject-matter jurisdiction of a bankruptcy court that had entered an order two decades earlier enjoining certain lawsuits against a debtor's insurer. The opinion is significant because, on the one hand, it appears to favor the importance of finality, especially given the context of the complex, protracted asbestos litigation. On the other hand, however, it leaves open important questions about the actual power of a bankruptcy court to issue channeling injunctions barring claims against third parties. Thus, the power of a bankruptcy court to approve plans of reorganization that provide global peace, in asbestos cases in particular, and in other mass tort bankruptcies in general, remains very much an issue.

Background and Procedural History. For half a century, Johns-Manville Corporation (Manville) had been the largest U.S. supplier of asbestos and manufacturer of asbestos-containing products. By the early 1980s, as more became known about the link between asbestos exposure and respiratory disease, thousands of lawsuits had been filed against Manville. In 1982, facing the prospect of overwhelming liability, Manville filed for bankruptcy protection.

During the period leading up to a reorganization plan, Manville and its insurers litigated over the scope and limits of Manville's asbestos claim liability coverage; various personal injury claimants filed actions against the insurers; and the insurers themselves filed claims for contribution and indemnification against each other. The key element of Manville's 1986 reorganization plan ("Plan") was the establishment of the Manville Personal Injury Settlement Trust ("Trust"). The Plan channeled all asbestos claims against Manville to the Trust ("Policy Claims"). The "cornerstone" of the settlement leading to the Plan was an agreement among Manville's insurers to pay \$770 million, \$80 million of it

from Travelers Indemnity Company and its affiliates (Travelers), to fund most of the initial corpus of the Trust.

In return, upon payment of the funds, the bankruptcy court order released the insurers from "any and all Policy Claims," and enjoined all actions of any kind for any Policy Claims against Manville's insurers, including Travelers. "Policy Claims" were defined broadly to include any type of claim "arising out of or relating to any or all" of the insurers' Manville asbestos liability policies.

Deal, or No Deal. Despite the 1986 injunction, over a decade later, plaintiffs began filing asbestos claims in state courts seeking to recover against Travelers, not indirectly for Manville's wrongdoing, but for Travelers' own alleged violations of state law. Travelers invoked the 1986 injunction and moved the bankruptcy court for an order enjoining these "Direct Action" state suits. After referring the parties to mediation, Travelers and some of the plaintiffs settled the Direct Actions, with Travelers paying \$400 million to compensate the Direct Action claimants, contingent upon the bankruptcy court holding that the state court suits were within the scope of the 1986 injunction, and entering an order clarifying that these suits had been enjoined by the 1986 Orders ("Clarifying Order"). Yet, the settlement required the Direct Action claimants to grant Travelers a separate release apart from the protection accorded by the 1986 Orders. The bankruptcy court also made extensive factual findings, specifically that because all the Direct Action claims were predicated on what Travelers knew by virtue of its relationship with Manville, they arose out of or were related to Travelers' insurance relationship with Manville, and accordingly were barred by the 1986 Orders. In sum, the bankruptcy court said that the Direct Actions were, and always had been, barred by the 1986 Orders.

Some Direct Action claimants and another insurer with contribution claims against Travelers appealed. The district court affirmed, but the Second Circuit reversed. The court of appeals concluded that the bankruptcy court lacked subject matter jurisdiction to enter an order barring state court suit based on Travelers' own conduct and not on that of Manville, the bankruptcy debtor. Although the bankruptcy court had subject matter jurisdiction to enforce its 1986 Orders, it could not enjoin claims over which it had no jurisdiction. In other words, to the extent that the 1986 Orders barred or sought to bar claims such as the Direct Actions, the orders exceeded the bankruptcy court's jurisdiction.

Claim Preclusion Barred Collateral Attack on Jurisdiction to Enter 1986 Injunction. In a 7-2 decision delivered by Justice Souter, the Supreme Court reversed. Interpreting the terms of the 1986 injunction, the Supreme Court agreed with the bankruptcy court that the state-court suits against Travelers were within the scope of the injunction. And, because that order had been tested on direct review at the time, the order was immune to a collateral attack on subject matter grounds.

The Direct Actions Were Within the Scope of the 1986 Orders. The respondents had argued that the Clarifying Order improperly expanded the scope of the 1986 Orders to enjoin the Direct Actions. Their position was that the 1986 Orders only barred actions against insurers seeking to recover derivatively for Manville's wrongdoing, but not actions to recover for Travelers' own misconduct, no matter what its relationship to Travelers' coverage of Manville. However, the Supreme Court noted that the definition of Policy Claims in the 1986 Orders contained nothing limiting it to derivative actions. Rather, there was language in the 1986 Orders directly to the contrary. It not only enjoined expansively defined "Policy Claims" against the settling insurers, but also provided only one specific exception to its reach that did not include claims such as the Direct Actions.

The Supreme Court also rejected the argument that some parties to the Manville bankruptcy (including Travelers) understood the proposed injunction to bar only claims derivative of Manville's liability. The Court conceded that there was some evidence in the record supporting that contention. But, the Court said that because the plain terms of the 1986 Orders were clear and unambiguous, they had to be enforced and applied as stated. Indeed, in a nod to the power of the bankruptcy court, it noted that even if the 1986 Orders had been ambiguous legitimizing a look at the parties' contentions, the Court noted that numerous Courts of Appeals have held that a bankruptcy court's interpretation of its own confirmation order is entitled to substantial deference.

The 1986 Orders Were Final. The Second Circuit's ruling assumed that the Direct Actions were within the scope of

the 1986 Orders. However, it held that the 1986 Orders could not be enforced according to their terms because, as the panel, including now-Justice Sonia Sotomayor, saw it, the Bankruptcy Court had exceeded its jurisdiction when it issued the orders in 1986. In overturning the decision below, the Second Circuit concluded that "the bankruptcy court erred insofar as it enjoined suits that, as a matter of state law, are predicated upon an independent duty owed by Travelers to Appellants, that do not claim against the *res* of the Manville estate, and that seek damages in excess of and unrelated to Manville's insurance policy proceeds." The Supreme Court decided that it was error for the court of appeals to reevaluate the Bankruptcy Court's exercise of jurisdiction in 1986.

The Supreme Court noted that on direct appeal of the 1986 injunction, anyone who objected was free to argue that the bankruptcy court had exceeded its jurisdiction, and the district court or court of appeals could have raised such concerns *sua sponte*. But, once the 1986 injunctive order became final on direct review (whether or not it was a proper exercise of bankruptcy court jurisdiction and power), it became *res judicata* to the parties and those in privity with them, not only as to matters that were offered and received to sustain or defeat them, but as to any other admissible matter that might have been offered for those purposes [see *Nevada v. United States*, 463 U.S. 110, 130, 103 S. Ct. 2906, 77 L. Ed. 2d 509 (1983)].

The Supreme Court explained that the 1986 injunctive order was not any the less preclusive because the attack was on the bankruptcy court's conformity with its subject-matter jurisdiction; subject-matter jurisdiction ordinarily is immune from collateral attack [see *Kontrick v. Ryan*, 540 U.S. 443, 455 n.9, 124 S. Ct. 906, 157 L. Ed. 2d 867, 2004 U.S. LEXIS 663 (Jan. 14, 2004)]. Thus, so long as the state-court plaintiffs/respondents or those in privity with them were parties to the Manville bankruptcy proceeding, and were given a fair chance to challenge the bankruptcy court's subject-matter jurisdiction then, they could not challenge it in the present case by resisting enforcement of the 1986 injunctive order.

The Supreme Court acknowledged that it had recognized rare exceptions to the general prohibition of collateral attacks on subject-matter jurisdiction [see, e.g., *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506, 514, 60 S. Ct. 653, 84 L. Ed. 894 (1940) (collateral attack on subject-matter jurisdiction is permissible when issue is waiver of sovereign immunity); *Kalb v. Feuerstein*, 308 U.S. 433, 439-440, 444, 60 S. Ct. 343, 84 L. Ed. 370 (1940) (when debtor's petition for relief was pending in bankruptcy court and federal statute affirmatively divested other courts of jurisdiction to continue foreclosure proceedings, state-court foreclosure judgment was subject to collateral attack)]. Neither of these exceptions applied in this case. In addition, the Restatement (Second) of Judgments describes three circumstances in which a collateral attack on subject-matter jurisdiction might be permissible: (1) when the exercise of subject-matter jurisdiction was a manifest abuse of authority; (2) when allowing the judgment to stand would substantially infringe the authority of another tribunal or agency; and (3) when the judgment was rendered by a court lacking the capability to make an adequately informed determination of a question concerning its own jurisdiction, and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court's subject-matter jurisdiction [Restatement (Second) of Judgments § 12 (1982)]. But none of the exceptions described in the Restatement was asserted in this case, and it was not apparent how any of them might apply, so the Supreme Court had no occasion to decide whether to adopt the Restatement exceptions.

Comment. It is important to note what the Supreme Court was doing and what it was not doing. It, as discussed below, was not ruling on the merits of the question whether the bankruptcy court had jurisdiction to enter an order barring the Direct Actions. Rather, it simply was ruling that neither it, nor the Second Circuit had jurisdiction now to review that issue. Indeed, the Supreme Court noted that if the case before it and the Second Circuit had been a direct review of the 1986 Orders, the Second Circuit (and of course the district court) would have been duty bound to consider whether the Bankruptcy Court had acted beyond its subject-matter jurisdiction [see *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006); *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382, 4 S. Ct. 510, 28 L. Ed. 462 (1884)]. But, the Court noted, the 1986 Orders had become final on direct review over two decades before. Accordingly, the question whether the Bankruptcy Court had jurisdiction and authority to enter the 1986 Orders, including the injunctions barring suits against the insurers was not properly before the Second Circuit in 2008, and was not properly before the Supreme Court now.

Dissent. Justice Stevens, joined by Justice Ginsburg, dissented, essentially agreeing with the respondents that the terms of the 1986 injunction did not bar state-court suits against Travelers based on its own misconduct. Therefore, because in his view the injunction never meant to bar such suits, Justice Stevens opined that the state-court plaintiffs' current challenge to the injunction was not an impermissible collateral attack on the bankruptcy court's subject-matter jurisdiction.

Narrow Holding. Both the majority opinion and the dissent took a relatively simplistic approach. By reading the 1986 Orders to include direct actions, but finding that the orders were final and not subject to a collateral attack on the subject matter jurisdiction of the bankruptcy court to issue the order in 1986, or to enforce it in 2004, the majority was able to side step the important question of whether the bankruptcy courts have the power to enjoin actions against non-debtors. By reading the 1986 Orders to exclude the Direct Actions, the dissent also was able to avoid the issue.

Thus, it is significant to note that the Supreme Court concluded by emphasizing the narrowness of its holding. Most importantly, the Court's decision in this case did not resolve whether the bankruptcy court, in 1986 or now, could properly enjoin claims against a nondebtor insurer that are not based on the insured debtor's conduct, but rather its own conduct.

Additionally, the Court did not decide whether any particular state court plaintiff is bound by the 1986 injunction. On remand, any such plaintiff could show, for example, that it had not received constitutionally sufficient notice of the 1986 injunctive order and so would not be barred. Given especially Justice Ginsburg's well-known bent towards protecting due process rights, see, for example, *Amchem Prods. v. Windsor*, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997) (writing majority opinion striking down asbestos class action settlement), the majority as well as the dissent are making it plain that that parties to a mass tort settlement will never know for sure exactly who is, and isn't bound by such settlements.

Damned if You Do, Damned if You Don't. It is difficult at times to envision litigation that may or may not be barred by a particular order enjoining future lawsuits. As a practical matter, what was Travelers to do when faced with the Direct Actions? Having thought it was protected by the 1986 Orders, why would it pay \$400 million more in 2004 to compensate the Direct Action claimants, \$320 million more than it paid into the Trust fund in 1986, and why would it seek a separate release from the Direct Action claimants? Travelers was between the rock and a hard place. Although it thought it had bought global peace for itself in 1986, cases were still coming down the pike. It was obviously good strategy to return to the bankruptcy court to enjoin the Direct Actions. But, to put the matter behind it once and for all, Travelers agreed to put up another \$320 million and require separate releases. Such careful lawyering to buy peace ironically provided the argument accepted by the dissent that the 2004 order was broader than the 1986 Orders.

What The Court Is Telling Us. It is fair to read the majority opinion as a strong endorsement of the principle of finality. Once a judgment is in, and an opportunity for direct review has been afforded, the Supreme Court will allow a possible error on the merits and leave it to another day for another litigant to present the issue. On the other hand, the Court -- majority and dissent -- leaves open the question as to who will be bound by the judgment. In 2008, the Supreme Court decided a preclusion case, *Taylor v. Sturgell*, -- U.S. --, 128 S. Ct. 2161, 171 L. Ed. 2d 155, 2008 U.S. LEXIS 4885, 76 U.S.L.W. 4453 (June 12, 2008)]. It unanimously interred the emerging use of the "virtual representation" theory as a basis for applying claim preclusion or issue preclusion against a litigant who was not a party to the earlier judgment. Justice Ginsburg's opinion explored the general rule against binding nonparties and the evolution of various theories creating exceptions to that rule, drawing a bright line clarifying the limited situations when a nonparty is bound by an earlier judgment.

The Supreme Court has closely guarded the idea that everyone should have his or her own day in court. Indeed, Justices to the left on the Court, such as Justice Ginsburg herself, and to the right, such as Justice Scalia, have been equally firm in protecting the day-in-court principle despite concerns about finality and efficiency. In this sense, the *Taylor* opinion can be seen as a twin to Justice Ginsburg's opinion in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689, 1997 U.S. LEXIS 4032 (1997), in which she, joined by Chief Justice Rehnquist, and

Justices Scalia, Thomas, Kennedy and Souter, vacated the class action settlement that could have largely ended the asbestos litigation chiefly because of conflicts among class members that resulted in inadequate representation of the class. Similarly, in *Dow Chemical Co. v. Stephenson*, 539 U.S. 111; 123 S. Ct. 2161; 156 L. Ed. 2d 106; 2003 U.S. LEXIS 4576 (2003), an equally divided court affirmed a Second Circuit case overturning a district court opinion in the Agent Orange litigation that would have barred non-military class members from collaterally attacking the Agent Orange Settlement, also on the grounds of inadequate representation. From these cases, it is clear that the Court will continue to adhere to a formalistic protection of the right to a day in court.

Conclusion. The Second Circuit's ruling certainly injected additional uncertainty about the scope of a bankruptcy court's jurisdiction to enter third-party channeling injunctions. Unfortunately, the Supreme Court did not resolve the question on the minds of many practitioners who had hoped that the Court would provide an answer to whether a bankruptcy court has broad jurisdiction to enter such channeling injunctions, thereby preserving the expectations of the parties to the settlement and their privies.

RELATED LINKS: For more information, see Moore's Federal Practice

■ 18 Moore's Federal Practice (3d ed.) § 131.30[1][d]

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Remand on Supplemental Claims: Vairo on Carlsbad Tech. Inc v. HIF Bio Inc.

2008 Emerging Issues 1602

Remand on Supplemental Claims: Vairo on Carlsbad Tech. Inc v. HIF Bio Inc.

By Georgene Vairo

July 29, 2009

SUMMARY: The courts of appeals have been divided on the issue of whether 28 U.S.C. § 1447(d) precludes appellate review of a decision to remand state law claims supported by supplemental jurisdiction. The recent opinion by the U.S. Supreme Court in the Carlsbad Tech. v. HIF Bio decision, resolves this question. This commentary, written by Georgene Vairo, Professor, author and editor, analyzes the U.S. Supreme Court's decision.

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ARTICLE: Georgene Vairo on Carlsbad Technology, Inc. v. HIF Bio, Inc.

Summary. *Carlsbad Technology, Inc. v. HIF Bio, Inc.*, -- U.S. --, 129 S. Ct. 1862, 173 L. Ed. 2d 843, 2009 U.S. LEXIS 3304 (May 4, 2009), resolves the question as to whether 28 U.S.C. § 1447(d) precludes appellate review of a decision to remand state law claims supported by supplemental jurisdiction. The question had divided the courts of appeals. As a matter of first impression for the circuit, the Federal Circuit in the case below had parted ways with a number of its sister circuits by holding that a remand based on the district court's decision to decline to exercise supplemental jurisdiction is not reviewable on appeal. *HIF Bio, Inc. v. Yung Shin Pharm. Indus. Co.*, 508 F.3d 659 (Fed. Cir. 2007).

Procedural Facts. *Carlsbad* involved a novel anti-angiogenic, anti-cancer application discovered by two Korean scientists. Two companies that obtained the rights to license the application sued a number of individuals, HIF Bio, and other companies in a California state court. They alleged causes of action for violation of the federal Racketeer Influence and Corrupt Organizations Act (RICO) [18 U.S.C. § 1961], as well as state law violations of rights and ownership of invention, slander of title, conversion, fraud, intentional and negligent interference with contractual relations and prospective economic advantage, breach of implied contract, unfair competition and fraudulent business practices, and unjust enrichment-constructive trust. HIF Bio removed the entire case under 28 U.S.C. § 1441(c), which allows such removal when the case includes at least one federal questions claim under 28 U.S.C. § 1331.

The district court dismissed the RICO claim for failure to adequately allege a pattern of racketeering. The district court found that the rights and ownership of invention claims were state-law claims lacking an independent federal jurisdiction basis. Under the supplemental jurisdiction statute, 28 U.S.C. § 1367(c), the court then declined supplemental jurisdiction over all state-law claims because the preponderance of state law issues means that a state

court is the proper venue to try the state law claims" and remanded the case to state court. *HIF Bio, Inc. v. Yung Shin Pharm. Indus. Co.*, 2006 U.S. Dist. LEXIS 97002, at *10 (C.D. Cal. June 9, 2006). The Federal Circuit dismissed the appeal, holding that it did not have appellate jurisdiction. The Supreme Court reversed, holding that a remand after declining to exercise supplemental jurisdiction is not a remand based on lack of subject matter jurisdiction, and therefore is not subject to the appellate review bar of § 1447(c) and (d).

Review of Remand Decision Basics. Section 1447(d) provides that [a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." One might think, as it seems all the opinions in the Supreme Court's *Carlsbad* opinion believe, that this is a straightforward prohibition on appellate review of any remand decision.

However, the Supreme Court previously had limited the scope of § 1447(d)'s non-reviewability principle. First, and most significantly, in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 345346, 96 S. Ct. 584, 46 L. Ed. 2d 542 (1976), the Court reasoned that § 1447(d) must be read in pari materia with, and thus be limited by the grounds enumerated in, § 1447(c). Section 1447(c) requires that a motion to remand based on any defect other than a lack of subject matter jurisdiction be made within 30 days, and also requires the district court to remand if at any time before entry of final judgment it appears that the court lacks subject matter jurisdiction. In *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996), the Supreme Court thus clarified that § 1447(d) bars appellate review only if the remand decision is based on a lack of subject matter jurisdiction or a defect in the removal process. Accordingly, as in *Thermtron*, a remand decision based on an overly crowded docket was reviewable; and, as in *Quackenbush*, a remand decision based on abstention was reviewable.

In other words, the Supreme Court tells us that if the remand decision is based on any other ground other than a lack of subject matter jurisdiction or a defect in the removal process, § 1447(d) does not bar appellate review of the remand decision. Only one problem: determining whether a remand decision is based on a lack of jurisdiction. That is the problem raised by *Carlsbad*: is a remand based on a refusal to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c) based on a lack of jurisdiction? If so, it is not subject to appellate review. Two later Supreme Court decisions informed the Federal Circuit's contrarian approach.

Are Remands of Supplemental Claims Based on a Lack of Jurisdiction? When a district court remands claims supported by supplemental jurisdiction because it is declining to exercise such jurisdiction, is the remand based on a lack of subject matter jurisdiction, which would bar appellate review of the decision? Most courts of appeals that had examined this question ruled that § 1447(d) does not act as a bar. [see, e.g., *Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217, 223224 (3d Cir. 1995). These decisions were primarily based on a footnote in *Carnegie-Mellon Univ. v. Cohill* stating that [Section] 1447(c) . . . do[es] not apply to cases over which a federal court has pendent jurisdiction," 484 U.S. 343, 355 n. 11, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988). The circuits reasoned that if § 1447(c) does not apply to cases over which a federal court has pendent jurisdiction, a remand order based on declining supplemental jurisdiction also is not within the class of remands described in § 1447(c) and, therefore, is not subject to the bar on review in § 1447(d).

The law seemed to be clear -- a remand based on a declination of supplemental jurisdiction is not barred by § 1447(d). This approach made sense. Assuming that the state law claims were so related to the federal claims asserted in the case that they would be supported by supplemental jurisdiction under § 1367(a) (as the claims in *Carlsbad* were), the district court unquestionably had subject matter jurisdiction over those state law claims. The only relevant question then, would be whether the district court would decide whether to exercise such jurisdiction. Section 1367(c) provides that a district court may decline to exercise supplemental jurisdiction under certain circumstances. With all the circuits having weighed in on this issue, why did the Federal Circuit rule that § 1447(d) barred review of remands based on § 1367(c)? And, why did the Supreme Court grant cert?

Ambiguous Supreme Court Subject Matter Jurisdiction Jurisprudence. The Federal Circuit questioned the other circuits' reliance on the *Cohill* footnote because of a more recent statement by the Supreme Court. In particular,

the Federal Circuit noted the Court's statement in *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 234-235, 127 S. Ct. 2411, 168 L. Ed. 2d 112 (2007): It is far from clear . . . that when discretionary supplemental jurisdiction is declined the remand is not based on lack of subject-matter jurisdiction for purposes of § 1447(c) and § 1447(d)." What *Powerex* adds to the supplemental jurisdiction issue is its holding that a remand order is unreviewable if it can be colorably characterized" as a remand based on lack of subject matter jurisdiction.

Therefore, the Federal Circuit distinguished remands based on abstention, which are reviewable under *Quackenbush*, from remands based on declining supplemental jurisdiction. The court acknowledged that the considerations underlying abstention may in some cases be similar to those enumerated for declining supplemental jurisdiction under § 1367, and both are discretionary doctrines that allow a district court to decline jurisdiction. However, the court reasoned that the two types of remands are fundamentally different in that a court abstains from hearing claims over which it has an independent basis for subject matter jurisdiction, such as federal question or diversity jurisdiction, while a court declines to exercise supplemental jurisdiction over a claim for which it has no independent basis for subject matter jurisdiction, i.e., state claims.

Thus, declining supplemental jurisdiction strips the claims of the only basis on which the district court had jurisdiction. Without the cloak of supplemental jurisdiction," state claims must be remanded for lack of subject matter jurisdiction. The court concluded that because every § 1367(c) remand necessarily involves a predicate finding that the claims at issue lack an independent basis of subject matter jurisdiction, the remand can be colorably characterized as a remand based on lack of subject matter jurisdiction, and thus is within the class of remands described in § 1447(c) and for which appellate review is barred by § 1447(d).

The Federal Circuit approach of characterizing a § 1367(c) remand as colorably characterized as a remand for lack of subject matter jurisdiction provided the reason for Supreme Court review. The majority opinion written by Justice Thomas seems to restore the status quo ante -- meaning the way things were before the Federal Circuit read *Powerex* for all it might be worth. But, his opinion, as well as the three concurring opinions by Justices Scalia; Stevens; and Breyer, joined by Justice Souter; illustrate the mess that *Thermtron* created, as exacerbated by *Powerex*. In other words, it needed to square the express prohibition of § 1447(d) with its earlier opinions putting certain matters beyond the prohibition.

Obsessing About Subject Matter Jurisdiction. It is true that courts must obsess about whether they have subject matter jurisdiction over a case, be it original jurisdiction or appellate jurisdiction. After setting forth the black letter understanding of the interplay between §§ 1447(d) and (c) discussed above, Justice Thomas notes that [s]ubject matter jurisdiction defines a court's authority to hear a given type of case. *Carlsbad*, 173 L. Ed. 2d at 848, quoting, *United States v. Morton*, 467 U.S. 822, 828, 104 S. Ct. 2769, 81 L. Ed. 2d 680 (1984). He then states the issue before the Court to be whether a remand order based on § 1367(c) is a remand based on a lack of subject matter jurisdiction for the purpose of § 1447(c) and (d). He declared that it is not. Indeed, he is correct in noting that a district court has subject matter jurisdiction -- supplemental jurisdiction under § 1367(a) -- over state law claims that lack an independent federal subject matter jurisdiction basis if such claims are part of the same case and controversy as the federal claims. There is jurisdiction over such claims. The question is whether the court will exercise such jurisdiction or decline to do so as provided in § 1367(c). Section 1367(c) provides that a court may decline to exercise supplemental jurisdiction in enumerated circumstances. In other words, a court's exercise of its discretion under § 1367(c) is not a jurisdictional matter. Thus, the court's determination may be reviewed for abuse of discretion, but may not be raised at any time as a jurisdictional defect. *Id.* at 849, quoting, 16 J. Moore et al., *Moore's Federal Practice* § 106.05[4] (3d ed. 2009).

Because there was no dispute that the federal court had original jurisdiction over the RICO claims, and because the state law claims were proper supplemental claims, Justice Thomas found that the remand could not be colorably characterized as a lack of subject matter jurisdiction, and therefore, was not subject to the § 1447(d) bar against appellate review. He certainly was correct about that. Why, then, were three concurring opinions filed?

Time to Overrule *Thermtron*? The Federal Circuit decision was significant because it went against the grain of

every previous court of appeals decision on the question whether remand decisions based on a declination of supplemental jurisdiction are reviewable. The Federal Circuit read *Powerex* as reinvigorating the essence of § 1447(d), and specifically Congress' goal of putting the reviewability of remand decision off-limits. This point was embraced by all the concurring opinions. First, Justice Stevens recalled former Chief Justice Rehnquist's dissent in *Thermtron*: The Court of Appeals not unreasonably believed that 28 U.S.C. § 1447(d) means what it says. *Id.* at 850. Justice Stevens wrote that if he had been writing on a clean slate, he would honor the text of § 1447(d). However, he then served a lob at some of his colleagues by stating that the Court's adherence to precedent in this case represents a welcome departure from its sometimes single-minded focus on literal text. *Id.* at 850851.

Next, Justice Scalia called for a reconsideration of *Thermtron*, finding that it was questionable in its day. *Id.* at 851. He stated further that the Court has created over the years a hodgepodge of jurisdictional rules that have no evident basis even in common sense. *Id.* He then shot back at Justice Stevens: If this muddle represents a *welcome* departure from literal text, . . . , the world is mad. *Id.*

Finally, somewhat picking up on the madness noted by Justice Scalia, Justice Breyer, joined by Justice Souter, contrasted the decision with *Powerex* itself. *Powerex* involved a complicated federal jurisdiction issue: whether a foreign entity that removed a state court case against it was entitled to sovereign immunity. The district court resolved the issue against the entity and remanded the case to state court. In *Powerex*, the Supreme Court held that the immunity question was colorably characterized as jurisdictional and therefore, appellate review was barred by § 1447(d). In contrast, in *Carlsbad*, the Court allowed review of a simple issue involving discretion. As Justice Breyer put it, we have held that § 1447 *permits* review of a district court decision in an instance where that decision is unlikely to be wrong and where a wrong decision is unlikely to work serious harm. And we have held that § 1447 *forbids* review of a district court decision in an instance where that decision may well be wrong and where a wrong decision could work considerable harm. Unless the circumstances I describe are unusual, something is wrong. *Id.* at 852. Unfortunately, he notes that such circumstances are not all that unusual, and therefore suggests that experts in this area of the law reexamine the matter with an eye toward determining whether statutory revision is appropriate. *Id.*

Indeed, Justice Breyer's opinion deftly illustrates the problematic nature of the Court's decisions on appellate review of remand decisions: those regarding subject-matter jurisdiction, which typically are more likely to be difficult and significant, may not be reviewed, while discretionary decisions that are less likely to be wrong or harmful may be appealed.

Justice Thomas also noted that the parties had not raised the issue whether *Thermtron* ought to be overruled. Thus, it appears that all members of the Court believe that *Thermtron* should go. It remains to be seen whether the Court will do the job itself, having invited attorneys to raise the issue, or, more likely, leave it to Congress, as Justice Breyer suggests, to fix § 1447(d).

RELATED LINKS: For further information, see Moore's Federal Practice:

- 16 Moore's Federal Practice (3d Ed.) § 106.05[4];
- 16 Moore's Federal Practice (3d Ed.) § 107.44[2][d];
- 19 Moore's Federal Practice (3d Ed.) § 202.11[5];
- 19 Moore's Federal Practice (3d Ed.) § 205.08[1]

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Jurisdiction -- Motion to Compel Arbitration: Vairo on Vaden v. Discover Bank

2008 Emerging Issues 2371

Jurisdiction -- Motion to Compel Arbitration: Georgene Vairo on Vaden v. Discover Bank

By Georgene Vairo

July 29, 2009

SUMMARY: The U.S. Supreme Court recently resolved a split in the courts of appeals regarding how a federal district court determines whether it has subject matter jurisdiction over a petition to compel arbitration in *Vaden v. Discover Bank*. All members of the Court agreed with a "look through" the petition approach, but disagreed sharply on how to apply it. This commentary by Georgene Vairo, professor and author, reviews this important decision.

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ARTICLE: Georgene Vairo on *Vaden v. Discover Bank*

Summary. *Vaden v. Discover Bank*, -- U.S. --, 129 S. Ct. 1262, 173 L. Ed. 2d 206 (Mar. 9, 2009), resolves a split in the courts of appeals regarding how a federal district court determines whether it has subject matter jurisdiction over a petition to compel arbitration pursuant to Section 4 of the Federal Arbitration Act (FAA) [9 U.S.C. § 4].

All members of the Court agreed with a look through the petition approach, but disagreed sharply on how to apply it. Both the majority opinion, written by Justice Ginsburg, and the dissenting opinion, written by Chief Justice Roberts, make compelling arguments, based on the language of § 4, for their differing takes on applying the look through the petition approach. Indeed, their dueling opinions are a bit like ships passing in the night. Or, perhaps, more appropriately with apologies to Lewis Carroll, they present different ways of going Through the Looking-Glass of the wonderful world of federal jurisdiction: Which controversy of the parties must the court consider? Although the arguable basis for federal jurisdiction in the *Vaden* case was federal question jurisdiction, the approach taken by the Court would apply in diversity cases as well.

Facts and Procedural Background. A bank sued a credit card holder in state court alleging state claims seeking to recover past-due charges. The card holder counterclaimed, alleging that the bank's finance charges, interest, and late fees violated state law. The bank responded to the counterclaims by filing a federal district court petition to compel arbitration under Section 4 of the FAA [9 U.S.C. § 4]. The district court ordered arbitration, and the Fourth Circuit affirmed [*Discover Bank v. Vaden*, 489 F.3d 594 (4th Cir. 2007)], both finding that federal jurisdiction existed because, as *Vaden* conceded, the state law counterclaims she alleged were completely preempted by federal law.

The Supreme Court split along relatively unusual lines. In an opinion by Justice Ginsburg, joined by Justices Scalia, Kennedy, Souter, and Thomas, the Supreme Court reversed the Fourth Circuit's judgment and remanded the case for further proceedings. Chief Justice Roberts, joined by Justices Stevens, Breyer, and Alito, concurred in part and dissented in part.

Determining an Independent Basis for Federal Jurisdiction. Section 4 of the FAA provides that petitions to compel arbitration may be brought before any United States district court which, save for such agreement, would have jurisdiction under title 28 . . . of the subject matter of a suit arising out of the controversy between the parties [9 U.S.C. § 4]. The FAA itself does not confer federal jurisdiction; rather the court must find an independent basis for jurisdiction. The bank argued that the district court had federal question jurisdiction [see 28 U.S.C. § 1331] because the card holder's state law counterclaims were completely preempted by § 27(a) of the Federal Deposit Insurance Act (FDIA) [12 U.S.C. § 1831d(a)]. The district court and the Fourth Circuit agreed. The question for the Supreme Court was whether the lower courts correctly found federal question jurisdiction.

There was no disagreement on the Court regarding the basic black-letter jurisdictional rules: Yes, the FAA requires an independent jurisdictional basis. Yes, the district court must comply with all other basic jurisdictional principles, such as the well-pleaded complaint rule [see *Louisville & N. R. Co. v. Mottley*, 211 U.S. 149 (1908)], including the rule that federal jurisdiction cannot be based on a federal counterclaim. [see *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 830-832, 122 S. Ct. 1889, 153 L. Ed. 2d 13 (2002)]. Yes, under § 4 of the FAA, the district court must determine whether the controversy between the parties arises under federal law or some other basis for federal jurisdiction. And, there was no disagreement on the precise issue facing the Court: Based on the language of § 4 of the FAA, the district court must look through the petition to compel arbitration to determine whether it is predicated on a controversy that arises under federal law, giving rise to federal question jurisdiction.

The Court acknowledged that the look through approach had been rejected by most of the Courts of Appeals that had addressed the question [compare *Wisconsin v. Ho-Chunk Nation*, 463 F.3d 655, 659 (7th Cir. 2006); *Smith Barney, Inc. v. Sarver*, 108 F.3d 92, 94 (6th Cir. 1997); and *Prudential-Bache Securities, Inc. v. Fitch*, 966 F.2d 981, 986-989 (5th Cir. 1992) (all rejecting look through approach) with *Community State Bank v. Strong*, 485 F.3d 597, 605-606, vacated, reh'g en banc granted, 508 F.3d 576 (11th Cir. 2007) and *Discover Bank v. Vaden*, 396 F.3d 366, 369-370 (4th Cir. 2005) (both holding that court may look through petition to underlying dispute)].

However, the alternative, considering the relevant controversy between the parties to be the dispute about arbitrability, ignores the phrase save for [the arbitration] agreement in § 4. Moreover, under that approach, federal courts could entertain § 4 petitions only if a federal question suit were already before the court, diversity requirements were satisfied, or the dispute over arbitrability involved a maritime contract. According to the majority, party who *could* file a federal question suit or remove such a suit to federal court would not have access to federal courts. In contrast, the look through approach allows a § 4 petitioner to ask a federal court to compel arbitration without first seeking federal adjudication of the very questions it wants to arbitrate.

Comment. It makes eminent sense to employ the look through approach. However, the majority ignored an important point made in an opinion that rejected the look through approach that, in turn, led the majority to adopt the overly restrictive approach to the controversy the court needs to look to in determining whether there is federal jurisdiction. In *Wisconsin v. Ho-Chunk Nation*, 463 F.3d 655, 661 (7th Cir. 2006), the Seventh Circuit had noted that even though it had determined that the plaintiff's complaint failed to provide a basis for subject matter jurisdiction, it did not hold that these facts are impervious to jurisdiction. Rather, it held out the possibility that either party might have been able to craft a complaint that stated a federal question or even that the plaintiff should have been permitted to amend its complaint to allege a federal claim.

This suggests the underlying reason why the majority opinion and dissent diverge: a dispute about what

controversy between the parties rules. Is it the controversy set forth in the underlying litigation? Or, is it the controversy that the petitioner seeks to arbitrate? The Court reasoned that the phrase save for [the arbitration] agreement in § 4 means that the court should determine whether it would have jurisdiction over the controversy between the parties if there were no arbitration agreement. However, according to the majority, the most straightforward meaning of the controversy between the parties is the substantive conflict between the parties before the state court. Thus, the federal court should determine whether that substantive conflict between the parties arises under federal law. The concurring and dissenting justices agreed that the district court should look through the petition, though they disagreed with respect to what controversy the court should be looking to.

The reason why the majority could reason as it did is because it postulated that the case involved two questions: Should a district court, if asked to compel arbitration pursuant to § 4, look through' the petition and grant the requested relief if the court would have federal-question jurisdiction over the underlying controversy? And if the answer to that question is yes, may a district court exercise jurisdiction over a § 4 petition *when the petitioner's complaint rests on state law but an actual or potential counterclaim rests on federal law?* (italics added). In other words, the majority looked to the actual procedural history prior to the bank's filing of the petition to compel arbitration, rather than any hypothetical litigation that could have been filed. According to the majority, if a complaint is filed before a petition to compel arbitration is filed, the federal court is stuck with the procedural posture of the case.

The bottom line under the majority approach, therefore, is that when a district court is asked to compel arbitration, it should look through the petition to determine whether it has jurisdiction to compel arbitration. In other words, the specific dispute the petition raises for arbitration is not the relevant dispute for jurisdictional purposes. Rather, it must look through to the underlying litigation.

Court May Not Look Past Complaint to Counterclaim. Because the FAA does not enlarge federal jurisdiction, the Court interpreted § 4 to permit a federal district court to entertain a petition to compel arbitration if the entire, actual controversy between the parties,' as they have framed it, could be litigated in federal court. In this case, the bank's state-law claim on the credit card debt could not be litigated in federal court. Therefore, the bank's § 4 petition had to be dismissed.

The Fourth Circuit erred, the Supreme Court held, in looking past the bank's complaint to the card holder's counterclaims to find a basis for federal question jurisdiction. The Court explained that under the well-pleaded complaint rule, a suit arises under federal law for purposes of federal question jurisdiction only if the plaintiff's statement of the plaintiff's own cause of action shows that it is based on federal law; a counterclaim based on federal law does not establish federal question jurisdiction [*Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 830<n>832, 122 S. Ct. 1889, 153 L. Ed. 2d 13 (2002)]. An exception to the well-pleaded complaint rule, known as the complete preemption doctrine, permits removal to federal court of a cause of action that was pleaded by the plaintiff as a state cause of action if the law governing the cause of action is exclusively federal [*see Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 8, 123 S. Ct. 2058, 156 L. Ed. 2d 1 (2003)]. However, because counterclaims cannot establish federal question jurisdiction, this exception does not apply to a state-law based counterclaim, even if it is governed exclusively by federal law. A completely preempted counterclaim remains a counterclaim, and thus does not give rise to federal question jurisdiction.

Applying the well-pleaded complaint rule of *Mottley*, and the ignore the federal counterclaim rule of *Vornado*, the district court may not look past a state-law complaint over which a federal court does not have jurisdiction to base jurisdiction on a completely preempted counterclaim even when the petitioner is seeking arbitration of that federal claim. But, this made no sense to Chief Justice Roberts. For good reason.

Dissent's Approach. First of all, as Chief Justice Roberts explains in his dissent, often a § 4 petition is filed before any state or federal lawsuit is filed. Thus, there is no underlying action to look through when determining whether there is federal jurisdiction under § 4. Accordingly, he argued that the controversy to which § 4 refers is the dispute the petitioner seeks to arbitrate. In this case, that is the dispute raised by the counterclaims, i.e., whether the bank charged

illegal finance charges, interest, and late fees. The resolution of that controversy is controlled by federal law [see 12 U.S.C. § 1831d(a)]. Therefore, the dissent concluded, a federal court would have jurisdiction . . . of the subject matter of a suit arising out of the controversy the bank seeks to arbitrate.

According to the dissent, the fact that a complaint alleging a state-law claim was filed first and the federal causes of action were filed as counterclaims is a mere fortuity that should not deflect the court's focus from the controversy the petitioner seeks to arbitrate. The dissent reasoned that in other sections of the FAA, controversy means the specific dispute asserted to be subject to arbitration [see, e.g., 9 U.S.C. §§ 2, 10(a)(3), 11(C)]. There is no reason to construe it differently in § 4 to refer to the entire controversy between the parties, including parts of the controversy that the petitioner does not seek to arbitrate.

The dissent also faulted the majority for interpreting § 4 in a way that will lead to inconsistent results depending on whether suit is filed before the petition to arbitrate and, if so, on what claim the suit is based. If, for example, the card holder had filed her completely preempted state-law claims first, and the bank had brought the debt-collection action as a counterclaim, the district court would have had jurisdiction over a petition to arbitrate. Similarly, if no complaint had been filed before the petition to arbitrate was filed, the court would have looked to the controversy sought to be arbitrated, i.e., the completely preempted claims. In contrast, if the controversy were deemed to be the dispute the petitioner sought to arbitrate, the result would be consistent regardless of the sequence or existence of pre-petition complaints.

Comment. The majority criticized the dissent's approach as hypothesizing discrete controversies of its own design rather than focusing on the whole controversy as framed by the parties. Perhaps events could have unfolded differently, the Court allowed, but § 4 does not invite federal courts to dream up counterfactuals when actual litigation has defined the parties' controversy. But, as Chief Justice Roberts pointed out in his dissent, federal courts are required to do just that whenever a party seeks a declaratory judgment. Whether there is federal question jurisdiction over a declaratory judgment action depends on the coercive actions that the parties could have brought [see *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 19, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983)] (jurisdiction over a declaratory judgment action exists when, "if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question" (emphasis added)). The specific controversy outlined in Discover's § 4 petition (whether its fees violate the FDIA), could have been the basis for a lawsuit in which Vaden would claim the FDIA has been violated and Discover would claim it has not.

Perhaps the majority was concerned about opening the floodgates. It made a point of noting that the case between Discover and Vaden involved garden variety state law claims, and suggested that adopting the dissent's approach would enable parties to manufacture federal jurisdiction. Moreover, the majority argued, the petitioner's statement of the issues to be arbitrated might not convey the full flavor of the parties' entire dispute, which would divert the court from recognizing the actual dimensions of the controversy. Finally, according to the majority, the dissent's inquiry could be complicated by the presence of a threshold question as to whether a counterclaim alleged to be based on state law is totally preempted by federal law, a jurisdictional issue that cannot be determined on the basis of a party's concession.

However, the dissent responded to such concerns by noting that a § 4 petitioner could not simply recharacterize or manufacture a controversy to create federal jurisdiction because all of the established rules of federal jurisdiction recited above are fully applicable in scrutinizing whether a federal court would have jurisdiction over a suit arising out of the parties' underlying controversy.

For example, a federal question must be presented by the specific controversy the § 4 petitioner seeks to arbitrate, not by some hypothetical federal issue lurking in the background [see *Gully v. First Nat. Bank in Meridian*, 299 U.S. 109, 117, 57 S. Ct. 96, 81 L. Ed. 70 (1936)]. A district court could not compel arbitration of a state-law dispute by pointing to a potential federal defense that a § 4 petitioner is not seeking to arbitrate, because the claim itself must present a federal question to arise under federal law [see *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 672, 70 S. Ct. 876, 94 L. Ed. 1194 (1950)]. Nor could a district court compel arbitration of a dispute that, though not federal in

character, could lead to the filing of a federal counterclaim, for a counterclaim . . . cannot serve as the basis for [federal] jurisdiction of the state-law dispute itself [*see Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 831, 122 S. Ct. 1889, 153 L. Ed. 2d 13 (2002)].

The dissent is correct that § 4 petitioners may no more smuggle state-law claims into federal court through § 4 than they can through declaratory judgment actions, or any other federal cause of action. Like the Declaratory Judgment Act, although § 4 might bring some issues into federal court in a particular case that may not be brought in through other procedural mechanisms, it does so by because it enlarges the range of remedies available in the federal courts, rather than extending its jurisdiction [*see Skelly Oil*, 339 U.S. 667, 671, 70 S. Ct. 876, 94 L. Ed. 1194 (1950)].

While the majority approach appears to present a bright line approach--just look at the underlying litigation and see whether it meets the well-established rules for federal jurisdiction--how would its approach work if no litigation had been filed? Anytime the basis for federal jurisdiction is predicated on federal questions jurisdiction, there are likely to be thorny problems, particularly when one party seeks to recharacterize a state law claim as a federal claim as Discover did in the *Vaden* case. But, the dissent's approach is also bright line in the sense that it simply incorporates the additional rules pertaining to when a Declaratory Judgment Act claim presents a federal question. If a § 4 petition seeks arbitration of a federal question, the district court must ask whether that issue could have been raised by one of the parties in a coercive action as a federal claim. If so, there should be jurisdiction under the FAA. If not, as the majority reminds us, the petition for arbitration may be filed in state court.

State Court May Order Arbitration. The Court noted that its decision did not deprive the bank of a forum for compelling arbitration. The FAA requires state courts to honor and enforce agreements to arbitrate [*see Southland Corp. v. Keating*, 465 U.S. 1, 12, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984)], and the Maryland Arbitration Act embodies the same policy favoring enforcement of arbitration agreements as does the FAA [*Walther v. Sovereign Bank*, 386 Md. 412, 424, 872 A. 2d 735, 742 (2005)]. Thus, the bank may petition a Maryland court to compel arbitration [*see Md. Cts. & Jud. Proc. Code* § 3-207 (If a party to an arbitration agreement . . . refuses to arbitrate, the other party may file a petition with a court to order arbitration. . . . If the court determines that the agreement exists, it shall order arbitration.)]. The dissenting justices were not moved by this point, noting that the existence of parallel state law remedies does not warrant a narrow construction of federal remedies.

Comment. An unintended consequence of the majority approach is that it may lead to strategic filings in state courts to prevent a federal court from entertaining a § 4 petition. For example, if *Vaden* had alleged solely state law claims (as opposed to the completely preempted state law claims) in state court, Discover would be powerless to bring a § 4 petition in federal court even though it may well have been true that the most important issue in the case was the question whether its fees violated federal law. Yes, that is the consequence of the much maligned well pleaded complaint rule. But it would seem that the Chief Justice had it right when he argued that the majority approach had the effect of limiting the meaning of the word controversy in § 4 even though it seemed that Congress had intended a broader construction. The use of the word controversy rather than claim should have allowed the district court to look not just at what was pleaded in the complaint, but the entire controversy involved in the dispute.

RELATED LINKS: For further information, see Moore's Federal Practice:

- 15 Moore's Federal Practice (3d Ed.) § 103.34;
- 19 Moore's Federal Practice (3d Ed.) § 203.12[1]

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Stricter Pleading Standards: Georgene Vairo on Ashcroft v. Iqbal

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By Georgene Vairo

July 28, 2009

SUMMARY: In a recent Supreme Court's case, *Ashcroft v. Iqbal*, the court continued the trend towards stricter pleading standards in civil cases. The Supreme Court held that in deciding a motion to dismiss a complaint, a district court need not accept as true assertions that are no more than recitals of the elements of a cause of action, supported by mere conclusory statements. This Emerging Issues Analysis analyzes the decision.

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ARTICLE: Summary. *Ashcroft v. Iqbal*, -- U.S. -, 129 S. Ct. 1937, 173 L. Ed. 2d 868, 2009 U.S. LEXIS 3472 (May 18, 2009) continues the Supreme Court's trend towards stricter pleading standards in civil cases. The Supreme Court held that in deciding a motion to dismiss a complaint, a district court need not accept as true assertions that are no more than recitals of the elements of a cause of action, supported by mere conclusory statements. Rather, only well-pleaded factual allegations are entitled to an assumption of veracity, and a district court should then determine whether such allegations plausibly give rise to an entitlement to relief. The 5-4 opinion significantly raises the Supreme Court's "plausibility" standard that it announced in *Bell Atlantic v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) to new heights. Unquestionably, the decision portends more cases dismissed at an early stage of litigation, before discovery. Indeed, the erosion of the notice pleading ideal of Federal Rule of Civil Procedure 8 occasioned by *Iqbal* and *Twombly* has caught the attention of Congress. Senator Arlen Specter has introduced a bill, entitled the "Notice Pleading Restoration Act of 2009" (S. 1504), that would prohibit the federal courts from dismissing a civil case unless the complaint fails the "no-set-of-facts" standard established by *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), See David Ingram, *Specter Proposes Return to Prior Pleading Standard* (7/24/2009), <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202432493166>, last visited, July 27, 2009).

Background and Procedural History. The respondent, Iqbal, was a citizen of Pakistan and a Muslim. After the September 11, 2001, terrorist attacks he was arrested in the United States on immigration charges and detained by federal officials. He was deemed to be "of high interest" to the investigation into the terrorist attacks, and was therefore held under restrictive conditions, spending 23 hours a day in lockdown and the remaining hours outside his cell in handcuffs and leg irons. He eventually pleaded guilty to the immigration fraud charges and was removed to Pakistan.

Iqbal then filed a *Bivens* action in federal court against various federal officials and corrections officers, including the U.S. Attorney General and the Director of the FBI, who were the petitioners here. The complaint alleged that the

officials and officers violated the U.S. Constitution by designating him as a person of "high interest," and thereby subjected him to harsh conditions of confinement, on account of his race, religion, or national origin. Iqbal's complaint further alleged that the petitioners approved a policy of arresting and detaining Arab Muslim men as part of the investigation of the September 11 terrorist attacks, and that both petitioners "knew of, condoned, and willfully and maliciously agreed to subject" the respondent to harsh conditions of confinement as a matter of policy, solely on account of his religion, race, or national origin and for no legitimate penological reason.

The petitioners asserted qualified immunity and moved to dismiss the suit on the ground that the complaint was not sufficient to state a claim against them. The district court denied the motion to dismiss, and the petitioners appealed to the Second Circuit Court of Appeals. While the appeal was pending, the Supreme Court decided *Bell Atlantic Corp. v. Twombly*, which, "retired" the *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), "no set of facts" standard and set out a more stringent standard for evaluating the sufficiency of a complaint [*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929]. The Second Circuit discussed *Twombly* at length, concluding that it called for a "flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*."

The Second Circuit, however, decided that it was not presented with one of those contexts requiring amplification, and that the respondent's complaint was sufficient to allege the petitioners' personal involvement in discriminatory decisions that, if true, violated clearly established constitutional law [*Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007)]. Judge Cabranes concurred but invited the Supreme Court to address the appropriate pleading standard in cases such as *Iqbal*'s which might lead to high-level government officials who are entitled to invoke official immunity, being subject to the burdens of discovery on the basis of a non-specific complaint. The Supreme Court took Judge Cabranes' cue, and reversed. Justice Souter, the author of the *Twombly* opinion, dissented.

Appellate Jurisdiction Under Collateral Order Doctrine. Writing for the majority, Justice Kennedy first noted that *Iqbal* had disputed the Second Circuit's subject matter jurisdiction to hear the appeal, but that the Second Circuit had hardly discussed the issue. He affirmed that subject matter jurisdiction cannot be forfeited or waived and should be fully considered when fairly in doubt.

Although the refusal to dismiss was not a final judgment subject to appellate jurisdiction under 28 U.S.C. § 1291, the Court concluded that the Second Circuit had jurisdiction to hear the appeal under the collateral order doctrine [see *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949).] This doctrine makes a limited set of district court orders reviewable even though not final judgments, when they "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

A decision denying a claim of qualified immunity falls within the narrow class of orders that are appealable under the doctrine. This is because qualified immunity, which shields government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights, is both a defense to liability and a limited entitlement not to stand trial or face the other burdens of litigation.

The respondent argued that a qualified immunity appeal based solely on the complaint's failure to state a claim, and not on the ultimate issues relevant to the qualified immunity defense itself, is not a proper subject of interlocutory jurisdiction. The Court ruled, however, that appellate jurisdiction is not so strictly confined. Moreover, the Court rejected the respondent's argument that its collateral order cases only permitted review of issues of law, and that the sufficiency of a complaint implicates issues of fact. Rather, the Court ruled that evaluating the sufficiency of a complaint is not a fact-based question of law that ought not be reviewed: "determining whether respondent's complaint has the 'heft' to state a claim is a task well within an appellate court's core competency." 173 L. Ed. 2d at 881.

Comment. The Court's approach to interlocutory review of the denial of the petitioners' motion to dismiss represents an extension of the collateral order doctrine. However, it is not a surprising development in the context of

official immunity. Over the decades, from *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985), through *Wilkie v. Robbins*, 551 U.S. 537, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007), the Court has consistently opened the door to the use of the collateral order doctrine to allow government officials the opportunity to obtain interlocutory review of district court orders regarding official immunity. Thus, it is not surprising that it found a way around the case relied on by *Iqbal*, *Johnson v. Jones*, 515 U.S. 304, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995). The Court acknowledged that the line between "fact-based" legal questions and "abstract" legal questions is "not well defined," but said that the sufficiency-of-complaint issue in *Iqbal* fell "well within the latter class." 173 L. Ed. 2d at 881. Of course, the goal here is to ensure that government officials not be required to engage in costly, time consuming discovery.

Bivens Action. Moving to the merits of the appeal, the Court began by taking note of the elements of a *Bivens* action—that is, the elements the plaintiff was required to plead to state a claim of unconstitutional discrimination against officials entitled to assert qualified immunity [see *Bivens v. Six Unknown FBI Narcotics Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)]. *Bivens* recognized an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights. The Court noted, however, that it has never extended this right of action to First Amendment claims. Nonetheless, because the petitioners did not press this argument, the Court assumed without deciding that the respondent's First Amendment claim was actionable under *Bivens*.

However, government officials, the Court said, may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*. Accordingly, a plaintiff must plead that each government official defendant, through the official's own individual actions, violated the Constitution. The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue. When the claim is invidious discrimination in contravention of the First and Fifth Amendments, the plaintiff must plead and prove that the defendants adopted and implemented the detention policies not for a neutral investigative purpose, but rather acted with discriminatory intent.

The respondent argued that the petitioners could be liable under a theory of "supervisory liability" for knowledge and acquiescence in their subordinates' use of discriminatory criteria to make classification decisions among detainees. In other words, a supervisor's mere knowledge of a subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution. The Court rejected this argument—each government official is liable only for his or her own misconduct. Thus, a plaintiff must plead and prove discriminatory intent, not mere knowledge of discrimination by subordinates.

Comment. As discussed below, *Iqbal*'s significance goes beyond its facts as a civil rights case. All of its bottom lines are likely to translate beyond the *Bivens* and official immunity context. Thus, even though, as Justice Kennedy said in *Iqbal* that the idea of "supervisory liability" is a "misnomer" in the *Bivens* context, one wonders whether litigation involving corporations' parents and subsidiaries in the future will be affected by this part of *Iqbal*. This is particularly so because, as the dissent points out, the petitioners had conceded that there may be *Bivens* liability as a supervisor on grounds other than *respondeat superior*. Even if *respondeat superior* is a viable legal theory in litigation outside the *Bivens* or civil rights context, *Iqbal* might be cited for the proposition that more facts need to be pleaded to implicate a parent or subsidiary in the wrongdoing of the other.

Twombly Is Not Limited to Antitrust Disputes. To the extent that there was any debate whatsoever about the reach of *Twombly*, *Iqbal* makes plain that stricter pleading standards apply to all civil cases. Justice Kennedy began by running through the pleading standards enunciated in the Court's earlier decision in *Bell Atlantic Corp. v. Twombly*. He squarely rejected the argument that the standards announced in *Twombly*, a complex antitrust case, should be limited to pleadings made in the context of an antitrust dispute. Rather, the Court made clear that its ruling in *Twombly* was based on its interpretation and application of Rule 8, which sets out the pleading standard for all civil actions.

Application of Twombly's Pleading Standard. Civil Rule 8(a)(2) requires that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Twombly* amplified Rule 8, according to the *Iqbal* Court. Under *Twombly*, to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff

pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Moreover, two working principles underlie the *Twombly* decision. First, the tenet that a court must accept as true all the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, also may be disregarded. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.

The Court then reads *Twombly* as applying a two-pronged approach to evaluating the sufficiency of a complaint. "In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."

Following this two-step methodology, the Court concluded that the complaint did not sufficiently plead claims of invidious discrimination. The complaint contained allegations that the petitioners "knew of, condoned, and willfully and maliciously agreed to subject [him]" to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." The complaint further alleged that the Attorney General was the "principal architect" of this invidious policy, and that the Director of the FBI was "instrumental" in adopting and executing it. The Court characterized these assertions as nothing more than a "formulaic recitation of the elements" of a constitutional discrimination claim, and therefore conclusory and not entitled to be assumed true. The Court made clear that it was "the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth." Bottom line, none of these allegations were entitled to the presumption of truth.

The Court then considered whether the remaining allegations, presumed to be true, plausibly suggested an entitlement to relief. The complaint alleged that the FBI, under the direction of one of the petitioners, "arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11" and that the policy of holding post-September-11 detainees in highly restrictive conditions of confinement until they were "cleared" by the FBI was approved by both petitioners in the weeks after September 11, 2001.

According to the Court, these allegations, taken as true, did not plausibly establish a discriminatory purpose on the part of the petitioners with respect to the respondent's arrest. Rather, a more likely explanation for their conduct existed: a neutral policy designed to weed out terrorists. According to the Court, even a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, but incidental impact on Arab Muslims. In other words, according to the Court, the purpose of the policy was not to target Arabs or Muslims, but it was likely that there would be more Arabs and Muslims detained under the policy. The arrests therefore "were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts." Because of this obvious alternative explanation, discrimination was not a "plausible" conclusion.

Moreover, these allegations were with reference to the respondent's arrest-but his claims against the petitioners rested on their ostensible policy of holding detainees under severe conditions of confinement once they were categorized as "of high interest." The complaint failed to show plausibly that the petitioners purposefully adopted a policy of classifying detainees as "of high interest" because of their race, religion, or national origin. The complaint alleged that the petitioners approved restrictive conditions of confinement for detainees until they were cleared by the FBI. Even accepting the truth of these allegations, no facts were alleged to show that this action was due to the detainees' race, religion, or national origin.

Comment. A combination of the Court's two-pronged approach requiring 1) an initial scrutiny of all allegations to determine whether they are fact-based sufficiently to be entitled to a presumption of truth, as well as 2) its "bigger than a breadbox" "plausibility" but not a "probability" standard present huge hurdles for plaintiffs. The quaint idea that notice pleading followed by liberal discovery will lead to a fair resolution of a case is dead. For years, since the 1980's, we have witnessed the Federal Rules of Civil Procedure being amended repeatedly to control discovery, to enhance judicial management, and to provide for sanctions to be imposed on attorneys who disregard their Rule 11 obligations. Rule 8 has not been touched. Indeed, until *Twombly*, in cases like *Leatherman v. Tarrant County Narcotics Intelligence And Coordination Unit*, 507 U.S. 163, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993), and *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002), we saw the Court appearing to rein in lower courts who were imposing stricter pleading standards.

The Supreme Court, however, did take some steps to that presaged *Twombly* and *Iqbal*. With its 1986 trilogy of summary judgment cases, along with the trilogy's progeny -- *Daubert*, *Joiner*, and *Kumho* -- the Supreme Court announced summary judgment standards that were intended to curb the costs and delay that a notice pleading and liberal discovery regime entail by making it easier for defendants to obtain summary judgment.

Although most commentators believe that summary judgment was granted more frequently than in the past, apparently more needed to be done. In both *Twombly* and *Iqbal*, the Court expressed its concerns about forcing defendants into costly discovery. So, it developed a standard for evaluating complaints that would cut off the plaintiff at the pre-discovery stage. A liberal summary judgment regime makes sense because the plaintiff will have had the opportunity to take discovery. A stringent pleading regime deprives plaintiffs of that.

So, what is a plaintiff to do? Even though the Court says that it is not requiring a return to fact pleading, it really is. Plaintiffs alleging conclusions without specific facts face dismissal. Indeed, such allegations will not make it past the first prong of the Court's approach because they will not be entitled to the presumption of proof. It will not work to throw in the kitchen sink because the court will be zeroing in only on the allegations that have some real factual basis so that the court can then apply its "common sense" to determine whether the claims are plausible.

Just as the 1986 trilogy and *Daubert* turned the district judge into a "gatekeeper" to trial, *Iqbal* and *Twombly* turn the district court judge into a gatekeeper to discovery. This will make life very difficult for plaintiffs in cases where the evidence is largely in the hands of the defendants. As the Scotusblog Web site noted, *Iqbal* is "an unexpected gift for the business community."

Relationship Between Discovery and Rule 12(b)(6). To hammer these points home, the Court also rejected the idea that application of Rule 8 and the *Twombly* standard might be tempered when the district court cabins discovery in such a way as to preserve the defense of qualified immunity as much as possible. The Court ruled that "the question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process. . . . Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise."

The Court concluded that the respondent's complaint failed to plead sufficient facts to state a claim for purposeful and unlawful discrimination against the petitioners, and reversed and remanded for further proceedings. The Court, however, was also careful to note that its decision applied only to the claims against the highest ranking defendants. It did not analyze the allegations against the lower ranking defendants who were accused of various wrongful acts while *Iqbal* was incarcerated.

Dissent. Justice Souter, the author of the *Twombly* opinion, filed a dissent, joined by Justice Stevens, Justice Ginsburg, and Justice Breyer. The dissent concluded that the majority both misapplied the pleading standard under *Twombly* and incorrectly rejected supervisory liability.

The dissent first observed that the petitioners had explicitly conceded, for purposes of their appeal, that an officer

may be subject to *Bivens* liability as a supervisor on grounds other than *respondeat superior*. The Court had therefore received no briefing or argument on the proper scope of supervisory liability. Rejecting the principle of supervisory liability in these circumstances was uncalled for, especially as this conclusion had no bearing on the majority's resolution of the present case.

Given the petitioners' concession, the complaint satisfied Rule 8, in the dissent's view. The petitioners admitted they were liable for their subordinates' conduct if they had actual knowledge of the discriminatory nature of the classification of suspects as being "of high interest," and were deliberately indifferent to that discrimination. The complaint alleged, at a bare minimum, that the petitioners knew of and condoned the discriminatory policy their subordinates carried out, and in fact went further and alleged that they acted affirmatively to create the discriminatory detention policy.

The petitioners argued that the complaint failed to satisfy *Twombly*'s plausibility standard because it was implausible that such high-ranking officials would be personally involved in the specific actions of lower-level officers. This response, the dissent said, "bespeaks a fundamental misunderstanding of the enquiry that *Twombly* demands. *Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be. . . . The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel. That is not what we have here."

The dissent did not necessarily disagree with the majority over the definition of "plausibility" under *Twombly*. Rather, the dissent took issue with the first prong of the majority's analysis, under which the majority discarded a number of allegations as "conclusory," leaving only two statements to consider. The dissent agreed that the two allegations selected by the majority did not, by themselves, state a plausible entitlement to relief.

However, the complaint contained many allegations linking the petitioners to the discriminatory practices of their subordinates. These allegations were not merely "bare assertions" or a "formulaic recitation of the elements," as the majority would have it. The complaint contained specific allegations as to a policy that discriminated against Arab Muslim men, and further alleged that the two petitioners knew of, condoned, and agreed to subject the respondent to this particular, discrete, discriminatory policy. Taking the complaint as a whole, it gave the petitioners fair notice of the claim and the grounds on which it rested.

Comment. It is notable that the *Iqbal* dissent was written by Justice Souter, who wrote for the 7-2 majority in the *Twombly* opinion. Justice Souter is correct that the *Twombly* decision did not require the court on a motion to dismiss to decide if the facts are true, as the majority decided in *Iqbal*. Rather, he said that a court must take the allegations as true, no matter how skeptical the court may be, unless the facts were fanciful -- such as seeing little green men.

Perhaps *Twombly* and *Iqbal* can be seen as special cases where public policy considerations give rise to heightened concerns about ensuring the "plausibility" of the cases before letting them go forward. In *Twombly*, the concern was about the enormous resources involved in defending against an antitrust case. In *Iqbal*, it was national security concerns, as well, perhaps, a judicial hostility to *Bivens* actions. Accordingly, while the ruling will lead to more arguments from defense lawyers that plaintiffs must plead with greater specificity in all cases, it is possible that *Iqbal* will not affect cases where these types of public policy considerations are not at play. On the other hand, district court judges now have an approach that enables them to play the gatekeeper by using their judgment that allegations are not sufficient to be entitled to the presumption of truth, and even if they are, they do not present a plausible claim for relief.

In any event, it is now apparent that the Court has endorsed a variable standard of specificity that depends on complexity, cost of litigation and other policy concerns. Certain business torts and civil rights cases involving a requirement of intent may well fall prey to *Iqbal*. It remains to be seen whether Senator Specter will be able to convince Congress to revive the no-set-of-facts standard of *Conley v. Gibson*, and pass the "Notice Pleading Restoration Act of

2009." In the meantime, it is likely that the Federal Judicial Conference will direct its Civil Rules Committees to look into the issue. Given that notice pleading and liberal discovery were the linchpins of the Federal Rules of Civil Procedure enacted in 1938, there is a great deal at stake. Will Congress or the Judiciary make it easier for plaintiffs to get to discovery? Or, will defendants be spared the costs of discovery? Defendants can argue that the policy choices made early in the 20th Century are too expensive, given 21st Century costs. Plaintiffs will argue that access to courts is priceless. Indeed, Senator Specter noted in his remarks introducing the bill that: "The effect of the Court's actions will no doubt be to deny many plaintiffs with meritorious claims access to the federal courts and, with it, any legal redress for their injuries." He further noted that given economic realities, government resources will be limited, and "the enforcement of federal antitrust, consumer protection, civil rights and other laws that benefit the public will fall increasingly to private litigants." See David Ingram, *Specter Proposes Return to Prior Pleading Standard* (7/24/2009), <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202432493166>, last visited, July 27, 2009).

Perhaps we will see a compromise of sorts. The Judicial Conference may recommend a revision of Rule 56 that will restore the pre-Style project language. Prior to the restyling of the Federal Rules of Civil Procedure in 2007, Rule 56 provided that a court "shall" grant summary judgment if no genuine issues of material fact existed. The Style Project eliminated the use of the word "shall" in all the words, substituting instead the words "must" or "should." For Rule 56, the word "shall" was replaced with the word "should." Defendants are arguing that the word "must" should be used. Plaintiffs tend to prefer "should" which connotes a degree of discretion. The proposed revision of Rule 56 would restore the word "shall." The Style Project was designed to clean up the language and structure of the Civil Rules, not change their meaning. The Advisory Committee Note to the proposed revision acknowledges that the change to "should" might suggest a different standard. Accordingly, it proposes restoring the word "shall" to ensure that the preexisting caselaw on the standard for granting summary judgment remains intact. See <http://www.uscourts.gov/rules/index2.html#standing0609>, last visited July 27, 2009.

A restoration of the word "shall" or, even better from the defense point of view, a change to "must" along with the Supreme Court's liberal interpretation of Rule 56 in its 1986 Trilogy, may appease defendants' interests sufficiently that a restoration of the no-set-of-facts standard for pleading and dismissal of claims will be politically palatable. No matter what positives exist for the Supreme Court's decision in *Iqbal*, it clearly is an end-run around notice pleading. This is a significant departure from the status quo and requires a rethinking. If notice pleading and liberal discovery are to be discarded, they ought to be discarded pursuant to the rule making process of the Rules Enabling Act. 28 U.S.C. § 2072.

RELATED LINKS: For more information on this topic, see Moore's Federal Practice

- 2 Moore's Federal Practice (3d Ed.) § 8.04;
- 2 Moore's Federal Practice (3d Ed.) § 12.34;
- 19 Moore's Federal Practice (3d Ed.) § 202.07[2][b]

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Admissibility of Records and Certificates in Criminal Cases After Melendez-Diaz

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Prof. Daniel Capra on Admissibility of Records and Certificates in Criminal Cases After Melendez-Diaz

By Daniel J. Capra

July 14, 2009

SUMMARY: Professor Capra considers the implications of Melendez-Diaz on the admissibility of records and certificates under the Federal Rules of Evidence. He finds that the Court has left a good deal of uncertainty on the admissibility of autopsy reports, certificates of authenticity, and many other documents that are offered at virtually every federal criminal trial.

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ARTICLE: Prof. Daniel Capra on Admissibility of Records and Certificates in Criminal Cases After *Melendez-Diaz*

Setting the Stage

In *Crawford v. Washington* the Court held that if hearsay is testimonial, its admission violates a criminal defendant's right to counsel unless the declarant is subjected to cross-examination. A quick summary of results on what has been held "testimonial" and what has not, so far, might be useful to frame the importance of the *Melendez-Diaz* decision.

Hearsay Found Testimonial:

1. Confession of an accomplice made to a police officer.
2. Grand jury testimony.
3. Plea allocutions of accomplices, even if specific references to the defendant are redacted.
4. Statement of an incarcerated person, made to a police officer, identifying the defendant as taking part in a crime.
5. Report by a confidential informant to a police officer, identifying the defendant as involved in criminal activity.
6. Accusations made to officers responding to a 911 call, after the emergency has subsided.

7. Statements made by an accomplice while placed under arrest, but before formal interrogation.

8. False alibi statements made by accomplices to the police (though while testimonial, they do not violate the defendant's right to confrontation because they are not offered for their truth).

9. A police officer's count of the number of marijuana plants found during the search of the defendant's premises.

Hearsay Found Not Testimonial:

1. Statement admissible under the state of mind exception, made to friends.

2. Autopsy reports.

3. Declaration against penal interest implicating both the declarant and the defendant, made in informal circumstances to a friend or loved one (i.e., statements admissible under the Court's interpretation of Rule 804(b)(3) in *Williamson v. United States*).

4. Letter written to a friend admitting criminal activity by the writer and the defendant.

5. Statements by coconspirators during the course and in furtherance of the conspiracy, when not made knowingly to the police or during a litigation.

6. Certificate of nonexistence of a record, prepared by government authorities in anticipation of litigation. ***(Though these cases were decided before Melendez-Diaz and are no longer good authority).***

7. Warrants of deportation.

8. Entries into a regulatory database.

9. Statements made for purpose of medical treatment.

10. 911 calls reporting crimes.

11. Statements to law enforcement officers responding to the declarant's 911 call reporting a crime.

12. Accusatory statements in a private diary.

13. Odometer statements prepared before any crime of odometer-tampering occurred.

14. A present sense impression describing an event that took place months before a crime occurred.

15. Business records -- including certificates of authenticity prepared for trial. ***(Though the cases finding certificates of authenticity admissible preceded Melendez-Diaz and are now in some doubt).***

16. Statements made by an accomplice to his lawyer, implicating the accomplice as well as the defendant.

17. Judicial findings and orders in one case, offered in a different case.

18. Informal statements made with no law enforcement officers present.

Reports on Forensic Testing by Law Enforcement Are Testimonial. *Melendez-Diaz v. Massachusetts*, 129 S.Ct. __ (2009)

In *Melendez-Diaz*, a drug case, the trial court admitted three "certificates of analysis" showing the results of the

forensic tests performed on the seized substances. The certificates stated that "the substance was found to contain: Cocaine." The certificates were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health. The Court, in a highly contested 5-4 decision, held that these certificates were "testimonial" under *Crawford* and therefore admitting them without a live witness violated the defendant's right to confrontation. The majority noted that affidavits prepared for litigation are within the core definition of "testimonial" statements, and the documents at issue, "while denominated by Massachusetts law 'certificates,' are quite plainly affidavits: declarations of facts written down and sworn to by the declarant before an officer authorized to administer oaths." The majority also noted that the only reason the certificates were prepared was for use in litigation. It stated that "[w]e can safely assume that the analysts were aware of the affidavits' evidentiary purpose, since that purpose -- as stated in the relevant state-law provision -- was reprinted on the affidavits themselves."

The implications of *Melendez-Diaz* -- beyond requiring a live witness to testify to the results of forensic tests conducted primarily for litigation -- are found in the parts of the majority opinion that address the dissent's arguments that the decision will lead to substantial practical difficulties. These implications are discussed in turn:

1. In a footnote, the majority declared in dictum that "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records." Apparently these are more like traditional business records than records prepared primarily for litigation, though the question is close -- the reason these records are maintained, with respect to forensic testing equipment, is so that the tests conducted can be admitted as reliable. At any rate, the footnote shows some flexibility, in that not every record involved in the forensic testing process will necessarily be found testimonial. And the footnote indicates an adherence to the test employed in the previous case of *Davis v. Washington*: hearsay is not testimonial simply because the declarant could anticipate that it would be used in a criminal prosecution. Rather, the *primary motivation* for making the statement must be to use it in a criminal prosecution.

2. The dissent argued that forensic testers are not "accusatory" witnesses in the sense of preparing factual affidavits about the crime itself. But the majority rejected this distinction, declaring that the text of the Sixth Amendment "contemplates two classes of witnesses -- those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter. Contrary to respondent's assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." This statement raises questions about the reasoning of many lower courts that have admitted autopsy reports and other certificates after *Crawford* -- these cases are discussed below.

3. Relatedly, the defendant argued that the affidavits at issue were nothing like the affidavits found problematic in the case of Sir Walter Raleigh. The Raleigh affidavits were a substitute for a witness testifying to critical historical facts about the crime. But the majority responded that while the ex parte affidavits in the Raleigh case were the paradigmatic confrontation concern, "the paradigmatic case identifies the core of the right to confrontation, not its limits. The right to confrontation was not invented in response to the use of the ex parte examinations in Raleigh's Case." Again, many lower courts after *Crawford* have distinguished between ministerial affidavits on collateral matters from Raleigh-type ex parte affidavits; this reasoning is in conflict with *Melendez-Diaz*.

4. The majority noted that cross-examining a forensic analyst may be necessary because "[a]t least some of that methodology requires the exercise of judgment and presents a risk of error that might be explored on cross-examination." This implies that if the evidence is nothing but a machine print-out, it will not run afoul of the Confrontation Clause. Before *Melendez-Diaz*, a number of courts held that machine printouts are not hearsay at all, because a machine can't make a "statement" -- and in terms of confrontation, a machine does not provide "testimony." This case law appears to survive the Court's analysis in *Melendez-Diaz*.

5. The majority does approve the basic analysis of Federal courts after *Crawford* with respect to business and public records, i.e., that if the record is admissible under FRE 803(6) or 803(8) it is, for that reason, non-testimonial under *Crawford*. For business records, this is because, to be admissible under Rule 803(6), it can't be prepared for litigation. For public records, this is because law enforcement reports prepared for a specific litigation are excluded

under Rule 803(8)(B) and (C).

6. In response to an argument of the dissent, the majority seems to state, at least in dictum, that certificates that merely authenticate proffered documents are not testimonial. That passage is better quoted than summarized:

The dissent identifies a single class of evidence which, though prepared for use at trial, was traditionally admissible: a clerk's certificate authenticating an official record -- or a copy thereof -- for use as evidence. But a clerk's authority in that regard was narrowly circumscribed. He was permitted "to certify to the correctness of a copy of a record kept in his office," but had "no authority to furnish, as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect." *State v. Wilson*, 141 La. 404, 409, 75 So. 95, 97 (1917). The dissent suggests that the fact that this exception was narrowly circumscribed makes no difference. To the contrary, it makes all the difference in the world. It shows that even the line of cases establishing the one narrow exception the dissent has been able to identify simultaneously vindicates the general rule applicable to the present case. A clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record, but could not do what the analysts did here: *create* a record for the sole purpose of providing evidence against a defendant.

This passage could be read to mean that certificates authenticating business records under Rule 902(11) -- and, for foreign business records, under 18 U.S.C. § 3505 -- are not testimonial, because such certificates authenticate pre-existing records rather than create a new one. The viability of a 902(11)-type certificate is muddled, however, because that certificate does more than just certify the authenticity of the record. It also certifies that the record was made at or near the time of the occurrence recorded, and was kept in the regular course of regularly conducted activity. It is notable that Justice Kennedy, in dissent, questioned whether Rule 902(11) could continue to be used in criminal cases -- though he raised the issue as a "sky is falling" rhetorical device, and the majority spent a lot of time emphasizing the narrowness of its opinion. The bottom line is that certification of business records in criminal cases is in some doubt after *Melendez-Diaz*, but strong arguments can be made that Rule 902(11) and 18 U.S.C. § 3505 remain constitutionally sound. This point will be discussed further below.

7. As counterpoint to the dissent's argument about prior practice having allowed certificates authenticating records, the *Melendez-Diaz* majority cited a line of cases about affidavits offered to prove the absence of a public record. Again, the passage is better quoted than summarized:

Far more probative here are those cases in which the prosecution sought to admit into evidence a clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it. Like the testimony of the analysts in this case, the clerk's statement would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched. Although the clerk's certificate would qualify as an official record under respondent's definition -- it was prepared by a public officer in the regular course of his official duties -- and although the clerk was certainly not a "conventional witness" under the dissent's approach, the clerk was nonetheless subject to confrontation. See *People v. Bromwich*, 200 N. Y. 385, 388-389, 93 N. E. 933, 934 (1911).

This passage should probably be read to mean that any use of Rule 803(10) in a criminal case -- to prove the absence of a public record by way of an affidavit of the official who checked for the record -- is prohibited. As seen below, every federal court to decide the question after *Crawford* has held that it does not offend the Confrontation Clause to prove the absence of a public record by introducing an affidavit of the official who searched for the record. The rationales behind these decisions are: 1) the underlying records are not testimonial, and so it would stand the Confrontation Clause on its head to hold the affidavit about the records to be testimonial; and 2) the affidavits are essentially ministerial and are not the kind of ex parte testimony used in the *Raleigh* case. But the first rationale is rejected by the passage quoted above -- it doesn't matter that the underlying records are nontestimonial, because the affidavit is a substitute for in-court testimony and is prepared solely for litigation. And the second argument is rejected by the majority's point that the Confrontation

Clause prohibits all testimony, not just the paradigmatic confrontation violation.

Lower Court Cases on Records and Certificates Decided Before Melendez-Diaz

This section discusses the federal circuit court opinions on records and certificates after *Crawford*, and discusses the possible effect of *Melendez-Diaz* on this case law.

Certification of business records under Rule 902(11) is not testimonial: *United States v. Adefehinti*, 519 F.3d 319 (D.C. Cir. 2007): The Court held that a certification of business records under Rule 902(11) was not testimonial even though it was prepared for purposes of litigation. The court relied on *United States v. Ellis*, 460 F.3d 920 (7th Cir. 2006), which held that a certification of business records was not testimonial, given the fact that the underlying records were not testimonial. It also noted that Rule 902(11) provided a procedural device for challenging the trustworthiness of the underlying records: the proponent must give advance notice that it plans to offer evidence under Rule 902(11), in order to provide the opponent with a fair opportunity to challenge the certification and the underlying records. The court stated that in an appropriate case, "the challenge could presumably take the form of calling a certificate's signatory to the stand. So hedged, the Rule 902(11) process seems a far cry from the threat of *ex parte* testimony that *Crawford* saw as underlying, and in part defining, the Confrontation Clause." In this case, the Rule 902(11) certificates were used only to admit documents that were acceptable as business records under Rule 803(6), so there was no error in the certificate process.

Note: While 902(11) may still be viable after *Melendez-Diaz*, as discussed above, some of the rationales used by the *Adefehinti* court are suspect. First, the *Melendez-Diaz* Court seems to reject the argument that the certificate is not testimonial just because the underlying records are nontestimonial. Second, the argument that the defendant can challenge the affidavit by calling the signatory is questionable because the *Melendez-Diaz* majority rejected the government's argument that any confrontation problem was solved by allowing the defendant to call the analyst. In response to that argument, Justice Scalia stated that "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses."

On the other hand, the *Melendez-Diaz* Court held that the Confrontation Clause would not bar the government from imposing a basic notice-and-demand requirement on the defendant. That is, the state could require the defendant to give a pretrial notice of an intent to challenge the evidence, and only then would the government have to produce the witness. Arguably, Rule 902(11) could be interpreted as embodying a notice-and-demand procedure. And more broadly, it can be argued that 902(11) is simply an authentication provision, and that the *Melendez-Diaz* majority stated, albeit in dicta, that certificates of authenticity are not testimonial.

The Advisory Committee on Evidence Rules may wish to consider, at some point, whether to amend Rule 902(11) to more specifically provide for a notice-and-demand procedure, at least in criminal cases. Any such amendment should wait for at least the next Supreme Court term, however, because the Court has taken a case presenting the question of what procedures are necessary for an acceptable notice-and-demand procedure after *Melendez-Diaz*.

Warrant of deportation is not testimonial: *United States v. Garcia*, 452 F.3d 36 (1st Cir. 2006): In an illegal reentry case, the defendant argued that his confrontation rights were violated by the admission of a warrant of deportation. The court disagreed, finding that the warrant was not testimonial under *Crawford*. The court noted that every circuit considering the matter has held "that defendants have no right to confront and cross-examine the agents who routinely record warrants of deportation" because such officers have no motivation to do anything other than

"mechanically register an unambiguous factual matter."

Other circuits have reached the same result on warrants of deportation. See, e.g., *United States v. Valdez-Matos*, 443 F.3d 910 (5th Cir. 2006) (warrant of deportation is non-testimonial because "the official preparing the warrant had no motivation other than mechanically register an unambiguous factual matter"); *United States v. Torres-Villalobos*, 487 F.3d 607 (8th Cir. 2007) (noting that warrants of deportation "are produced under circumstances objectively indicating that their primary purpose is to maintain records concerning the movements of aliens and to ensure compliance with orders of deportation, not to prove facts for use in future criminal prosecutions."); *United States v. Bahena-Cardenas*, 411 F.3d 1067 (9th Cir. 2005) (a warrant of deportation is non-testimonial "because it was not made in anticipation of litigation, and because it is simply a routine, objective, cataloging of an unambiguous factual matter."); *United States v. Cantellano*, 430 F.3d 1142 (11th Cir. 2005) (noting that a warrant of deportation is recorded routinely and not in preparation for a criminal trial").

Note: Warrants of deportation probably still satisfy the Confrontation Clause after *Melendez-Diaz*. Unlike the forensic analysis in that case, a warrant of deportation is for regulatory purposes and is clearly not prepared for the illegal reentry litigation, because by definition the crime has not been committed at the time it's prepared. Warrants of deportation are more akin to certificates of maintenance of forensic equipment, which the Court declared to be nontestimonial in *Melendez-Diaz*.

Proof of absence of business records is not testimonial: *United States v. Munoz-Franco*, 487 F.3d 25 (1st Cir. 2007): In a prosecution for bank fraud and conspiracy, the trial court admitted the minutes of the Board and Executive Committee of the Bank. The defendants did not challenge the admissibility of the minutes as business records, but argued that it was constitutional error to allow the government to rely on the absence of certain information in the minutes to prove that the Board was not informed about such matters. The court rejected the defendants' confrontation argument in the following passage:

Although the Court has yet to articulate a precise definition of "testimonial," it is beyond debate that the Board minutes are nontestimonial in character and, consequently, outside the class of statements prohibited by the Confrontation Clause. The Court in *Crawford* plainly characterizes business records as "statements that by their nature [are] not testimonial." 541 U.S. at 56. If business records are nontestimonial, it follows that the absence of information from those records must also be nontestimonial.

Note: This analysis appears unaffected by *Melendez-Diaz*, as no certificate or affidavit is involved.

Autopsy reports are not testimonial: *United States v. Feliz*, 467 F.3d 227 (2d Cir. 2006): Affirming racketeering convictions, the court found no error in the admission of autopsy reports offered to prove the manner and the cause of death of nine victims. The court held that the autopsy reports were properly admitted as both business records under Rule 803(6) and as public records under Rule 803(8)(B). The court concluded that to be admissible under either of these exceptions, the record could not be testimonial within the meaning of *Crawford*. Put another way, the court declared that if a record were testimonial, it could not by definition meet the admissibility requirements of either exception. With respect to business records, the court noted that Rule 803(6) cannot be used to admit a record that is prepared primarily for purposes of litigation. So by definition to be admissible under Rule 803(6) the record cannot be testimonial within the meaning of *Crawford* and *Davis*. The court recognized that a medical examiner may anticipate that an autopsy report might later on be used in a criminal case. But the court stated that mere anticipation of use in litigation was not enough to make the record testimonial. It noted that the Supreme Court had not embraced such a broad definition of "testimonial." With respect to Rule 803(8)(B), the court observed that the rule "excludes documents prepared for the ultimate purpose of litigation, just as does Rule 803(6)." The court also reasoned that an extreme application of the term "testimonial" would impose unnecessary burdens on the government without a corresponding gain in the truth-seeking process. The court noted the "practical difficulties" of proving cause and manner of death if the report is found

inadmissible:

Years may pass between the performance of the autopsy and the apprehension of the perpetrator. This passage of time can easily lead to the unavailability of the examiner who prepared the report. Moreover, medical examiners who regularly perform hundreds of autopsies are unlikely to have any independent recollection of the autopsy at issue in a particular case and in testifying invariably rely entirely on the autopsy report. Unlike other forensic tests, an autopsy cannot be replicated by another pathologist. Certainly it would be against society's interest to permit the unavailability of the medical examiner who prepared the report to preclude the prosecution of a homicide case.

Note: The court's emphasis on a practical result is problematic under the majority's analysis in *Melendez-Diaz*. The dissenters in *Melendez-Diaz* argued vehemently that requiring live testimony of the analyst would be impractical and would impose substantial and sometimes insurmountable obligations on the government. The majority's response was that it had no authority to consider burdens, because the certificate was testimonial and admission of testimonial hearsay in the absence of cross-examination violates the Confrontation Clause.

This does not mean, however, that autopsy reports are necessarily testimonial after *Melendez-Diaz*. The forensic report in *Melendez-Diaz* was prepared *solely* for litigation and so fit squarely within the Court's definition of "testimonial." Under *Davis*, it is not enough that a report might foreseeably be used in a litigation -- use in litigation has to be the *primary purpose* of the report. Under that test, a good argument can still be made that autopsy reports are not testimonial. And notably, the *Melendez-Diaz* Court agreed with the argument that if a report is admissible under Rule 803(6) or (8), it is by that fact nontestimonial -- because in order to be admissible, it can't be prepared primarily for purposes of litigation.

Certificate of the non-existence of a public record found not testimonial: *United States v. Rueda-Rivera*, 396 F.3d 678 (5th Cir. 2005): The defendant was charged with being found in the United States after deportation, without having obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security. To prove the lack of approval, the government offered a Certificate of Nonexistence of Record (CNR). The CNR was prepared by a government official specifically for this litigation. The court found that the record was not "testimonial" under *Crawford*, declaring as follows:

The CNR admitted into evidence in this case, reflecting the absence of a record that Rueda-Rivera had received consent to re-enter the United States, does not fall into the specific categories of testimonial statements referred to in *Crawford*. We decline to extend *Crawford* to reach such a document.

Other courts have found that certificates proving the absence of public records are not testimonial. See, e.g.: *United States v. Urquhart*, 469 F.3d 745 (8th Cir. 2006) (arguing that a CNR "is similar enough to a business record that it is nontestimonial under *Crawford*."); *United States v. Cervantes-Flores*, 421 F.3d 825 (9th Cir. 2005) (noting that while the *certificate* was prepared for litigation, the underlying records were not -- though this misses the point that while the underlying records are not testimonial, the certificate as to their existence or non-existence would still be so because the certificate is prepared solely for purposes of litigation).

Note: For reasons discussed in the analysis of *Melendez-Diaz*, *supra*, it is almost certain that CNR's are testimonial, and therefore the above cases are not longer good law. Certificates offered to prove the absence of a public record are prepared solely for purposes of litigation, and the fact that they do not fall within the specific categories referred to in *Crawford* is certainly not dispositive after *Melendez-Diaz*. Nor is it dispositive that the records are not about contested historical facts like the *ex parte* testimony in the *Raleigh* case.

Certificate of a record of a conviction found not testimonial: *United States v. Weiland*, 420 F.3d 1062 (9th Cir. 2006): The court held that a certificate of a record of conviction prepared by a public official was not testimonial under *Crawford*: "Not only are such certifications a 'routine cataloging of an unambiguous factual matter,' but requiring the

records custodians and other officials from the various states and municipalities to make themselves available for cross-examination in the countless criminal cases heard each day in our country would present a serious logistical challenge without any apparent gain in the truth-seeking process. We decline to so extend *Crawford*, or to interpret it to apply so broadly."

Note: The interest in avoiding burdens in countless criminal cases is precisely the argument that was rejected in *Melendez-Diaz*. Nonetheless, certificates of conviction may still be found non-testimonial, because the *Melendez-Diaz* majority states, albeit in dicta, that a certificate is not testimonial if it does nothing more than authenticate another document.

Business records are not testimonial: *United States v. Jamieson*, 427 F.3d 394 (6th Cir. 2005): In a prosecution involving fraudulent sale of insurance policies, the government admitted summary evidence under Rule 1006. The underlying records were essentially business records. The court found that admitting the summaries did not violate the defendant's right to confrontation. The underlying records were not testimonial under *Crawford* because they did not "resemble the formal statement or solemn declaration identified as testimony by the Supreme Court." ***See also United States v. Baker*, 458 F.3d 513 (6th Cir. 2006)** ("The government correctly points out that business records are not testimonial and therefore do not implicate the Confrontation Clause concerns of *Crawford*.").

Note: The court's analysis of business records appears unaffected by *Melendez-Diaz*, because no certificate or affidavit was prepared primarily for use in the litigation.

Post office box records are not testimonial: *United States v. Vasilakos*, 508 F.3d 401 (6th Cir. 2007): The defendants were convicted of defrauding their employer, an insurance company, by setting up fictitious accounts into which they directed unearned commissions. The checks for the commissions were sent to post office boxes maintained by the defendants. The defendants argued that admitting the post office box records at trial violated their right to confrontation. But the court held that the government established proper foundation for the records through the testimony of a postal inspector, and that the records were therefore admissible as business records; the court noted that "the Supreme Court specifically characterizes business records as non-testimonial."

Note: The court's analysis of business records is unaffected by *Melendez-Diaz*.

Drug test prepared by a hospital with knowledge of possible use in litigation is not testimonial; certification of that business record under Rule 902(11) is not testimonial: *United States v. Ellis*, 460 F.3d 920 (7th Cir. 2006): In a trial for felon gun possession, the trial court admitted the results of a drug test conducted on the defendant's blood and urine after he was arrested. The test was conducted by a hospital employee named Kristy, and indicated a positive result for methamphetamine. At trial, the hospital record was admitted without a qualifying witness; instead, a qualified witness prepared a certification of authenticity under Rule 902(11). The court held that neither the hospital record nor the certification were testimonial within the meaning of *Crawford* and *Davis* -- despite the fact that both records were prepared with the knowledge that they were going to be used in a prosecution.

As to the medical report, the court reasoned as follows:

Given the focus of the courts of appeals and our own precedent on the declarant's reasonable expectations of whether a statement would be used prosecutorially, *Ellis* may appear to be on strong ground in arguing that the results of his medical tests were testimonial. It must have been obvious to Kristy (the laboratory technician at the local hospital) that her test results might end up as evidence against *Ellis* in some kind of trial. . . .

Nevertheless, we do not think these circumstances transform what is otherwise a nontestimonial business record into a testimonial statement implicating the Confrontation Clause. There is no indication that the observations embodied in *Ellis*'s medical records were made in anything but the ordinary course of business. Such observations, the Court in *Crawford* made clear, are nontestimonial. And we do not think it matters that these observations were made with the knowledge that they might be used for criminal prosecution. Prior to the Court's decision in *Davis*, two other courts of

appeals decided that certificates of nonexistence of record ("CNR"), admitted under Rule 803(10) and used to prove an alien did not receive permission from the Attorney General to reenter the country, were nontestimonial despite the fact they were prepared by the government in anticipation of a criminal prosecution. *See, e.g., United States v. Cervantes-Flores*, 421 F.3d 825, 833 (9th Cir. 2005); *United States v. Rueda-Rivera*, 396 F.3d 678, 680 (5th Cir. 2005). The focus of these decisions was that the preparation of these CNRs was routine, and the statements in them were simply too far removed from the examples of testimonial evidence provided by *Crawford*.

The *Ellis* court found that the Supreme Court's analysis in *Davis* supported its view that a statement is not testimonial simply because it is prepared with the knowledge that it is likely to be used in a prosecution:

In *Davis*, the Court addressed a statement made by a woman to a 911 operator reporting she had been assaulted. That recorded statement was later used at trial to prosecute Davis (the woman's former boyfriend) for a felony violation of a domestic no-contact order. The Court considered the 911 operator's questioning of the woman to be an interrogation, and the operators themselves to be at least "agents of law enforcement." In the face of Davis's objection that introduction of the statement violated the Sixth Amendment, the Court held that when the objective circumstances indicate the "primary purpose" of police interrogation is to meet an ongoing emergency, the statements elicited in response are nontestimonial. We believe this holding necessarily implies that consciousness on the part of the person reporting an emergency (or the police officer eliciting information about the emergency) that his or her statements might be used as evidence in a crime does not lead to the conclusion ipso facto that the statement is testimonial. A reasonable person reporting a domestic disturbance, which is what the declarant in *Davis* was doing, will be aware that the result is the arrest and possible prosecution of the perpetrator. . . . So it cannot be that a statement is testimonial in every case where a declarant reasonably expects that it might be used prosecutorially.

As to the medical reports, the *Ellis* court concluded as follows:

While the medical professionals in this case might have thought their observations would end up as evidence in a criminal prosecution, the objective circumstances of this case indicate that their observations and statements introduced at trial were made in nothing else but the ordinary course of business. Therefore, when these professionals made those observations, they--like the declarant reporting an emergency in *Davis*--were "not acting as . . . witness[es];" and were "not testifying." *See Davis*, 126 S. Ct. at 2277. They were employees simply recording observations which, because they were made in the ordinary course of business, are "statements that by their nature were not testimonial." *Crawford*, 541 U.S. at 56.

Note: *Ellis* is cited by the dissent in *Melendez-Diaz* (not a good thing for its continued viability), and the circumstances of preparing the toxic screen in *Ellis* are certainly similar to those in *Melendez-Diaz*. That said, toxicology tests conducted by private organizations may be found nontestimonial if it can be shown that law enforcement was not involved in the testing. The *Melendez-Diaz* majority emphasized that the forensic analyst knew that the test was being done for a prosecution, as that information was right on the form. Essentially, after *Melendez-Diaz*, the less the tester knows about the use of the test, the better.

As to the certification of business record, prepared under Rule 902(11) specifically to qualify the medical records in this prosecution, the *Ellis* court similarly found that it was not testimonial because the records that were certified were prepared in the ordinary course, and the certifications were essentially ministerial. The court explained as follows:

As should be clear, we do not find as controlling the fact that a certification of authenticity under 902(11) is made in anticipation of litigation. What is compelling is that *Crawford* expressly identified business records as nontestimonial evidence. Given the records themselves do not fall within the constitutional guarantee provided by the Confrontation Clause, it would be odd to hold that the foundational evidence authenticating the records do. We also find support in the decisions holding that a CNR is nontestimonial. A CNR is quite like a certification under 902(11); it is a signed

affidavit attesting that the signatory had performed a diligent records search for any evidence that the defendant had been granted permission to enter the United States after deportation.

The certification at issue in this case is nothing more than the custodian of records at the local hospital attesting that the submitted documents are actually records kept in the ordinary course of business at the hospital. The statements do not purport to convey information about Ellis, but merely establish the existence of the procedures necessary to create a business record. They are made by the custodian of records, an employee of the business, as part of her job. As such, we hold that written certification entered into evidence pursuant to Rule 902(11) is nontestimonial just as the underlying business records are. Both of these pieces of evidence are too far removed from the "principal evil at which the Confrontation Clause was directed" to be considered testimonial.

Note: As discussed in the treatment of *Melendez-Diaz* earlier in this outline, the fact that the certificate conveys no personal information about Ellis is not dispositive, because the information imparted is being used against Ellis. Moreover, the certificate is prepared exclusively for use in litigation. Nonetheless, a 902(11) certification may still be permissible on one of two grounds, as discussed above: 1) the rule provides for a type of notice-and-demand procedure, and the Court gave its imprimatur to at least some form of such a procedure; or 2) the Court stated that certificates that simply authenticate other records are not testimonial.

Odometer statements, prepared before any crime of odometer-tampering occurred, are not testimonial: *United States v. Gilbertson*, 435 F.3d 790 (7th Cir. 2006): In a prosecution for odometer-tampering, the government proved its case by introducing the odometer statements prepared when the cars were sold to the defendant, and then calling the buyers to testify that the mileage on the odometers when they bought their cars was substantially less than the mileage set forth on the odometer statements. The defendant argued that introducing the odometer statements violated *Crawford*. He contended that the odometer statements were essentially formal affidavits, the very kind of evidence that most concerned the Court in *Crawford*. But the court held that the concern in *Crawford* was limited to affidavits prepared for trial as a testimonial substitute. This concern did not apply to the odometer statements. The court explained as follows:

The odometer statements in the instant case are not testimonial because they were not made with the respective declarants having an eye towards criminal prosecution. The statements were not initiated by the government in the hope of later using them against Gilbertson (or anyone else), nor could the declarants (or any reasonable person) have had such a belief. The reason is simple: each declaration was made *prior* to Gilbertson even engaging in the crime. Therefore, there is no way for the sellers to anticipate that their statements regarding the mileage on the individual cars would be used as evidence against Gilbertson for a crime he commits in the future.

Note: this result is unaffected by *Melendez-Diaz* as the records clearly were not prepared for purposes of litigation.

Tax returns are business records and so not testimonial: *United States v. Garth*, 540 F.3d 766 (8th Cir. 2008): The defendant was accused of assisting tax filers to file false claims. The defendant argued that the her right to confrontation was violated when the trial court admitted some tax returns of the filers. But the court found no error. The tax returns were business records, and the defendant made no argument that they were prepared for litigation, "as is expected of testimonial evidence."

Note: this result is unaffected by *Melendez-Diaz*.

Foreign business records are not testimonial: *United States v. Hagege*, 437 F.3d 943 (9th Cir. 2006): In a prosecution for bankruptcy fraud and related offenses, the trial court admitted foreign business records under 18 U.S.C. § 3505. Similar to Rule 803(6), section 3505 allows the foundation requirements for the business records exception to be established by certification. The defendant argued that admission of the foreign business records violated his right to confrontation after *Crawford*. The court rejected this argument and affirmed the convictions. It relied on the statement

in *Crawford* that business records are an example of the kind of statements "which by their nature are not testimonial." The court noted that "[t]he foreign certifications attesting to the authenticity of the business records were not admitted into evidence. Thus, we do not consider whether admission of the foreign certifications would have violated the Confrontation Clause under *Crawford*."

Note: This result is unaffected by *Melendez-Diaz*, as it involves only the business records, and not the foreign certification. (Certifications that do nothing but authenticate another document may still be nontestimonial, as discussed above.)

Absence of records in database is not testimonial; and drug ledger is not testimonial: *United States v. Mendez*, 514 F.3d 1035 (10th Cir. 2008): In an illegal entry case, an agent testified that he searched the ICE database for information indicating that the defendant entered the country legally, and found no such information. The ICE database is "a nation-wide database of information which archives records of entry documents, such as permanent resident cards, border crossing cards, or certificates of naturalization." The defendant argued that the entries into the database (or the asserted lack of entries in this case) were testimonial. But the court disagreed, because the records "are not prepared for litigation or prosecution, but rather administrative and regulatory purposes." The court also observed that Rule 803(8) tracked *Crawford* exactly: a public record is admissible under Rule 803(8) unless it is prepared with an eye toward litigation or prosecution; and under *Crawford*, "the very same characteristics that preclude a statement from being classified as a public record are likely to render the statement testimonial."

Mendez also involved drug charges, and the defendant argued that admitting a drug ledger with his name on it violated his right to confrontation under *Crawford*. The court also rejected this argument. It stated first that the entries in the ledger were not hearsay at all, because they were offered to show that the book was a drug ledger and thus a "tool of the trade." As the entries were not offered for truth, their admission could not violate the Confrontation Clause. But the court further held that even if the entries were offered for truth, they were not testimonial, because "[a]t no point did the author keep the drug ledger for the *primary purpose* of aiding police in a criminal investigation, the focus of the *Davis* inquiry." (emphasis the court's). The court noted that it was not enough that the statements were relevant to a criminal prosecution, otherwise "any piece of evidence which aids the prosecution would be testimonial."

Note: Both holdings in the above case survive *Melendez-Diaz*. The first holding is only about the absence of public records -- records that were not prepared in testimonial circumstances. If that absence had been proved by a certificate, then the Confrontation Clause, after *Melendez-Diaz*, would have been violated. But the absence was proved by a testifying agent. The second holding states the accepted proposition that business records admissible under Rule 803(6) are, for that reason, non-testimonial.

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Time-Computation Amendments to Federal Rules and Statutes

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Time-Computation Amendments to Federal Rules and Statutes

By Editorial Staff

July 7, 2009

SUMMARY: This Emerging Issues Analysis introduces the changes being made to 52 Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, and Federal Rules of Appellate Procedure. It focuses on the changes in how time periods in those Rules are calculated and on the changes in specific Rule and statute based deadlines.

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ARTICLE: Moore's Federal Practice

Time-Computation Amendments to Federal Rules and Statutes

Rules Amendments Effective December 1, 2009, Absent Congressional Action

PREFACE

This pamphlet introduces the changes being made to 52 Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, and Federal Rules of Appellate Procedure. It focuses on the changes in how time periods in those Rules are calculated and on the changes in specific Rule- and statute-based deadlines. This pamphlet does not cover time-computation changes in the Federal Rules of Bankruptcy Procedure or in bankruptcy statutes.

All these changes will take effect on December 1, 2009, unless Congress acts to deny or delay the changes. Congress, as a practical matter, has already approved the changes. It has passed companion legislation, the "Statutory Time-Periods Technical Amendments Act of 2009." n1 This legislation adjusts time deadlines that affect court proceedings in 28 statutes, which are governed by the proposed federal-rules time computation amendments. Passage of this legislation indicates that affirmative Congressional action to disapprove the proposed Rule amendments is unlikely.

The pamphlet consists of:

- A brief analysis of the major "themes" of the changes in the time-counting method and deadlines in the Rules; n2
- Reproduction of the proposed amendments to Rule 6 of the Federal Rules of Civil Procedure, which served as a "template" for similar changes to the method of computing time being made to the other sets of Rules; n3
- A chart listing all the proposed changed deadlines in the Federal Rules of Civil Procedure;
- A chart listing all the proposed changed deadlines in the Federal Rules of Criminal Procedure;

- A chart listing all the proposed changed deadlines in the Federal Rules of Appellate Procedure; and
- A chart listing the most significant changes made by statute in the companion legislation, the "Statutory Time-Periods Technical Amendments Act of 2009."

SYNOPSIS

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PROPOSED 2009 CHANGES IN FEDERAL RULES AND STATUTES AFFECTING TIME COUNTING PROCEDURES AND DEADLINES

Effective December 1, 2009, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Federal Rules of Appellate Procedure will be amended. A companion statute has been passed by Congress and signed into law by the President, whose changes also become effective on December 1, 2009. n4 The changes affect time deadlines and are important to all lawyers practicing in federal courts.

The changes address two related matters:

- The method for calculating or counting time periods set out in the rules, such as deadlines for actions; and

- The specific time periods set out in the various federal rules.

I. CHANGES IN METHODS FOR CALCULATING TIME PERIODS

A. Adopting "Days Are Days" Approach

The current rules exclude intermediate weekends and holidays for some short time periods, resulting in inconsistency and unnecessary complication. The amended rules are consistent and simple: they count every day, including intermediate weekends and holidays for all time periods.

Under the pre-December 2009 version of the federal rules, the methods used for calculating time periods vary depending on whether the time period in question is 10 days or fewer or 11 days or more. For periods of 10 days or fewer, weekend days and legal holidays that occur during the period are not counted. For periods of 11 days or more, these "intermediate" weekend days and legal holidays are counted. n5 This made calculating time periods unnecessarily complex. As the drafters note: n6

[A] 10-day period and a 14-day period that started on the same day usually ended on the same day (and the 10-day period not infrequently ended later than the 14-day period.

Under the proposed amended rules, this distinction is completely eliminated. As amended, the rules explicitly state: n7

[C]ount every day, including intermediate Saturdays, Sundays, and legal holidays.

The drafters note that the directive to count every day "is relevant only if the time period is stated in days (not weeks, months, or years)." n8 No other exemption or exception is provided in the amended rules.

The drafters recognized that the change requiring all time periods to be counted the same way will effectively shorten periods of 10 days or fewer, which, under the old rules, would have almost always been stretched out to more than the equivalent number of "calendar" days because the "intermediate" weekend days and holidays were excluded. n9 It was this phenomenon that prompted the drafters to adjust the many short time periods and deadlines in the rules and seek comparable changes to the relevant statutes.

See II., below, for a discussion of the changes in individual rule-based or statutory periods.

B. Basic "Exclude-the-First-Day and Include-the-Last-Day" Counting Rule Remains Unchanged

Under all the federal rules, both as currently existing and as proposed to be amended effective December 1, 2009, the most basic counting rule remains the same. n10 In calculating or counting any time period, the "first" day, the day of the act or event that starts the period running, is not counted. n11 The last day of the period is included, unless it is a Saturday, Sunday, or legal holiday. If the "last" day falls on a Saturday, Sunday, or legal holiday, the last day of the period extends to the next day that is not a Saturday, Sunday, or legal holiday. n12

The proposed amendments clarify this basic counting rule in two significant ways. Under the current rules, a time period is extended to the next day when the "last" day falls on a day when the clerk's office is "inaccessible." n13 The provision applies expressly to filing a paper. The proposed amendments expand the provision to explicitly address electronic filings. The provision extending the "last" day of a time period for making a paper filing is preserved in the proposed amended rules. n14 In this era of electronic service and filing, this may seem anachronistic. However, a significant number of filings in the federal courts continues to be made by persons filing pro se, including incarcerated persons, who typically do not have access to a computer. But in most other cases, the crucial test should be whether the electronic filing system is available, rather than whether the "clerk's office" is or is not physically "accessible."

The proposed rule amendments do not define "inaccessible." The drafters recognized that a national rule could not

address all conceivable situations, which could be subject to unique local conditions and practice. For this reason, the proposed amendments authorize each court to adopt local rules defining "inaccessible" and providing for shorter or different time-period extensions in such circumstances. n15 By way of an example, the drafters state that the "inaccessibility" provision, as revised, is intended to cover situations in which the "clerk's office" is "inaccessible" because of "an outage of the electronic filing system." The drafters note that a court "might not wish a [temporary or momentary] period of inaccessibility to trigger a full 24-hour extension" of the time to file. In such circumstances, a court is in a better position to determine how long the time period should be extended when an "outage" of the electronic filing system occurs on the last day permitted for filing. Many courts already have elaborate and disparate provisions in their local rules covering this circumstance. n16

The proposed amendments also explain how to determine the "next day" for both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time after an event. A backward-looking time period requires something to be done within a period of time before an event. n17 The definition of "next day" comes into play when a deadline falls on a weekend or holiday, because the proposed amendments then directs that the deadline continues to run until the "next day" that is not a weekend or holiday. Under the proposed amendments, if the deadline is measured after an event and the deadline falls on a weekend or holiday, the "next day" is determined by continuing to count forward. But if the deadline is measured before an event and the deadline falls on a weekend or holiday, the "next day" is determined by continuing to count backward, for example, from Saturday the 31st to Friday the 30th. n18

For forward-counted periods, that is, periods that are measured after an event, the rule includes state holidays within the definition of legal holidays. However, state legal holidays are not recognized in counting backward-counted periods. n19 For both forward- and backward-counted periods, the rule thus protects those who may be unaware of the effect of state holidays, some of which may be arcane and little known. n20

C. New Definitions for Expiration of "Last Day"

The proposed amendments provide a definition for when the "last day" of a period expires. For paper filing, the last day of a time period expires "when the clerk's office is scheduled to close." n21 For electronic filing in a district court, the last day of a time period expires "at midnight in the court's time zone." n22 For electronic filing in a court of appeals, the last day of a time period expires at "midnight in the time zone of the circuit clerk's principal office." n23

D. New Rules for Time Periods Stated in Hours

The amended federal rules contain new provisions for calculating time periods or deadlines stated in hours rather than in days, week, months, or years. The time period for a deadline stated in hours starts to run "immediately" on the occurrence of the event that triggers the period. n24 All hours are counted, including those during "intermediate" Saturdays, Sundays, and legal holidays. n25 If the last hour of the period or deadline falls on a Saturday, Sunday, or legal holiday, the period extends until the same time on the next day that is not a Saturday, Sunday, or legal holiday. n26

Although the federal rules as amended will now contain rules for calculating time periods or deadlines stated in hours, there are no such time periods in any of the existing or soon-to-be-amended federal rules. n27 Nonetheless, the possibility of such deadlines is more probable in the era of electronic service and filing than it was previously. Furthermore, as the drafters note, time periods or deadlines stated in hours do exist already in a few statutes and are reasonably common in emergency court orders. n28

II. PRINCIPLES USED IN ADJUSTING INDIVIDUAL TIME PERIODS

A. General Scheme Underlying the Time-Period Changes

One of the primary goals of the drafters was to ensure that the changes to the time computation method did not

shorten, as a practical matter, any time period in the rules. n29 Another goal, though less important, was to make the time periods in the rules more convenient by setting them in multiples of seven days whenever possible. n30 The drafters reviewed every time period in the rules with these two purposes in mind. They paid particular attention to every period that was less than 11 days because such periods would be effectively shortened by the change in the time-computation method. n31 After a comprehensive review, they proposed amending time periods in a total of 52 Appellate, Civil, and Criminal Rules.

Though the drafters generally adjusted the time periods to meet the two goals, they did not mechanically extend every short period of time and change every period to a multiple of seven days. Instead they reviewed and evaluated each time period independently. They recognized that some periods were deliberately short and only limited extensions would be appropriate to account for the inclusion of weekends. Practical experience with time periods in other rules, however, called for significant extensions. The drafters took advantage of the top-to-bottom review of the rules to make appropriate adjustments to time periods if there was a good reason to do so.

The bottom line is that practitioners must be aware that virtually all time periods in the federal rules have been adjusted. Most of the adjustments will, as a practical matter, either slightly extend a time deadline or maintain the status quo. A handful of amendments are made for reasons independent of those required to account for the change in the time-computation method. n32 Because the principles were not applied with anything resembling mechanical consistency, a prudent practitioner must check every single deadline, and review all calendaring systems to make sure that every possible deadline change is anticipated.

Practitioners also must be aware that the change in the method of computing time in the federal rules applies to time periods contained in local rules and in statutes affecting court proceedings. Courts were asked to amend their local rules consistent with the changes to the federal rules. Courts also were advised to make these changes effective on the same date as the federal rule changes and the changes to the relevant statutory time periods, December 1, 2009, to prevent confusion.

B. Shorter Deadlines Lengthened to Account for Changes in Counting Rules

Most of the changes in the federal rules that will take effect in December 2009 are intended either to offset the inclusion of weekends and holidays in the computation of short time periods or set the periods in multiples of seven days. A good example of the extension of a short time period given by the drafters of the amendments to the Federal Rules of Civil Procedure is Rule 14(a)(1). n33 As currently drafted, a defending party may serve a third-party summons and complaint on a nonparty without leave of court if the defending party acts not more than 10 days after serving its original answer in the action. n34 To keep the deadline essentially the same under the new methods for counting time periods, this time period will be extended to 14 days to account for the four days in the two intermediate weekends. n35

C. In Adjusting Deadlines, Week-Long Periods (Multiples of 7 Days) Were Preferred

In adjusting deadlines, the drafters of the amendments expressed a preference for time periods measured in weeks, that is, in 7-day increments. For example, in Appellate Rule 5(d)(2), a 10-day period was replaced with a 14-day period. n36 In Appellate Rules 28.1(f) and 31(a), 3-day periods were replaced with 7-day periods. n37 The advantage of such time periods is explained in the context of changing 10-day periods to 14-day periods: n38

A 14-day period has an additional advantage. The final day falls on the same day of the week as the event that triggered the period—the 14th day after a Monday, for example, is a Monday. This advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days, and 21-day periods to replace 20-day periods.

The drafters of the amendments explain their methodology as follows: n39

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new

period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method—two Saturdays and Sundays were excluded, giving 14 days in all.

This explanation accounts for the almost universal practice of transforming 20-day periods into 21-day periods. n40 After all, 20-day periods would not be affected by the change in time-period calculation methods, but as the charts in this pamphlet show, most (if not all) 20-day periods were changed to 21-day periods.

The drafters did not apply their preference for deadlines stated in increments of seven days to any period that was already set at 30 days or longer because it is more convenient to compute such longer time periods in months or years. n41

D. Adjusting Seven-Day Periods Raises Issues

There are a few 7-day periods in the rules, for example, Criminal Rules 29(c)(1), 33(b)(2), 34, and 35(a), which raised unique issues. Adding two days to these time periods would offset the inclusion of an intermediate weekend, but a 9-day period would fall short of meeting the drafters' intent to set time periods in multiples of 7 days, whenever possible. Extending 7-day periods to 14-day periods would be consistent with the preference for 7-day multiples, but it might provide too much time in a given situation. For example, the drafters did not extend the 7-day period in Appellate Rule 5(b)(2) from 7 days to 14 days. Instead, they changed it to 10 days. n42 In this case, the drafters concluded that the 7-day period had to be extended to account for the practical loss of two days under the new time computation method, but there was good reason to keep it relatively short. n43

The amendments dealing with time periods for filing interlocutory appeals in class actions offer a good illustration of how complicated adjusting 7-day time periods can be. The Statutory Time-Periods Technical Amendments Act of 2009 n44 did not alter the general statute authorizing discretionary interlocutory appeals, 28 U.S.C. § 1292(b), so the statutory period for taking an interlocutory appeal under this provision remains at 10 days. n45 As noted earlier, the change in counting methodology will effectively shorten this "10-day" period when the federal rule amendments become effective on December 1, 2009. n46 The drafters concluded that maintaining a "shortened" 10-day period was appropriate for these types of proceedings. For class actions covered by the Class Action Fairness Act, the statutory provision governing the time period for seeking appellate review of a district court's order on a remand motion was extended to 10 days. n47 The statutory amendment not only extended the time period but also addressed a troublesome drafting error, which had inadvertently called for a seven-day "waiting period" before an application for an appeal could be filed. n48 The amendment provided a clear deadline for filing an application to appeal. However, the time period selected was not 14 days but 10 days. n49

Despite the use of a 10-day period in the statutory provisions governing interlocutory appeals generally and of class-action orders on remand motions specifically, the time period in Rule 23(f) governing interlocutory appeal of an order granting or denying class-action certification was extended from 10 to 14 days. n50 Prior to the proposed amendments, these appeals had, like the general statute on discretionary interlocutory appeals, a 10-day deadline within which to file a "petition" for permission to appeal. n51 However, this 10-day deadline was changed to a 14-day deadline in the proposed amendments. n52 Thus, one form of discretionary appeals affecting class actions has a 10-day deadline for filing an application to appeal (in conformity with the general statute on interlocutory appeals), but another form of discretionary appeals in class actions has a 14-day deadline to take the same action.

E. Some Deadlines Were Reconsidered on the Merits and Restated Accordingly

1. "Jurisdictional" Time Limits for Civil and Criminal Post-Trial Motions Expanded

The time periods or deadlines for filing post-trial motions in civil cases, such as a motion for new trial, n53 are frequently considered "jurisdictional" in the sense that (1) a court may not grant an untimely motion, n54 and (2)

neither the court nor the parties have the power to extend the deadlines for these motions. n55 The drafters did not merely restate these deadlines as the same or similar periods, adjusted for the new counting rules. Instead, the drafters decided to make a more significant change and expanded the time for filing these types of motions from 10 to 28 days: n56

Former Rules 50, 52, and 59 adopted 10-day periods for their respective post-judgment motions. Rule 6(b) prohibits expansion of those periods. Experience has proved that in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. These time periods are particularly sensitive because Appellate Rule 4 integrates the time to appeal with a timely motion under these rules. Rather than introduce the prospect of uncertainty in appeal time by amending Rule 6(b) to permit additional time, the former 10-day periods are expanded to 28 days. Rule 6(b) continues to prohibit expansion of the 28-day period.

A similar expansion of the time periods governing post-trial motions in criminal cases was also made. These filing deadlines were expanded from seven to 14 days. This might have been justified under the principles of adjusting for counting-rule changes to a same or similar period (*see* II.B., *above*) that is a multiple of seven days (*see* II.C., *above*). However, given the "jurisdictional" nature of the deadlines for these post-trial motions, the drafters adjusted the deadlines by selecting what they determined was a more substantively appropriate deadline: n57

Former [Criminal] Rules 29, 33, and 34 adopted 7-day periods for their respective motions. This period has been expanded to 14 days. Experience has proved that in many cases it is not possible to prepare a satisfactory motion in 7 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. This led to frequent requests for continuance, and the filing of bare bones motions that required later supplementation. The 14-day period (including intermediate Saturdays, Sundays, and legal holidays as provided by [Criminal] Rule 45(a)) sets a more realistic time for the filing of these motions.

2. General Civil Motion Deadlines Reconsidered

Prior to the 2009 amendments to the Federal Rules of Civil Procedure, Rule 6 permitted written motions to be made on a mere five days' notice, n58 and any opposing affidavit to the motion could be served a mere one day before the "hearing." n59 In most courts, this "default" provision was impractical. Local rules in most courts set much different limits on notice for motions and on the deadlines for responding to motions. n60 This will probably not change, but the "default" provisions of Rule 6 setting deadlines for notice of and opposition to motions have been deliberately altered to a more realistic 14 days of notice for motions and a 7-day deadline for filing opposition. n61

Along the same line, the "unrealistically short" amount of notice on which the court clerk could tax costs other than attorney's fees has been extended from a single day to 14 days under Rule 54. n62

3. Time Limits on Amendments of Pleadings Without Leave of Court Completely Revised

Prior to the 2009 amendments Federal Rules of Civil Procedure, Rule 15(a)(1) permitted a pleader to amend a pleading once without leave of court ("as a matter of course") under the following two circumstances: n63

- The amendment was made before a "responsive pleading" was served; or
- If a responsive pleading was not allowed, the amendment was made within 20 days of serving the pleading.

This scheme has generated a large amount of confusion and resulting litigation. n64 Under the pre-amendment scheme, the service of a responsive answer immediately cut off the right to amend as a matter of course, but the service of a responsive Rule 12 motion, or, for that matter, a responsive summary judgment motion, would not cut off the right to amend because these motions do not fall under the definition of a "pleading." Thus, if a defendant challenges the complaint by moving to dismiss without filing an answer, the right to amend as a matter of course continues while the motion remains under consideration. n65

The drafters did not merely correct the time periods to conform to the new time-counting rules; they substituted an entirely new scheme of deadlines for amendments to pleadings without leave of court. Under proposed amended Rule 15(a), a pleader has a right to make one amendment without leave of court within 21 days of serving the pleading. n66 If the pleading is one that does require a response, and if either a responsive pleading or a Rule 12 motion is filed, there is no immediate cutoff of the right to amend without leave. Instead, the right to amend without leave of court survives both a responsive pleading and a responsive Rule 12 motion if the amendment is made within 21 days of the service of the responsive pleading or Rule 12 motion, whichever is earlier. n67 The 21-day periods to amend after service of a response to the pleading are not cumulative. If a responsive pleading is served after a Rule 12 motion, there is no new 21-day period. n68

There are three related, substantial differences in the new scheme:

- The distinction between responsive "pleadings" and responsive Rule 12 "motions" as they affect the time to file is eliminated. A response to the pleading in either form has the same procedural effect; n69
- Service of a response to the pleading, even in the form of a responsive "pleading," does not immediately terminate the right to amend without leave of court. The right to amend without leave of court persists for another 21 days; n70 and
- The right to amend is cut off after 21 days following service of a response to the pleading, regardless of whether response is in "motion" or "pleading" form. The right to amend without leave will not persist through potentially lengthy litigation of Rule 12 motions until some responsive "pleading" is served. n71

4. Default Scheduling Rules for Making and Responding to Summary Judgment Motions Completely Revised

Prior to the 2009 amendments to the Federal Rules of Civil Procedure, Rule 56(b) permitted a "defending" party to make a motion for summary judgment "at any time." n72 In contrast, under the pre-amendment version of Rule 56(a), a "claiming" party could move for summary judgment only after 20 days elapsed from the commencement of the action or after an opposing party served a motion for summary judgment. n73 The pre-amendment version of Rule 56 required only 10 days' notice of the motion, and permitted opposing affidavits to be served at any time "before the day of the hearing." n74

As the drafters note, "[t]he timing provisions for summary judgment are outmoded." n75 The amendments totally revise Rule 56(c), setting out an entirely new timing scheme. n76 Rule 56(a) and (b) are revised to eliminate the timing distinction between motions by "claiming" and "defending" parties. n77

The revised scheme for timing of summary judgment motions provides:

- Any party may move for summary judgment "at any time until 30 days after the close of all discovery." n78 A motion may be filed at the same time the action is commenced. If the motion is premature, the time for response may be extended. n79
- Any response to the motion must be filed within 21 days of service of the motion, or when a responsive pleading is due, whichever is later. n80
- The moving party may reply to the response to the motion within 14 days after the response is served. n81

The drafters are well aware that these Rule 56 provisions are, for all practical purposes, "default" provisions. n82 The proposed rule itself notes that its deadlines will not apply if "a different time is set by local rule or the court otherwise orders." n83 In fact, the timing of summary judgment motions is almost always a matter addressed at a Rule 16(b) scheduling conference and in the Rule 16(b) scheduling order itself. n84

Practitioners should also be aware that the timing provisions in Rule 56 that will go into effect on December 1, 2009, will likely be altered again on December 1, 2010. The 2010 changes are part of a comprehensive revision of Rule 56 that is currently pending approval under the rulemaking process. Under the 2010 changes, the provision governing the time to file a summary judgment motion remains unaltered, but the provisions governing the time to file a response

to the motion and reply to the response will be eliminated, leaving such times to local court determinations. The rulemakers recognize that such consecutive amendments may cause confusion, but concluded that the benefits from the 2010 changes would outweigh the temporary confusion.

III. Amendments of Time Periods in Selected Statutory Provisions Affecting Court Proceedings

The Statutory Time-Periods Technical Amendments Act of 2009 amends 28 statutory provisions affecting court proceedings in cases litigated in federal courts, including 9 bankruptcy provisions, to coincide with the changes to the method of computing time in the rules in two important ways. n85 First, the legislation changes certain statutory deadlines to offset any shortening of the time periods resulting from the rules changes that count every day, in effect maintaining the same time period in the statutes. Second, the legislation changes some statutory deadlines that would otherwise be inconsistent with the amended rules deadlines and lead to confusion. The changes, like the proposed rule amendments, take effect on December 1, 2009. n86

Though a large number of statutory time periods could theoretically be affected by the proposed shift in the rules' method of computing time, the number of statutes actually amended is modest. Only statutory time provisions in which the case law applied the rules' method of computing time were amended. Also, only statutes that are frequently used or have time periods that could helpfully be adjusted to offset the effects of the time-computation method were amended. The amendment of 28 U.S.C. § 636(b)(1) provides a good illustration of such a change. n87 The provision sets the period for objecting to a magistrate judge's report and recommendations at 10 days. n88 The proposed amendments to Civil Rule 72 and Criminal Rule 59 extend the time from 10 days to 14 days, n89 recognizing that under the present computation method 10 days has always meant at least 14 calendar days. Section 636(b) is amended to allow 14 days n90 so that the statute and rules remain consistent.

PROPOSED AMENDMENT TO CIVIL RULE 6 AND ADVISORY COMMITTEE NOTE TO RULE 6 AMENDMENTS

New material is underlined; matter to be omitted is lined through.

Rule 6. Computing and Extending Time; Time for Motion Papers

(a) Computing Time. The following rules apply in computing any time period specified in these rules or in any local rule, court order, or statute:

(1) Day of the Event Excluded. Exclude the day of the act, event, or default that begins the period.

(2) Exclusions from Brief Periods. Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days.

(3) Last Day. Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or-if the act to be done is filing a paper in court-a day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

(4) "Legal Holiday" Defined. As used in these rules, "legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and

(B) any other day declared a holiday by the President, Congress, or the state where the district court is located.

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any

local rule or court order, or in any statute that does not specify a method of computing time.

(1) *Period Stated in Days or a Longer Unit.* When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) *Period Stated in Hours.* When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) *Inaccessibility of the Clerk's Office.* Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) *"Last Day" Defined.* Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) *"Next Day" Defined.* The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) *"Legal Holiday" Defined.* "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day;

(B) any day declared a holiday by the President or Congress; and

(C) for periods that are measured after an event, any other day declared a holiday by the state where the district court is located.

* * * * *

(b) Extending Time.

* * * * *

(2) Exceptions. A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b), except as those rules allow.

(c) Motions, Notices of Hearing, and Affidavits.

(1) In General. A written motion and notice of the hearing must be served at least 5 14 days before the time specified for the hearing, with the following exceptions:

(A) when the motion may be heard ex parte;

(B) when these rules set a different time; or

(C) when a court order-which a party may, for good cause, apply for ex parte-sets a different time.

(2) Supporting Affidavit. Any affidavit supporting a motion must be served with the motion. Except as Rule 59(c) provides otherwise, any opposing affidavit must be served at least 1 7 days before the hearing, unless the court permits service at another time.

* * * * *

Committee Note

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time. In accordance with Rule 83(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a).

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. The amendments thus carry forward the approach taken in *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) (holding that Civil Rule 6(a) "does not apply to situations where the court has established a specific calendar day as a deadline"), and reject the contrary holding of *In re American Healthcare Management, Inc.*, 900 F.2d 827, 832 (5th Cir. 1990) (holding that Bankruptcy Rule 9006(a) governs treatment of date-certain deadline set by court order). If, for example, the date for filing is "no later than November 1, 2007," subdivision (a) does not govern. But if a filing is required to be made "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

Subdivision (a) does not apply when computing a time period set by a statute if the statute specifies a method of computing time. *See, e.g.*, 2 U.S.C. § 394 (specifying method for computing time periods prescribed by certain statutory provisions relating to contested elections to the House of Representatives).

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years. *See, e.g.*, Rule 60(c)(1). Subdivision (a)(1)(B)'s directive to "count every day" is relevant only if the period is stated in days (not weeks, months or years).

Under former Rule 6(a), a period of 11 days or more was computed differently than a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 6(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day-and the 10-day period not infrequently ended later than the 14-day period. *See Miltimore Sales, Inc. v. Int'l Rectifier, Inc.*, 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days—including intermediate Saturdays, Sundays, and legal holidays—are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below in the discussion of subdivision (a)(5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk's office is inaccessible.

Where subdivision (a) formerly referred to the "act, event, or default" that triggers the deadline, new subdivision (a) refers simply to the "event" that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change meaning.

Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. *See, e.g.*, Rule 14(a)(1).

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method—two Saturdays and two Sundays were excluded, giving 14 days in all. A 14-day period has an additional advantage. The final day falls on the same day of the week as the event that triggered the period—the 14th day after a Monday, for example, is a Monday. This advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days, and 21-day periods to replace 20-day periods. Thirty-day and longer periods, however, were generally retained without change.

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Civil Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires at a specific time (say, 2:17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be "rounded up" to the next whole hour. Subdivision (a)(3) addresses situations when the clerk's office is inaccessible during the last hour before a filing deadline expires.

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:23 a.m. on Friday, November 2, 2007, will run until 9:23 a.m. on Monday, November 5; the discrepancy in start and end times in this example results from the intervening shift from daylight saving time to standard time.

Subdivision (a)(3). When determining the last day of a filing period stated in days or a longer unit of time, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. When determining the end of a filing period stated in hours, if the clerk's office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday, or day when the clerk's office is inaccessible.

Subdivision (a)(3)'s extensions apply "[u]nless the court orders otherwise." In some circumstances, the court might not wish a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office. The rule does not attempt to define inaccessibility. Rather, the concept will continue

to develop through caselaw, *see, e.g.*, William G. Phelps, *When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure*, 135 A.L.R. Fed. 259 (1996) (collecting cases). In addition, many local provisions address inaccessibility for purposes of electronic filing, *see, e.g.*, D. Kan. Rule 5.4.11 ("A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.").

Subdivision (a)(4). New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply in computing periods stated in hours under subdivision (a)(2), and does not apply if a different time is set by a statute, local rule, or order in the case. A local rule may, for example, address the problems that might arise if a single district has clerk's offices in different time zones, or provide that papers filed in a drop box after the normal hours of the clerk's office are filed as of the day that is date-stamped on the papers by a device in the drop box.

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A corresponding provision exists in Rule 77(a). Some courts have held that these provisions permit an after-hours filing by handing the papers to an appropriate official. *See, e.g., Casaldue v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(4) does not address the effect of the statute on the question of after-hours filing; instead, the rule is designed to deal with filings in the ordinary course without regard to Section 452.

Subdivision (a)(5). New subdivision (a)(5) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Civil Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. *See, e.g.*, Rule 59(b) (motion for new trial "must be filed no later than 28 days after entry of the judgment"). A backward-looking time period requires something to be done within a period of time *before* an event. *See, e.g.*, Rule 26(f) (parties must hold Rule 26(f) conference "as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b)"). In determining what is the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction—that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 30 days *after* an event, and the thirtieth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 21 days *before* an event, and the twenty-first day falls on Saturday, September 1, then the filing is due on Friday, August 31. If the clerk's office is inaccessible on August 31, then subdivision (a)(3) extends the filing deadline forward to the next accessible day that is not a Saturday, Sunday, or legal holiday—no later than Tuesday, September 4.

Subdivision (a)(6). New subdivision (a)(6) defines "legal holiday" for purposes of the Federal Rules of Civil Procedure, including the time-computation provisions of subdivision (a). Subdivision (a)(6) continues to include within the definition of "legal holiday" days that are declared a holiday by the President or Congress.

For forward-counted periods—*i.e.*, periods that are measured after an event—subdivision (a)(6)(C) includes certain state holidays within the definition of legal holidays. However, state legal holidays are not recognized in computing backward-counted periods. For both forward- and backward-counted periods, the rule thus protects those who may be unsure of the effect of state holidays. For forward-counted deadlines, treating state holidays the same as federal holidays extends the deadline. Thus, someone who thought that the federal courts might be closed on a state holiday would be safeguarded against an inadvertent late filing. In contrast, for backward-counted deadlines, not giving state holidays the treatment of federal holidays allows filing on the state holiday itself rather than the day before. Take, for example, Monday, April 21, 2008 (Patriot's Day, a legal holiday in the relevant state). If a filing is due 14 days after an event, and the fourteenth day is April 21, then the filing is due on Tuesday, April 22 because Monday, April 21 counts as a legal holiday. But if a filing is due 14 days before an event, and the fourteenth day is April 21, the filing is due on Monday, April 21; the fact that April 21 is a state holiday does not make April 21 a legal holiday for purposes of computing this backward-counted deadline. But note that if the clerk's office is inaccessible on Monday, April 21, then subdivision

(a)(3) extends the April 21 filing deadline forward to the next accessible day that is not a Saturday, Sunday or legal holiday-no earlier than Tuesday, April 22.

Subdivisions (b), (c). The times set in the former rule at 1 or 5 days have been revised to 7 or 14 days.

CHARTS:

DEADLINE CHANGES IN CIVIL RULES*

DEADLINE CHANGES IN CRIMINAL RULES*

DEADLINE CHANGES IN APPELLATE RULES*

DEADLINE CHANGES IN FEDERAL STATUTES (Statutory Time-Periods Technical Amendments Act of 2009) Pub. L. No. 111-16; 123 Stat. 1607*

***For full chart detailing Deadline changes in Criminal Rules, please select the PDF version of this commentary at no additional charge.**

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n1 Pub. L. No. 111-16, 123 Stat. 1607.

n2 The publishers gratefully acknowledge the assistance of Mr. John Rabiej, of the Administrative Office of the United States Courts, for his assistance in the preparation of this pamphlet.

n3 See Report of the Civil Rules Advisory Committee, May 9, 2008 [Revised June 17, 2008], p. 1 (Civil Rule 6(a) was chosen as the vehicle for the template "provisions that are adopted in as nearly uniform terms as possible by each of the different sets of rules that have time-computation provisions.").

n4 See Statutory Time-Periods Technical Amendments Act of 2009, Pub. L. No. 111-16, 123 Stat. 1607.

n5 Fed. R. Civ. P. 6(a)(2); Fed. R. Crim. P. 45(a)(2); Fed. R. App. P. 26(a)(2).

n6 Fed. R. Civ. P. 6, advisory committee note of 2009.

n7 *Proposed* Fed. R. Civ. P. 6(a)(1)(B); *proposed* Fed. R. Crim. P. 45(a)(1)(B); *proposed* Fed. R. App. P. 26(a)(1)(B).

n8 Fed. R. Civ. P. 6, advisory committee note of 2009.

n9 Fed. R. Civ. P. 6, advisory committee note of 2009 ("Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays.").

n10 *See* 1 *Moore's Federal Practice*, §§ 6.02, 6.03 (basic counting rule has its origins in common law and applies not only to time periods set out in federal rules, but also to calculation of federal statutory periods except when those statutes explicitly provide for different method of calculating time periods).

n11 Fed. R. Civ. P. 6(a)(1); Fed. R. Crim. P. 45(a)(1); Fed. R. App. P. 26(a)(1); *proposed* Fed. R. Civ. P. 6(a)(1)(A); *proposed* Fed. R. Crim. P. 45(a)(1)(A); *proposed* Fed. R. App. 26(a)(1)(A).

n12 Fed. R. Civ. P. 6(a)(3); Fed. R. Crim. P. 45(a)(3); Fed. R. App. P. 26(a)(3); *proposed* Fed. R. Civ. P. 6(a)(1)(C); *proposed* Fed. R. Crim. P. 45(a)(1)(C); *proposed* Fed. R. App. 26(a)(1)(C).

n13 Fed. R. Civ. P. 6(a)(3); Fed. R. Crim. P. 45(a)(3); Fed. R. App. P. 26(a)(3).

n14 *See proposed* Fed. R. Civ. P. 6(a)(3); Fed. R. Crim. P. 45(a)(3); Fed. R. App. P. 26(a)(3).

n15 *See, e.g.*, Fed. R. Civ. P. 6, advisory committee note of 2009.

n16 *See* 1 *Moore's Federal Practice*, § 5.31[5]; 14 *Moore's Federal Practice*, § 77.02.

n17 *Proposed* Fed. R. Civ. P. 6(a)(5); Fed. R. Crim. P. 45(a)(5); Fed. R. App. P. 26(a)(5).

n18 *See* Fed. R. Civ. P. 6, advisory committee note of 2009 ("In determining what is the 'next' day . . . , one should continue counting in the same direction-that is, forward when computing a forward-looking period and backward when computing a backward-looking period.").

n19 *Proposed* Fed. R. Civ. P. 6(a)(6)(C), Fed. R. Crim. P. 45(a)(6)(C), Fed. R. App. P. 26(a)(6)(C).

n20 *See* Fed. R. Civ. P. 6, advisory committee note of 2009 ("For forward-counted deadlines, . . . someone who thought that the federal courts might be closed on a state holiday would be safeguarded against an inadvertent late filing. In contrast, for backward-counted deadlines, not giving state holidays the treatment of federal holidays allows filing on the state holiday itself, rather than the day before.").

n21 *Proposed* Fed. R. Civ. P. 6(a)(4)(B), Fed. R. Crim. P. 45(a)(4)(B), Fed. R. App. P. 26(a)(4)(D).

n22 *Proposed* Fed. R. Civ. P. 6(a)(4)(A); Fed. R. Crim. P. 45(a)(4)(A), Fed. R. App. P. 26(a)(4)(A).

n23 *Proposed* Fed. R. App. 26(a)(4)(B).

n24 *Proposed* Fed. R. Civ. P. 6(a)(2)(A); Fed. R. Crim. P. 45(a)(2)(A); Fed. R. App. P. 26(a)(2)(A).

n25 *Proposed* Fed. R. Civ. P. 6(a)(2)(B); Fed. R. Crim. P. 45(a)(2)(B); Fed. R. App. P. 26(a)(2)(B).

n26 *Proposed* Fed. R. Civ. P. 6(a)(2)(C); Fed. R. Crim. P. 45(a)(2)(C); Fed. R. App. P. 26(a)(2)(C).

n27 Fed. R. Civ. P. 6, advisory committee note of 2009; Fed. R. Crim. P. 45, advisory committee note of 2009; Fed. R. App. P. 26, advisory committee note of 2009.

n28 Fed. R. Civ. P. 6, advisory committee note of 2009; Fed. R. Crim. P. 45, advisory committee note of 2009; Fed. R. App. P. 26, advisory committee note of 2009.

n29 Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure, Sept. 2008, Rules-p. 2 ("In consultation with the Committee's Time-Computation Subcommittee, the Appellate, Bankruptcy, Civil, and Criminal Rules Advisory Committees proposed amendments to Appellate Rule 26, Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45 to make the method of computing time consistent, simpler, and clearer. In tandem with this work, each advisory rules committee also reviewed and proposed changes to the time periods in all the rules to ensure that every deadline is reasonable and that changing the time-computation method did not have the effect of shortening existing time periods.").

n30 Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure, Sept. 2008, Rules-p. 4 ("To further simplify time-counting, the advisory committees proposed changing most periods of less than 30 days to multiples of 7 days. The advisory committees adopted 7, 14, 21, and 28-day periods when possible, so that deadlines will usually fall on weekdays.").

n31 *See, e.g.*, Fed. R. Civ. P. 6, advisory committee note of 2009 ("Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays").

n32 *See, e.g., proposed* Fed. R. App. P. 4(a)(A)(vi) (adjusting time to file a Fed. R. Civ. P. 60 motion that tolls appeal time); Fed. R. App. P. 4(a)(6)(B) (adjusting time for motion to reopen time to file appeal); Fed. R. Civ. P. 6(c) (adjusting time to serve motion and any affidavit supporting motion in opposition); Fed. R. Civ. P. 50, 52, and 59 (adjusting time to file certain posttrial motions); Fed. R. Civ. P. 54(d)(1) (adjusting time of taxation of costs); Fed. R. Civ. P. 56 (establishing presumptive deadline for motions); Fed. R. Crim. P. 29, 33, and 34 (adjusting time to file certain posttrial motions for judgment of acquittal); and Fed. R. Crim. P. 35 (adjusting deadline to file motion to correct errors in sentencing).

n33 *See* Fed. R. Civ. P. 6, advisory committee note of 2009.

n34 Fed. R. Civ. P. 14(a)(1).

n35 *Proposed* Fed. R. Civ. P. 14(a)(1).

n36 *Compare* Fed. R. App. P. 5(d)(2) *with proposed* Fed. App. P. 5(d)(2).

n37 *Compare* Fed. R. App. P. 28.1(f), 31(a) *with proposed* Fed. App. P. 28.1(f), 31(a).

n38 Fed. R. Civ. P. 6, advisory committee note of 2009; Fed. R. Crim. P. 45, advisory committee note of 2009; Fed. R. App. P. 26, advisory committee note of 2009.

n39 Fed. R. Civ. P. 6, advisory committee note of 2009; Fed. R. Crim. P. 45, advisory committee note of 2009; Fed. R. App. P. 26, advisory committee note of 2009.

n40 *See, e.g.,* Fed. R. Civ. P. 12(a) (normal time for responding to complaint changed from 20 to 21 days).

n41 Fed. R. Civ. P. 6, advisory committee note of 2009; Fed. R. Crim. P. 45, advisory committee note of 2009; Fed. R. App. P. 26, advisory committee note of 2009 ("Thirty-day and longer periods, however, were retained without change.").

n42 *Compare* Fed. R. App. P. 5(b)(2) *with proposed* Fed. R. App. P. 5(b)(2).

n43 Fed. R. App. P. 5, advisory committee note of 2009 ("Under former [Appellate] Rule 26(a), '7 days' always meant at least 9 days and could mean as many as 11 or even 13 days. Under current [Appellate] Rule 26(a), intermediate weekends and holidays are counted. Changing the period from 7 to 10 days offset the change in computation approach.").

n44 See Pub. L. No. 111-16, 123 Stat. 1607.

n45 28 U.S.C. § 1292(b) ("The Court of Appeal . . . may . . . permit an appeal . . . if application is made within ten days after entry of the order.").

n46 Fed. R. App. P. 26, advisory committee note of 2009) ("Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all time periods.").

n47 Statutory Time-Periods Technical Amendments Act of 2009, Pub. L. No. 111-16, § 6(2), 123 Stat. 1607.

n48 See *Moore's Federal Practice*, §§ 23.63A[5][b], 107.43A[2].

n49 See 28 U.S.C. § 1453(c)(1), as amended in 2009.

n50 Compare Fed. R. Civ. P. 23(f) with *proposed* Fed. R. Civ. P. 23(f).

n51 Fed. R. Civ. P. 23(f).

n52 *Proposed* Fed. R. Civ. P. 23(f).

n53 See Fed. R. Civ. P. 59(a).

n54 *See Moore's Federal Practice*, §§ 50.42[1], 50.51, 52.61, 59.11[1][a], [2][a], 59.31, 60.65[2][a].

n55 Fed. R. Civ. P. 6(b)(2).

n56 Fed. R. Civ. P. 50, 52, 59, advisory committee notes of 2009.

n57 Fed. R. Crim. P. 29, 33, 34, advisory committee note of 2009.

n58 Fed. R. Civ. P. 6(c)(1).

n59 Fed. R. Civ. P. 6(c)(2).

n60 *See 1 Moore's Federal Practice*, § 6.07 ("As a practical matter, the five-day period for notice of motions is frequently superseded by provisions of local rules."); § 6.08[1] ("Local rules typically require opposition to be filed a considerably longer time before the hearing.").

n61 *See proposed* Fed. R. Civ. P. 6(c)(1), (2).

n62 *Compare* Fed. R. Civ. P. 54(d)(1) *with proposed* Fed. R. Civ. P. 54(d)(1); *see* Fed. R. Civ. P. 54, advisory committee note of 2009 ("Former Rule 54(d)(1) provided that the clerk may tax costs on 1 day's notice. That period was unrealistically short. The new 14-day period provides a better opportunity to prepare and present a response.").

n63 Fed. R. Civ. P. 15(a)(1).

n64 *See 3 Moore's Federal Practice*, §§ 15.10-15.13.

n65 Fed. R. Civ. P. 15, advisory committee note of 2009 ("Serving a motion attacking the pleading did not terminate the right to amend, because a motion is not a 'pleading' as defined in Rule 7."); *see also* 3 *Moore's Federal Practice*, § 15.11.

n66 *Proposed* Fed. R. Civ. P. 15(a)(1)(A).

n67 *Proposed* Fed. R. Civ. P. 15(a)(1)(B).

n68 Fed. R. Civ. P. 15, advisory committee note of 2009.

n69 Fed. R. Civ. P. 15, advisory committee note of 2009 ("The distinction drawn in former Rule 15(a) is changed").

n70 Fed. R. Civ. P. 15, advisory committee note of 2009 ("the right to amend is no longer terminated by service of a responsive pleading.").

n71 Fed. R. Civ. P. 15, advisory committee note of 2009 ("the right to amend once as a matter of course terminates 21 days after service of a motion under Rule 12(b), (e), or (f).").

n72 Fed. R. Civ. P. 56(b).

n73 Fed. R. Civ. P. 56(a).

n74 Fed. R. Civ. P. 56(c).

n75 Fed. R. Civ. P. 56, advisory committee note of 2009.

n76 *See proposed* Fed. R. Civ. P. 56(c).

n77 *See proposed* Fed. R. Civ. P. 56(a), (b).

n78 *Proposed* Fed. R. Civ. P. 56(c)(1)(A).

n79 Fed. R. Civ. P. 56, advisory committee note.

n80 *Proposed* Fed. R. Civ. P. 56(c)(1)(B).

n81 *Proposed* Fed. R. Civ. P. 56(c)(1)(C).

n82 Fed. R. Civ. P. 56, advisory committee note of 2009 ("The presumptive timing rules are default provisions that may be altered by an order in the case or by local rule.").

n83 *See proposed* Fed. R. Civ. P. 56(c)(1).

n84 Fed. R. Civ. P. 56, advisory committee note of 2009 ("Scheduling orders are likely to supersede the rule provisions in most cases."); *see* Fed. R. Civ. P. 16(b)(3)(A); *see also* 3 *Moore's Federal Practice*, § 16.13[1][b]; *Manual for Complex Litigation (Fourth)* § 11.34 (2004).

n85 *See* Statutory Time-Periods Technical Amendments Act of 2009, Pub. L. No. 111-16, §§ 2-6, 123 *Stat.* 1607.

n86 Pub. L. No. 111-16, § 7, 123 Stat. 1607.

n87 See Statutory Time-Periods Technical Amendments Act of 2009, Pub. L. No. 111-16, § 6(1), 123 Stat. 1607.

n88 28 U.S.C. § 636(b)(1).

n89 *Proposed* Fed. R. Civ. P. 72(b)(2); Fed. R. Crim. P. 59.

n90 Pub. L. No. 111-16, § 6(1), 123 Stat. 1607.

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California's 2009 E-Discovery Laws: Text and Analysis

2009 Emerging Issues 3958

California's 2009 E-Discovery Laws: Text and Analysis

By Paul R. Kiesel and Steve Williams

July 2, 2009

SUMMARY: E-Discovery: California's new Electronic Discovery Act, effective June 29, 2009, makes comprehensive changes in California law relating to e-discovery. This Emerging Issues Analysis includes analysis by two authors who helped write the Act, the full text of the Code of Civil Procedure provisions affected by the Act, plus the proposed Rules of Court and the corresponding federal e-discovery rules.

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ARTICLE: *California's 2009 E-Discovery Laws*

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California E-Discovery: Analysis of the 2009 Legislation and Rules

By

Paul R. Kiesel & Steve Williams

§ 1 Electronic Discovery

[1] Importance of Electronic Evidence in Modern Law Practice

The explosion of data in the Information Age has changed the face of litigation. In the past, cases were often built on eyewitness accounts, personal recollection, and credibility. Documents always have been important, but "smoking gun" evidence was difficult to locate manually (among mountains of paper files)-or simply wasn't written down.

Litigation is different today. Juries are now conditioned to *expect* "smoking gun" evidence. This evidence is often found in the growing mass of e-mail, video, text messages, online commentary, instant messages, and presentations, electronically recorded and stored-somewhere. Electronic information often takes center stage when a dispute arises. "A picture is worth a thousand words." So is an incriminatory e-mail.

Electronically stored information ("ESI") is at issue in almost every case. Information stored on such devices as cell phones, blackberries, computers, computer networks, and voicemail systems is prevalent. It is difficult to imagine a case in which, at a minimum, early discussions to ascertain whether ESI is at issue would not be appropriate-and these discussions must take place at the earliest possible time to insure that ESI is not lost due to the normal functioning of the devices described above. All practitioners should make it a routine practice to identify these issues at the outset of discovery. In the rare case in which ESI is not at issue, nothing will be lost aside from a short letter and a brief amount of time spent confirming that ESI is not at issue. Such cases, however, will be the exception; the rule is that ESI will almost always be at issue, and a practitioner who ignores this reality does so at her own peril, both in terms of seeking information from an adversary *and* in insuring that she has taken appropriate steps in relation to her own client.

[2] Need for Regulation of Electronic Discovery

In the past few years a pressing need has arisen to manage the discovery demands created by all this electronic data. Counsel need a common set of rules. Judges need uniform guidelines for resolving electronic discovery issues that now appear regularly in their courtrooms.

The general federal and state discovery rules simply were not specific enough to provide detailed guidance on the handling of ESI discovery matters, and did not deal effectively with some of the unique issues that typically arise in e-discovery. Until 2006, the Federal Rules of Civil Procedure did not address issues relating to ESI, and the law governing such matters was developed through case law. Similarly, until 2009, California had virtually no statutes or rules addressing ESI.

In 2006, the Federal Rules of Civil Procedure were amended to explicitly deal with issues relating to ESI. These changes were made due to a recognition that while existing rules provided a rough framework to deal with the issues presented by ESI, that was all that was provided. There was little uniformity in the application of these rules, and both courts and litigants demanded that the system provide clearer guidance-especially given the draconian consequences which could follow from the failure to preserve data in anticipation of, or during litigation. The amendments to the Federal Rules of Civil Procedure were made with these concerns in mind.

Over the last few years, a number of states also amended their rules of procedure to address issues concerning ESI. In addition, the Uniform Law Commission established model e-discovery rules. Many states followed the approach of

the Federal Rules, others were more consistent with the Uniform Law Commission's model rules, while others blended the two.

California, however-the home of Silicon Valley and the seventh largest economy in the world, with some of the world's most active courts both in the state and federal system-took no action. For that reason, courts and litigants tried, with results that varied throughout the state, to apply the general principles governing discovery as set forth in the Discovery Act to ESI issues. There was little consistency, as decisions were often made based upon the familiarity (or lack thereof) of a particular judicial officer with ESI issues. The same lack of uniformity which prompted the amendments to the Federal Rules of Civil Procedure exists in California, and courts and litigants had no ability to conform their conduct with a clear set of rules because there was none.

[3] The Federal Rules of Civil Procedure

The 2006 amendments to the Federal Rules of Civil Procedure, which became effective December 1, 2006, address ESI in the following ways:

- Issues relating to electronic document maintenance, preservation, and production are to be discussed at the conference of parties [*Fed. R. Civ. Proc. 26(f)(3)(C)*].
- A party serving a request to produce documents or information "may specify the form or forms in which electronically stored information is to be produced" [*Fed. R. Civ. Proc. 34(b)(1)(C)*].
- A party responding to such a request may "state an objection to a requested form for producing electronically stored information," and if the responding party objects to the requested form or if no form was specified in the request, "the [responding] party must state the form or forms it intends to use" [*Fed. R. Civ. Proc. 34(b)(2)(D)*].
- The foregoing provisions must be read in conjunction with *Fed. R. Civ. Proc. 34(b)(2)(E)(ii)* and (iii), which provide that if the request does not specify the form of production, a party "must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms (34(b)(2)(E)(ii)) and that a "party need not produce the same electronically stored information in more than one form" [*Fed. R. Civ. Proc. 34(b)(2)(E)(iii)*].
- A "safe harbor" is created which provides that absent exceptional circumstances, a court may not impose sanctions on a party for evidence lost due to routine, good-faith operation of an electronic information system [*Fed. R. Civ. Proc. 37(f)*]. The Advisory Committee Note to this Rule explains that the rule is intended to prevent a party from permitting electronic systems to destroy evidence after a party knows of actual or potential litigation.

The Federal Rules also provide a "claw back" provision that protects a party against claims of waiver when privileged materials are unintentionally produced as part of an electronic production [*Fed. Rule Civ. Proc. Rule 26(b)(5)*]. This is a reasonable response to the fact that extraordinarily large productions of electronic information make it difficult to perform a traditional privilege review before production without unduly delaying production. This change was incorporated into prior amendments to the Federal Rules of Civil Procedure, and is also reflected in newly amended *Fed. R. Evid. 502*.

The relevant Federal Rules are reproduced in Appendix F, *below*.

§ 2 California Law Governing Electronic Discovery

[1] Prior Law

The general law concerning discovery in California primarily resides in the provisions of the Civil Discovery Act of 1986, presently codified in *Code Civ. Proc.* §§ 2016 et seq. These provisions provide general rules and principles governing discovery in civil cases in California, but for the most part do not explicitly address issues relating to ESI. One of the few exceptions to this is *Code Civ. Proc.* §§ 2017.710-2017.740 (Chapter 3, relating to "Use of Technology in Conducting Discovery in a Complex Case"), which was added to the Discovery Act in 2004.

Cases which addressed issues of ESI under California law may be viewed as simply applying the general principles of California discovery law rather than creating new rules unique to ESI. For example, in *Electronic Funds Solutions v. Murphy* (2005) 134 Cal. App. 4th 1161, 36 Cal. Rptr. 3d 663, terminating discovery sanctions were affirmed after a party had "wiped" computer hard drives after production of the computer hard drives had been ordered. The result is not substantively different from what would have resulted had paper documents been destroyed after an order to produce the files had been issued.

[2] Development of Judicial Council Proposal

The California Judicial Council Rules and Projects Committee on Electronic Discovery (the "Committee") first circulated a proposal for electronic discovery in spring, 2006. Those proposed changes would have only amended Rule 212 of the California Rules of Court (on civil case management). However, the Committee withdrew the 2006 proposal out of concern that more comprehensive changes were needed to the framework of the Code of Civil Procedure.

[3] Passage of the 2009 Electronic Discovery Act

The Committee developed a new proposal after working with members of attorney organizations. The new proposal involved various amendments to the Civil Discovery Act [*Code Civ. Proc.* § 2016.010 et seq.], along with supporting changes in civil case management rules in the California Rules of Court.

In January, 2008 the Judicial Council Rules and Projects Committee on Electronic Discovery circulated the first version of the new proposal for public comment. Thereafter, the Committee evaluated those comments and made final changes. The proposal was unanimously approved by the Judicial Council on April 25, 2008. The legislative changes were introduced in the California Legislature shortly thereafter as AB 926, with the Judicial Council as co-sponsor of the bill along with the Consumer Attorneys of California and the California Defense Counsel. AB 926 was approved unanimously by both houses of the legislature and sent to enrollment. It was expected that the bill would be signed prior to expiration of the legislative session, with the changes going into effect on January 1, 2009. Governor Schwarzenegger, however, vetoed this bill on September 27, 2008, along with many others, as part of the fallout from the protracted budget crisis which took up much of the summer and fall of 2008.

The bill was reintroduced in 2009 as AB 5, in essentially identical form. Due to the importance of the topic and the immediate need for statewide rules in the area [see § 1, *above*], the 2009 version was designated as an urgency measure. The bill again passed both houses of the legislature unanimously, and this time was signed by Governor Schwarzenegger [Stats. 2009 ch. 5]. The legislation, known as the Electronic Discovery Act [Stats. 2009 ch. 5, § 1], became effective on June 29, 2009, as an urgency measure, "[i]n order to eliminate uncertainty and confusion regarding the discovery of electronically stored information, and thereby minimize unnecessary and costly litigation that adversely impacts access to the courts" [Stats. 2009 ch. 5, § 23].

Conforming amendments to Cal. Rules of Court, Rule 3.724, establishing the duty of the parties to meet and confer regarding issues relating to the discovery of electronically stored information, were adopted by the California Judicial Council, effective August 14, 2009 [see Cal. Rules of Court, Rule 3.724(8), discussed in § 5, *below*].

[4] Basic Features of New Statutes and Rules

Production of electronic documents involves important considerations of subject matter, accessibility, and cost-benefit analysis. The obligation to identify and produce certain electronic documents is spelled out with particularity in the new electronic discovery rules, as well as in the broader Civil Discovery Act itself.

The new California Electronic Discovery Act and its conforming rules (referred to collectively in this analysis as the "California rules") are largely based on the Uniform Rules Relating to Discovery of Electronically Stored Information ("*Uniform Rules*") issued by the National Conference of Commissioners on Uniform State Laws ("NCCUSL").

The new California rules were carefully developed by the Judicial Council to operate *within the basic framework of existing California civil discovery law*. Because California civil discovery law is organically different from federal law, there are differences between the California rules and the Federal Rules of Civil Procedure [see § 2[5], *below*]. However, there are also many similarities, as will be discussed below.

This commentary primarily addresses core subjects of the proposed California Rules for electronic discovery:

- The *scope* and frequency of production [see § 3, *below*].
- Document *preservation* [see § 4, *below*].
- The *form* of production [see § 6, *below*].
- Maintaining *privilege* [see § 7, *below*].

These are perhaps the most important substantive areas of electronic discovery. This commentary also addresses the new "meet and confer" rules that are important to the smooth functioning of electronic discovery rules in practice [see § 5, *below*].

Businesses and consumer advocates need to know about these changes and be ready to implement them when e-discovery situations arise in their practices.

[5] Comparison Between California Law and Federal Rules

California ESI law is similar to Federal law in many respects. The key differences are:

- California law defines ESI as stored information having "electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities." The Federal rules refer to information "stored in any medium" which can be "retrieved and examined."
- The Federal rules permit discovery of ESI that is "reasonably accessible," which some suggest is intended to preclude discovery of information which is not reasonably accessible due to burden. The California rules, in contrast, do not create a presumption that information which is not "reasonably accessible" is not subject to discovery, but instead provide for case-by-case examination of whether ESI which is not reasonably accessible should be produced in a particular case.

§ 3 Scope and Frequency of Allowable Discovery

[1] Discovery Allowed if Relevant to Subject Matter of Action

The *scope* of allowable discovery under the Civil Discovery Act is as follows:

§ 2017.010. Unless otherwise limited by order of the court in accordance with this title, any party may obtain discovery regarding any matter, not privileged, that is *relevant to the subject matter involved* in the pending action or to the determination of any motion made in that action, *if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence*.

Discovery is allowed if relevant to the *subject matter* of the pending action and the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. This section is not amended by the Electronic Discovery Act, and remains in effect.

Federal court practitioners will recognize the foregoing rule as the broader standard of discovery used in federal court prior to 2000. However, changes to *FRCP Rule 26(b)(1)* in the 2000 amendments changed the subject matter of federal discovery from information relevant to the "subject matter involved" to information relevant to the "claims and defenses of the parties." The Federal Advisory Committee Notes state that the 2000 amendment "signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings" [192 *F.R.D.* at 389 (2000)].

This is an important difference in discovery practice in California state court, *irrespective* of electronic discovery. California Superior Court practitioners may seek discovery of matter relevant to the subject matter of the action, so long as it is reasonably calculated to lead to the discovery of admissible evidence.

Due consideration should be given to identification, preservation, collection and production of electronic documents in California state courts that are relevant to the *subject matter involved*, not just to the claims and defenses of the parties.

[2] Preservation Request and Litigation Holds

Conducting discovery of ESI should begin well before a request for production is served. Practitioners should contemplate sending a preservation letter to the opposing party along with the first documents served in a case. At the same, time, a letter setting forth preservation responsibilities should be sent to one's own client.

For plaintiffs, the preservation letter may be served with the summons and complaint or in some instances *before* an action is commenced. Defendants should send a preservation letter at an early point as well. While there may be some variations among practitioners, a preservation letter should advise an adversary of the general nature of the claims at issue in the case and advise of the duty to maintain and preserve documents and information relating to such claims, whether they be in hard copy or electronic form. Reference may be made to data having "electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities," and reference should also be made to devices including cell phones, blackberries, computers, laptop computers, servers, networks, backup tapes, and digital cameras. The letter should specifically advise an adversary that routine backup procedures should be suspended to the extent necessary to avoid deletion of material which may be subject to discovery.

See Appendix A for an example of a preservation letter.

[3] Conference of Counsel

Prior to the first case management conference, counsel must meet and confer to discuss whether there are particular ESI issues at issue in the case [see Cal. Rules of Court, Rule 3.724; see § 5, below]. If so, the parties should discuss how they propose to handle such issues including such key topics as preservation, form of production, the extent to which discoverable ESI is not "reasonably accessible," and whether there is ESI which a party will not search for potentially discoverable information.

Assertions that ESI is not "reasonably accessible" due to burden or for other reasons should be tested by seeking specifics as to how data is maintained and what steps are necessary to make such data accessible, given that the disputes over such matters are to be resolved by weighing the need for the information against the burdens posed by searching and producing the information.

[4] Requests for Production

Under the Electronic Discovery Act, *Code Civ. Proc.* § 2031.010(a) has been amended to state:

§ 2031.010(a). Any party may obtain discovery within the scope delimited [by Chapters 2 and 3] by inspecting, copying, testing or sampling. . .electronically stored information in the possession, custody, or control of any other party to the action.

This amendment clarifies that electronically stored information may be sought in discovery.

In serving discovery requests, the practitioner should specify the form of production which is desired. Those who use litigation database programs such as Summation or Concordance typically ask that electronic documents be produced as ".tiff files with load files." See Appendix B for a sample set of comprehensive instructions setting forth the manner in which ESI should be produced.

When the parties recognize that issues concerning ESI are present, it is often helpful to negotiate an ESI protocol. See Appendix C for a sample ESI protocol. If agreement cannot be reached, the parties may present the issue to the court for resolution.

[5] Testing and Sampling

The amendment to *Code Civ. Proc.* § 2031.010(a) also expands the methods of discovery beyond "inspecting" to also include "copying, testing or sampling." Sampling has become a very useful tool in federal court electronic discovery, and is often used to determine whether broader discovery should be sought or allowed from backup tapes and other legacy information. Through sampling, a requesting party is allowed to review production from a certain number of backup tapes for relevant information and, based on the result, may be allowed broader access to backup tapes and other information otherwise deemed "not reasonably accessible." This option will be available under the new California rules.

The Electronic Discovery Act has not incorporated a limitation that exists under the Federal rules. Specifically, the Advisory Committee Note to *FRCP Rule 34(a)* contains a limiting clarification on the scope of sampling which states:

The addition of testing and sampling to federal rule 34(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a party's electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.

A similar provision apparently was considered by the Committee but is not contained in the California statute.

[6] Protective Orders

Code Civ. Proc. § 2031.060(a), relating to protective orders, has been amended to clarify that:

§ 2031.060(a). When an *inspection, copying, testing, or sampling* of documents. . . or *electronically stored information* has been demanded, the party to whom the demand has been directed, and any other party of affected person or organization, may promptly move for a protective order.

The amendments to *Code Civ. Proc. § 2031.060(a)* add the words "inspection, copying, testing or sampling" and add the words "electronically stored information." Otherwise, the code provision relating to protective orders remains as before—a *party resisting discovery may move for a protective order in lieu of production*.

The Electronic Discovery Act also added a new *Code Civ. Proc. § 2031.060(b)*, which provides as follows:

§ 2031.060(b). The *party* or affected person or organization *seeking a protective order* regarding the production, inspection, copying, testing, or sampling of electronically stored information on the basis that such information is *not reasonably accessible* because of undue burden or expense *bears the burden* of so demonstrating.

This new subsection clarifies that the party seeking a protective order on the grounds that the information sought is not reasonably accessible because of undue burden or expense bears the burden of proof.

The burden is similarly placed under the Federal Rules, once the discovery dispute is before the court. However, the way a discovery dispute is brought to attention of the court is different under the Federal Rules. In both systems, the party is required to respond to the discovery request fully and completely unless the responding party believes an objection is appropriate. If the responding party chooses to object rather than respond, the propounding party will have the obligation to bring a motion to compel, however, the burden remains with the responding party to establish the appropriateness of the objection.

Thus, under the Federal Rules a producing party "*need not provide*" information "*it identifies*" as being not reasonably accessible because of undue burden or expense. If a requesting party disagrees, it must bring a motion to compel. Alternatively, the responding party may move for a protective order in response to a discovery request [*Fed. Rules Civ. Proc., Rule 26(c)*]. Similarly, under the California Civil Discovery Act, a responding party may either object to the production, requiring the propounding party to move to compel, or may file a motion for a protective order [*Code Civ. Proc. § 2031.060(a)*].

The California approach is an extension of the existing framework of the Civil Discovery Act. Moreover, the burden of production is consistent with Rule 6 of the *Uniform Rules* of the National Conference of Commissioners on Uniform State Laws, which provides:

A party on which a request to produce electronically stored information has been served shall, in a timely manner, serve a response on the requesting party. The *response must state*, with respect to each item or category in the request *that inspection, copying, testing, or sampling of the information will be permitted as requested; or any objection to the request and the reasons for the objection*.

With its consensus view that any new e-discovery legislation needs to operate within the basic framework of California civil discovery law, and with the *Uniform Rules* as an overall guide, the Committee determined that production of electronic information should be based on the same standard as production of other documents and things.

[7] Production of Documents "Not Reasonably Accessible"

The amended protective order statute requires production of electronically stored information found by the court to be "not reasonably accessible" under some circumstances. New *Code Civ. Proc. § 2031.060(d)*, which is similar to the Federal Rules, provides:

§ 2031.060(d). If the party or affected person or organization from whom discovery of electronically stored information is sought establishes that the information is from a source that is not reasonably accessible because of undue burden or expense, the court may nonetheless order discovery if the requesting party shows *cause*.

The Committee note states that this provision is based on the NCCUSL Uniform Rules, Rule 8, subdivision (c); however, the Uniform Rules contain a specific *balancing test* rather than a *good cause* standard. The Uniform Rules test provides that the court may order the discovery of electronically stored information from sources deemed "not reasonably accessible" because of undue burden or expense if the party requesting discovery shows that the likely benefit of the proposed discovery outweighs its likely burden or expense, taking into account the following:

- Amount in controversy.
- Resources of the parties.
- Importance of the issues.
- Importance of the requested discovery in resolving the issues.

After seeking comments from the public as to whether a good cause standard or a version of the NCCUSL balancing test should be used in new *Code Civ. Proc. § 2031.060(d)*, the present proposal provides that "the court may . . . order discovery if the demanding party shows good cause[.]"

Under the Electronic Discovery Act,, new subsection *Code Civ. Proc. § 2031.060(e)* provides that if the court finds good cause for production of electronically stored information that is not reasonably accessible, it may set conditions for the discovery of the information, including allocation of the expense of discovery. A similar provision is found in the Federal Rules.

Another new subsection, *Code Civ. Proc. § 2031.210(d)*, provides that if a party objects to the discovery of electronically stored information on the ground that it is from a source that is not reasonably accessible because of undue burden or expense and that the responding party will not search the source in the absence of an agreement with the demanding party or a court order, the responding party must identify in its response the types or categories of sources of electronically stored information that it asserts are not reasonably accessible. By so doing, the responding party preserves any objections it may have relating to that electronically stored information which it asserts is not readily accessible.

The purpose of this latter provision is to provide notice to a propounding party of what types of sources and locations are *not being searched* for responsive documents. This will permit the parties to meet and confer productively to either resolve the issue or present it to the court for resolution in a more productive manner. In the absence of this provision, it was feared that a party could hide the ball by objecting to discovery on the ground of undue burden; a propounding party would have no way of knowing what the contours of this objection were. For example, a party may object to searching ESI at all on the ground of burden. Such an objection ordinarily would not be reasonable; the burdens of searching various categories of ESI differ and a party should provide some specificity. Taken to its extreme,

ESI resident on a computer without a power source might be called "not reasonably accessible." Of course, once power is supplied, the ESI would become reasonably accessible. On the other hand, a party which objects to searching archived backup tapes relating to computer systems which were replaced by the responding party years ago, and for which even putting the backup tapes in a searchable format would be expensive and burdensome, has stated a much more appropriate objection. Providing this type of identification of a category of ESI which will not be searched permits the propounding party to determine quickly which areas are worth pursuing and which are not. Particular objections are preserved for a simple reason: until such time as a responding party actually searches such a source for responsive information, there is typically no feasible way for the responding party to determine whether privileged material is implicated and to determine what, if any, privileges need be asserted.

[8] Frequency of Discovery

Another new subsection, *Code Civ. Proc. § 2031.060(f)*, allows the court to limit the frequency or extent of discovery of electronically stored information, *even from a source that is reasonably accessible*, if the court determines that one or more of the following conditions exist:

- It is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive;
- The discovery sought is unreasonably cumulative or duplicative;
- The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
- The likely burden or expense outweighs the likely benefit, considering the amount in controversy, resources of the parties, importance of the issues and importance of the requested discovery in resolving the issues.

The Federal Rules contain a similar provision. This is a potentially challenging provision for attorneys unfamiliar with electronic discovery. A disciplined approach to discovery is typically required with electronic information. Some attorneys do not seriously focus on documents until later in the case, as trial approaches. Delay in pursuing documents creates the risk that a court may determine that ample opportunity to pursue discovery existed but was not sought, and that belated efforts therefore will not be permitted.

[9] Subpoenas to Nonparties

An area that is always of significant concern to businesses and individuals is subpoenas. People often have information relevant to cases in which they are not directly involved. Searching for, and producing, this information raises concerns of cost and disruption, as well as confidentiality. *Courts are much more likely to be solicitous of claims of burden asserted by non-parties than they might be when a party asserts burden.*

The Electronic Discovery Act addresses this issue in the context of electronic discovery by adding a new section to the Civil Discovery Act, *Code Civ. Proc. § 1985.8*, which is similar in many ways to the section governing production of electronic documents by a party to the litigation. The parts of *Code Civ. Proc. § 1985.8* governing subpoenas that *are the same as production rules for parties* are as follows:

- A party serving a subpoena requiring production of electronically stored information must specify the form in which each type of information is to be produced.
- If a party responding to a subpoena objects to a specified form for producing electronic information, or if no form is specified, the responding party shall state in its response the form in which it intends to produce each type of information.

- Unless the parties otherwise agree or the court otherwise orders, if a subpoena does not specify form of electronic production, the subpoenaed party must produce the information in a form in which it is ordinarily maintained or in a form that is reasonably usable.
- The subpoenaed party need not produce the same electronically stored information in more than one form.

The parts of *Code Civ. Proc. § 1985.8* governing subpoenas that *differ from production rules for parties* are as follows:

- If necessary, the responding party at the reasonable expense of the requesting party must translate any data compilations included in the demand into reasonably usable form.
- A party serving a subpoena requiring production of electronically stored information must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.
- An order of the court requiring compliance with a subpoena must protect a person who is neither a party nor a party's officer from undue burden or expense resulting from compliance.
- If a subpoenaed person notifies the subpoenaing party that electronically stored information produced pursuant to a subpoena is subject to a claim of privilege or of protection as attorney work product, the special "claw back" provisions of *Code Civ. Proc. § 2031.285*, discussed in § 7[2], *below*, are applicable.

These last three rules implement the common sense notion that parties involved in litigation should bear the expense of translating data compilations and should otherwise take reasonable steps to avoid imposing an undue burden on third parties.

§ 4 Document Preservation Obligations

[1] Importance

Document preservation goes to the heart of electronic discovery. If documents are modified, overwritten, deleted, or destroyed, important evidence may be lost and the goals of discovery undermined. However, businesses need latitude to periodically destroy documents not part of reasonably anticipated or active litigation, and not otherwise subject to retention under Sarbanes-Oxley, HIPPA, etc. For example, most businesses maintain backup tapes of their computer systems for the purpose of disaster recovery. These backup tapes are usually overwritten on a regular basis, e.g., every 30 to 45 days. Voicemail systems, both traditional and cellular, tend to overwrite messages unless special steps to preserve messages are taken. Suspending these processes can cause disruption and expense.

[2] Client Notification

The practice of immediately notifying clients to preserve electronic information is already widespread in federal court as a matter of common law. The initial notification to clients about document preservation is no small matter and should be considered carefully by the practitioner. For example, if a client has a routine document destruction policy in place, *how much* of that policy must be suspended upon notice of a suit or claim? *How early* should potential document custodians and document collection categories be identified so that routine destruction of these documents is stopped?

Federal common law requires a party to cease destruction of "relevant" information upon knowledge that a claim or

case is likely. In many cases this is prior to litigation actually being filed. Importantly, the party's legal counsel is also required to inform his or her client of this duty. Failure by counsel to do so has resulted in sanctions.

It remains to be seen how notification to clients of the duty to preserve documents will develop under California law. Even if the Civil Discovery Act required counsel to immediately notify clients of the duty to preserve, the question of *what should be in the notification letter* still remains. The full scope of preservation duties will likely develop under California as a matter of common law, as has occurred under federal law. However, it would be wise for practitioners to take appropriate steps when litigation is anticipated or initiated to insure that information likely to become the subject of discovery is not inadvertently lost or modified through routine business operations. As seen in the sample preservation letter in Appendix A, such obligations may appear onerous. Failure to take reasonable steps to preserve evidence, on the other hand, may lead to severe consequences in proving or defending a case.

[3] Development of Common Law Preservation Obligations

Widely-followed case law defining a range of preservation obligations in *federal courts* is found in four published opinions from the Southern District of New York in *Zubulake v. USB Warburg*. The principal opinion on affirmative obligations is *Zubulake v. UBS Warburg LLC* (S.D.N.Y. 2003) 220 F.R.D. 212. *Zubulake* has been followed by the Southern District of California in *Qualcomm Inc. v. Broadcom Corp.* (S.D. Cal. 2008) 2008 U.S. Dist. LEXIS 911, and by the Central District of California in *Hous. Rights Ctr. v. Sterling* (C.D. Cal. 2005) 2005 U.S. Dist. LEXIS 31872.

Practitioners in California state courts are justifiably hesitant to cite federal sources in support of a California common law argument. California tends to find its own way in legislation and judicial decisions, and cannot be expected to follow federal common law without good reason. Nevertheless, given the widespread acceptance of the *Zubulake* decisions, it seems likely that California common law regarding the document preservation duty may develop along similar lines.

The starting point in an analysis of California law is probably *Cedars-Sinai Med. Ctr. v. Superior Court* (1998) 18 Cal. 4th 1, 72 Cal. Rptr. 2d 248, 954 P.2d 511, in which the California Supreme Court declined to adopt a tort remedy for spoliation of evidence, deferring instead to the "potent" sanctions rules governing discovery under former *Code Civ. Proc.* § 2023 [now see *Code Civ. Proc.* § 2023.010 et seq.]. The California Supreme Court explained:

[O]ur discovery laws provide a broad range of sanctions for conduct that amounts to a "misuse of the discovery process."

Section 2023 of the Code of Civil Procedure gives examples of misuses of discovery. . . *Destroying evidence* in response to a discovery request *after litigation has commenced* would surely be a misuse of discovery within the meaning of section 2023.

See also *Electronic Funds Solutions, LLC v. Murphy* (2005) 134 Cal. App. 4th 1161, 36 Cal. Rptr. 3d 663, in which a California Court of Appeal affirmed a discovery sanction striking a defendant's answer for destruction of electronic evidence. While neither of these California cases addresses the broader scope of the *affirmative duty to preserve*, the underlying principles are grounded in similar goals of substantive and procedural fairness. Ambiguity arises, however, from the fact that *Cedars-Sinai* and *Electronic Funds Solutions* arise from loss of evidence *after* litigation has been initiated and discovery served. Less clear is the obligation to preserve discoverable information prior to the commencement of litigation and service of discovery requests.

Given the increasing practice of counsel sending letters to opponents at the outset of litigation demanding document preservation, it seems inevitable that document preservation practices will receive increasing scrutiny in California state

courts just as has occurred in federal courts. And given the broad range of sanctionable conduct, as suggested by the California Supreme Court in *Cedars-Sinai Med. Ctr. v. Superior Court*, *above*, document preservation duties may generate the kind of scrutiny no lawyer wants to be on the wrong side of.

[4] Safe Harbor for Inadvertent Destruction of ESI

Federal practitioners are familiar with the idea of a "safe harbor" provision, prohibiting sanctions in the event of inadvertent, *good faith* destruction of documents during the course of litigation. The Electronic Discovery Act contains a similar provision. *Code Civ. Proc. § 2031.060(i)* provides a safe harbor to parties and counsel for failure to provide electronically stored information that is "lost, damaged, altered, or overwritten as the result of the routine, good-faith operation of an electronic information system."

California state practitioners therefore can assume that good faith mistakes will not be deemed sanctionable conduct. However, the safe harbor defense will likely require a careful explanation of the mistake and why it was in "good faith." *Code Civ. Proc. § 2031.060(i)* states that "[t]his subdivision shall not be construed to alter any existing obligation to preserve discoverable information."

The "safe harbor" provision is developing in federal common law in a way that does not excuse negligence or material oversight [*see, e.g., Hous. Rights Ctr. v. Sterling (C.D. Cal. 2005) 2005 U.S. Dist. LEXIS 31872*]. Prudence suggests cautious expectations about relying too heavily on safe harbor protections.

[5] Duty to Preserve May Be Broader Than Duty to Produce

Finally, it is noteworthy that under federal common law the duty to preserve electronic information is broader than the duty to produce. Advisory Committee Notes to *FRCP Rule 26* provide: "A party's identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence."

This specific issue is not addressed in the new California rules or Judicial Council commentary. Again, prudence dictates caution about the scope of document preservation under California law. It seems likely that the duty to preserve will be interpreted to be broader than the duty to produce. For that reason, a preservation letter should be sent when litigation is anticipated or has commenced. This letter not only serves to advise the client of what steps are necessary in relation to discovery obligations, but may also become important if claims of loss of evidence or spoliation arise later in the case. In recent years, focus on document preservation issues has become a routine area of discovery, and parties seek to score points by establishing that their adversary took no steps to preserve important evidence—even when the party cannot point to any particular evidence which has been lost. A letter or memo to the client putting them on notice of their obligation to preserve ESI will not only serve to avoid this problem, but may also provide the attorney with protection should the client claim that they were not told of their obligations. No one wants these issues to arise for the first time at their client's deposition.

§ 5 Meet and Confer Obligations

In addition to the Electronic Discovery Act itself, California Rules of Court, Rule 3.724 has been amended to highlight important obligations of counsel to meet and confer regarding electronic discovery. Rule 3.724 generally requires the parties to meet and confer, in person or by telephone, no later than 30 calendar days before the date set for the initial case management conference (unless the court orders another time period), to consider specified issues [Cal. Rules of Court, Rule 3.724]. The amended version of the rule, effective August 14, 2009, specifically requires that the parties consider the following issues relating to e-discovery as part of their obligation to meet and confer [Cal. Rules of Court, Rule 3.724(8)] (note that the proposed version of the amendment would have established a separate 45-day meet-and-confer rule for e-discovery, but that period was changed to 30 days in the final version to conform to the

general meet-and-confer rule)]:

- Any issue relating to the *preservation* of discoverable electronically stored information.
- The *form or forms* in which information will be produced.
- The *time* within which the information will be produced.
- The *scope* of discovery of the information.
- The method for asserting or preserving *claims of privilege or attorney work product*, including whether such claims may be asserted after production.
- The method for asserting or preserving the *confidentiality, privacy, trade secrets*, or proprietary status of information relating to a party or persons not a party to the civil proceedings.
- How the *cost* of production of electronically stored information is to be allocated among the parties.
- *Any other issues* relating to the discovery of electronically stored information, including developing a proposed plan relating to the discovery of the information.

Meet and confer conferences smooth the issues of electronic discovery immensely. Many questions that counsel ask in the abstract about electronic discovery can, and typically are, dealt with successfully in conference.

While the outer boundaries of discovery need to be explored at times, most discovery of electronic information is focused on active data, readily accessible to most producing parties. Both parties can assist the process immensely by disclosing basic information about computer networks and storage that allow the other party to focus requests more intelligently.

Conversely, counsel who wait until the proverbial "last minute" to seriously address discovery may find themselves short on electronic documents and inadequately prepared for depositions, motions and trial.

Cal Rules of Court, Rule 3.728(13), provides that the court's case management order may contain "any additional orders that may be appropriate, including orders on matters listed in rules 3.724 and 3.727." This section provides authority for the court to include provisions relating to e-discovery in its case management order.

As experience in federal courts has shown, strong case management orders are of great value in facilitating electronic discovery. Proper focus on electronic discovery at the early phases of a case pays dividends as the case proceeds.

§ 6 Form in Which Electronic Evidence Must Be Produced

[1] Production Obligations Under California Rules

The Electronic Discovery Act contains somewhat competing provisions governing the form of production. One sees this by comparing the rules for specifying the form of production in a request against the rules for objecting to the form of production in a response.

Code Civ. Proc. § 2031.030(a) has been amended to allow the *requesting party* to "*specify the form* in which each type of electronically stored information is to be produced." This provision suggests that the requesting party controls the form of production.

However, a new subsection, *Code Civ. Proc. § 2031.280(b)*, allows the *responding party* to *object to a specified*

form for production and "state in its response the form in which it intends to produce each type of the information." This suggests that the responding party ultimately may control the form of production because if it does not agree with the form specified by the requesting party, it can simply object and specify the form in which it agrees to produce.

Another new subsection, *Code Civ. Proc.* § 2031.280(c), provides that unless the parties agree or the court otherwise orders:

- The responding party must produce the information in a form in which it is ordinarily maintained or in a form that is reasonably usable if no production format is specified in the request, and
- A party need not produce the same electronically stored information in more than one form.

No default form of production is specified in the new rules.

If a dispute develops between the parties as to the form of production—if, for example, the responding party chooses to make a production in a format different from that which was requested and the propounding party is not pleased with the chosen form of production—it is in all parties' interest to promptly present the matter to the court *before* production is made. Choosing the wrong format could entail great expense if the court orders a subsequent, alternative form of production. It is also possible that a court will refuse to order a new production due to cost concerns even if the court concludes that the responding party was wrong in refusing to produce in the format which was requested by the propounding party. As with many other areas of ESI, it is critical that the parties identify disputes, address them, and present them to the court for resolution where necessary before great expense is incurred.

[2] Native Form Versus "Reasonably Usable" Form

Whether or not a default production form is specified, we expect that debates over the form of production will reduce, in practice, to whether documents are produced in "native format" (including all metadata) or a "reasonably usable form" (not including metadata). Requesting counsel should always consider requesting documents in native format, and should always seek metadata. Because this is likely to be a disputed issue, it is once again imperative for counsel to address it at an early point of the case so that court intervention may be sought if necessary.

Metadata is the hidden information about a document that reveals many things that may be important to litigation, including: file and document history, date of creation, author, editors, dates of access, dates of modification and revision history.

Production in "native" format is almost always cheaper than production in other formats. However, because responding counsel resist producing metadata, the more common current practice is not to produce documents in native format, and instead to incur the additional expense to produce in some other form. In some cases, issues concerning metadata may be minor because of the nature of the case or the value of the case. In other cases, parties will pursue metadata because, for example, it may be critical to determine who accessed and read critical documents. Counsel should note that metadata *will not* be produced unless affirmative efforts are made to require its production. Attention must be paid to this issue at the earliest point of the discovery process, as metadata may be lost or altered in the absence of preservation, and metadata will not typically be produced unless specifically sought.

A form currently in vogue in federal and state court is to produce *electronic documents* in "TIFF" format, together with extracted text and a "load file" (computer instructions for loading the data), which can all be matched up and loaded into a litigation software package (such as Concordance or Summation) for review. Parties then agree to retain the original native documents, including metadata, for further possible review.

It is common practice to produce *databases* in *native format*. Because databases are constructed in "bits and pieces"

of information, it is usually not feasible to print out a database in image format. Most databases can only be meaningfully accessed in native format using search commands such as SQL (search query language). This sometimes requires a reviewing party to obtain a software license from a third party vendor for viewing the database data.

It remains to be seen whether electronic images (TIFF or PDF) will continue to be the accepted standard for production of e-mails and other documents, or whether courts will require production in native format. This is a debate taking place in state and federal courts across the country and will likely continue in California state courts, as well, after adoption of the Electronic Discovery Act.

§ 7 Inadvertent Production of Privileged Information

[1] Nature of the Problem

Inadvertent productions of privileged documents are not uncommon in the era of electronic discovery. When a party and reviewing counsel are producing hundreds of thousands of electronic files in one production, it is possible for privileged documents to slip through from time to time. Because of the volume of material which is produced, it is frequently impossible to perform a complete privilege review while still producing documents in a timely manner. The Federal Rules, and the new California law, both provide for a "claw back" as the only practical means of protecting privilege while permitting production of information in litigation [see Fed. R. Civ. Proc., Rule 26(b)(5); *Code Civ. Proc.* § 2031.285].

It is not unusual for a document which is either marked "attorney-client privileged" on its face to be produced, or for an e-mail, memo, or letter to or from counsel, to be produced as part of a large production. It is vital that counsel for the requesting party be aware of the rules, and advise all paralegals or other staff of how to recognize such documents. Any such documents should immediately be segregated and notice provided to the responding party, so that the responding party can determine whether the production was intentional or inadvertent. No use of such documents should be made until the responding party has had a chance to express its position on the issue and the issue has been resolved between the parties or by the court.

[2] California "Claw Back" Rule

The Electronic Discovery Act deals with this problem by adding an entirely new section to the Civil Discovery Act, *Code Civ. Proc.* § 2031.285, which works like this:

- If privileged (or attorney work product protected) *electronically stored information* is discovered to have been produced, the party making the claim may give notice of the privilege claim and the basis for the claim.
- After being notified, the receiving party must "immediately sequester" the information and either return the information (and any copies) or, *within 30 days* present the information to the court conditionally under seal for a determination of the claim. Until resolution, the receiving party is required to preserve the information and keep it confidential.
- Any receiving party is precluded from using or disclosing the specified information until the claim of privilege is resolved.

This is known as a "*claw back*" provision, since a party who inadvertently produces an electronic document can

simply "claw" or take it back after production without regard to waiver issues.

[3] 30-Day Limitation

It is important that the receiving party move the court to address the privilege question *within 30 days*, or it will lose the ability to use that document [*Code Civ. Proc. § 2031.285(d)(1)*]. This is not a lot of time. And since document "claw backs" often occur during depositions, it is critical that deposing counsel not lose track of the 30-day filing period after the deposition is over.

[4] Obligations of Party Receiving Privileged Information

The new California provision discussed above will control inadvertent production insofar as *electronically stored information* is concerned. However it does *not* address inadvertent production of other documents and things and does *not* address any possible *affirmative obligations* a receiving party's counsel may have if he or she received inadvertently produced information that is obviously privileged.

In *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal. 4th 807, 68 Cal. Rptr. 3d 758, 171 P.3d 1092, the California Supreme Court addressed the affirmative duty of counsel who receive inadvertent productions that are obviously identifiable as confidential or privileged:

When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified.

The new California rules for electronic discovery should be read in context of this duty spelled out by the California Supreme Court. It is not always the case that inadvertent productions are obvious. In fact, some companies seem to have an unspoken policy to include an attorney on many e-mails that are sensitive, but not necessarily privileged.

A good way to deal with the potential conflict in this issue will be to agree among counsel as part of the initial meet and confer conference precisely *how all forms* of privileged and confidential documents will be dealt with in discovery. Proposed new additions to California Rules of Court, Rule 3.724 (discussed in § 5, *above*) require this.

§ 8 Other LexisNexis References

For coverage of electronic discovery procedures in California, with checklists, see Matthew Bender Practice Guide: California Civil Discovery, Ch. 5, *Discovery of Electronic Evidence*.

For a general guide to electronic discovery in Federal courts in California under the Federal Rules of Civil

Procedure, see Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 23, *Methods of Discovery*, Part VII, *Discovery of Electronically Stored Information*, § 23.158 et seq.

For coverage of the revision of the Federal Rules of Court as they effect electronic discovery, see E-Discovery: Newly Amended Fed Rules of Civil Procedure; see also Moore's Federal Practice, Ch. 37A, *Discovery of Electronically Stored Information*.

Appendix A

Sample Preservation Letter

The following form is a sample preservation letter directing an opposing party to preserve electronic evidence. For discussion of preservation letters, see § 3[1], *above*. A preservation letter should contain the provisions included in this sample.

SAMPLE:

You are hereby given notice to immediately take all steps necessary to prevent the destruction, loss, concealment, or alteration of any paper, document, or electronically stored information ("ESI") and other data or information generated by and/or stored on your computers and storage media (e.g., hard disks, floppy disks, backup tapes, etc.), and e-mail related to (1) [*subject matter of lawsuit*]; (2) the events and causes of action described in Plaintiffs' Complaint; and (3) ESI and documents you may use to support any defenses you may claim to have in this action.

You should anticipate that much of the information subject to disclosure and responsive to discovery in this action is stored on your current or former computer systems and other media and devices (including personal digital or data assistants, voice-messaging or voice-mail systems, online repositories, and cell phones).

ESI should be afforded the broadest possible definition and includes, but is not limited to, all digital communications (e.g., e-mail, voice mail, instant messaging), word processed documents (e.g. Word and WordPerfect documents and drafts), spreadsheets and tables (e.g. Excel and Lotus 123 worksheets), accounting application data (such as QuickBooks, Money, or Peachtree), image and facsimile files (including PDF, TIFF, JPG, and GIF images), sound recordings (including WAV and MP3 files), video recordings, all databases, all contact and relationship management data, calendar and diary application data, online access data (including temporary, internet files, History, and Cookies), all presentations (including PowerPoint and Corel), all network access and server activity logs, all data created with the use of any Personal Data Assistant (PDA) such as Palm Pilot, HP Jornada, Cassiopeia, or other Windows-based or Pocket PC devices, all CAD files, and all back-up and archival files.

Adequate preservation of ESI requires more than simply refraining from efforts to destroy or dispose of such evidence. You must also intervene to prevent loss due to routine operations and employ proper techniques to safeguard all such evidence.

Because hard copies do not preserve electronic searchability or metadata, they are not an adequate substitute for ESI. If information exists in both electronic and paper form, you should preserve them both.

LITIGATION HOLD

You are requested to immediately initiate a litigation hold for potentially relevant ESI, documents, and tangible things, and to act diligently and in good faith to secure and audit compliance with that litigation hold. You are also requested to preserve and not destroy all passwords, decryption procedures (including, if necessary, the software to decrypt the files), network access codes, ID names, manuals, tutorials, written instructions, decompression or reconstruction software, and any and all other information and things necessary to access, view, and (if necessary) reconstruct any ESI. You should not pack, compress, purge, or dispose of any file or any part thereof.

You are further requested to immediately identify and modify or suspend features of your operations, information systems, and devices that, in routine operations, operate to cause the loss of documents, tangible items, or ESI. Examples of such features and operations include, but are not limited to, purging the contents of e-mail repositories by age, capacity, or other criteria; using data or media wiping, disposal, erasure, or encryption utilities or devices; overwriting, erasing, destroying, or discarding back-up media; re-assigning, re-imaging or disposing of systems, servers, devices, or media; running antivirus or other programs that alter metadata; using metadata stripper utilities; and destroying documents or any ESI by age or other criteria.

SERVERS

With respect to servers like those used to manage electronic mail and network storage, the entire contents of each user's network share and e-mail account should be preserved and not modified.

STORAGE

With respect to on-line storage and/or direct access storage devices attached to your mainframe computers and/or minicomputers, in addition to the above, you are not to modify or delete any ESI, "deleted" files, and/or file fragments existing on the date of this letter's delivery that contain potentially relevant information.

With regard to all electronic media used for off-line storage, including magnetic tapes and cartridges, optical media, electronic media, and other media or combinations of media containing potentially relevant information, you are requested to stop any activity which may result in the loss of any ESI, including rotation, destruction, overwriting and erasure in whole or in part. This request is intended to cover all media used for data or information storage in connection with your computer systems, including magnetic tapes and cartridges, magneto-optical disks, floppy diskettes, and all other media, whether used with personal computers, minicomputers, mainframes or other computers, and whether containing backup and/or archival ESI.

PERSONAL COMPUTERS

You should take immediate steps to preserve all ESI on all personal computers used by your officers, directors and employees, including all secretaries and assistants, that in any way relate to the [subject matter of action], and the events

and causes of action described in the Complaint. As to fixed devices, (1) a true and correct copy is to be made of all such ESI, including all active files and completely restored versions of all deleted electronic files and file fragments; (2) full directory listings (including hidden files) for all directories and subdirectories (including hidden directories) on such fixed devices should be written; and (3) all such copies and listings are to be preserved until this litigation is ended. As to floppy diskettes, CDs, tapes, and other non-fixed media relating to this matter, they are to be collected and stored pending resolution of this litigation.

PORTABLE SYSTEMS

In addition to your immediate preservation of ESI, documents and tangible items in your business, on servers and workstations, you should also determine if any home or portable systems may contain potentially relevant data or information. To the extent that officers, board members, or employees have sent or received potentially relevant e-mails or created or reviewed potentially relevant documents away from the office, you must preserve the contents of systems, devices, and media used for these purposes (including not only potentially relevant data from portable and home computers, but also from portable thumb drives, CD-R discs, PDAs, smart phones, voice mailboxes, or other forms of ESI storage). Additionally, if any employees, officers, or directors used online or browser-based e-mail accounts or services to send or receive potentially relevant messages and attachments, the contents of these account mailboxes should be preserved.

EVIDENCE CREATED OR ACQUIRED IN THE FUTURE

With regard to documents, tangible things, and ESI that are created or come into your custody, possession, or control subsequent to the date of delivery of this letter, potentially relevant evidence is to be preserved. You should take all appropriate action to avoid destruction of potentially relevant evidence.

Please forward a copy of this letter to all persons and entities possessing or controlling potentially relevant evidence. Your obligation to preserve potentially relevant evidence is required by law.

Appendix B

Comprehensive Instructions for Manner of Production of ESI

The following form is a sample set of instructions setting forth the manner in which ESI should be preserved in connection with requests for production. For discussion of the use of these instructions, see § 3[4], *above*.

SAMPLE:

When a request specifically seeks DOCUMENTS in electronic form, such DOCUMENTS shall be produced (i) with a load file suitable for loading the data into a litigation database that defines document breaks, attachments,

metadata, and other information (identified below) and (ii) with a cross-reference file that facilitates the linking of the produced TIFF or native file with a litigation database; specifically, production to be as follows:

(a) Spreadsheets -To be produced (i) as a native file, and (ii) with a load file suitable for linking it to a litigation support database that (for authentication) identifies the MD-5 hash value of each file.

(b) Standard Office File Forms (e.g. E-mails, Word Processing Documents, Presentations) -- To be produced (i) in TIFF format, and (ii) with metadata and text searchable information extracted from the native file and produced as fielded metadata. Family relationships among e-mail and attachments are to be maintained.

When any such DOCUMENTS cannot be provided in one of the above manners, as in the case of certain scheduling, accounting, contact management, and database programs (e.g. Primavera, MS Access, Oracle, Microsoft SQL Server), or if Plaintiffs and each Defendant otherwise agree, Plaintiffs and each Defendant will determine another acceptable electronic form for production.

Appendix C

Sample ESI Production Protocol

The following form is a sample ESI protocol. In cases when the parties recognize that issues concerning ESI are present, it is often helpful to negotiate such a protocol. For discussion of the use of such a protocol, see § 3[4], *above*.

SAMPLE:

ESI PRODUCTION PROTOCOL

■ **Obligation to Produce Electronically Stored Information.** The parties acknowledge and agree that to the extent they possess electronically stored information ("ESI") responsive to a document request, that ESI is within the scope of matters subject to discovery in this case.

■ **Load Files.** Except for ESI described in sections 3(b) and (c) below, ESI will be produced in electronic format, with files suitable for loading into a litigation support database. The load files will define document breaks, attachments and other information identified below.

(a) **Document Cross-Reference File.** The producing party will provide a cross-reference file that identifies the start and end of the document, its attachments and its corresponding metadata.

(b) **Cross-Reference or Linking File.** The producing party will also provide a cross-reference file that facilitates the linking of the produced image or native file with the litigation database. This cross-reference file will contain fields such as the unique document ID (*i.e.*, BegBates) and the file path of the corresponding image or native file. The producing party may provide this information either in a litigation database format or as a standard delimited ASCII text

file.

■ **Categories of Production of ESI.** ESI will be produced as follows, depending on its classification.

(a) **Production of ESI as TIFF Images With Metadata and Extracted Text.** Documents created in standard office automation file formats (including but not limited to Microsoft Word or WordPerfect documents) and ESI that can practicably be converted into TIFF format will be produced as single-page TIFF Group IV images, with any available fielded metadata and text searchable information extracted from the native documents.

(i) **Bates Numbering.** The producing party will brand all TIFF images in the lower right-hand corner with its corresponding bates number, using a consistent font type and size. The Bates number must not obscure any part of the underlying image.

(ii) **File Names.** Image file names will be identical to the corresponding bates numbered images, with a ".tif" file extension.

(iii) **Confidentiality Endorsements.** The producing party will brand any confidentiality or similar endorsements in a corner of the TIFF image. Those endorsements must be in a consistent font type and size, and must not obscure any part of the underlying image or Bates number.

(iv) **Production of Extracted Full Text.** The producing party will provide extracted full text (*i.e.*, text extracted from ESI) for all material originating as ESI in a text file corresponding to a single page of a document. The full text file name will be composed of the Bates number of the associated document, with a ".txt" file extension. When a party is unable to produce extracted full text, it will provide an explanation of that inability with its document production.

(v) **Production of Metadata.** The producing party will provide the following metadata, as applicable, for all ESI: start bates, end bates, start attachment, end attachment, custodian or source, original file path, original file name, file type/file extension, MD-5 hash value, title, creation date, creation time, page count, last modification date, last modification time, and last saved by name.

(vi) **Metadata for E-Mail.** In addition to the metadata to be produced for all ESI, for all e-mail, the producing party will also produce the following as fielded metadata: subject, author, recipients, from, to, copyees, blind copyees, date sent, time sent, date received, time received, MD-5 hash value, attachment file name, begin attachment, and end attachment. Family relationships among e-mail and attachments will be maintained by ensuring that attachments immediately follow their parent e-mail, and setting the "begin attachment" and "end attachment" metadata fields appropriately.

(vii) **Explanation of Inability to Produce Metadata.** When a party is unable to produce metadata for a particular field, it will provide an explanation of that inability with its document production.

(viii) **Redaction.** If a file that originates in ESI needs to be redacted before production, the file will be rendered in TIFF, and the TIFF will be redacted and produced. However, to the extent that the text is searchable in the native format, the producing party will still provide searchable text for those portions of the document that have not been redacted.

(b) **Production of Native Format Documents That Are Impractical to Convert to TIFF.** ESI that is not practical to convert to TIFF may be produced using one of the two following methods, which method will be subject to meet and confer between the parties.

(i) **Spreadsheets that are Impractical to Convert to TIFF.** ESI that is not practical to convert to TIFF (for example, spreadsheets) may be produced in electronic format suitable for loading to a litigation support database with links to the native files.

(A) **Identification.** ESI produced in native file format will be assigned a unique DocID number within the litigation database.

(B) **File Names.** File names will be identical to the DocID number, followed by the original file name and file extension.

(C) **Authentication.** The producing party will provide a litigation database load file with separately fielded data, which will contain, as one of the fields, the MD-5 hash value of each file produced in native format.

(ii) **ESI That is Impractical to Produce with Links to a Database.** The parties understand and acknowledge that certain categories of ESI are structurally complex and do not lend themselves to production as native format documents with links to a litigation database. For example, in some instances renaming and/or linking a native document comprised of subparts will render the document unusable. After meet and confer, the parties may agree to produce these types of documents in native form, accompanied with a bates number and MD-5 hash value, but separate from a litigation support database. In those instances, if a propounding party or its experts lack access to proprietary software needed to review the producing party's ESI in native format, the parties will meet and confer to obtain a resolution which allows that party to view the affected documents.

(iii) **Encrypted or Password-Protected ESI.** For any ESI that exists in encrypted format or is password-protected, the producing party will provide the propounding party a means to gain access to those native files (for example, by supplying passwords).

(c) **Reports in Lieu of Native Production.** If a party believes that it would be impractical to produce ESI in native format because of complexities associated with certain scheduling programs (such as Primavera), accounting systems, mapping systems, and/or other databases (such as MS Access, Oracle, and Microsoft SQL Server), it will so notify the propounding party and will inform the propounding party whether it has generated reports in the normal course of business using those programs or systems. In any such instance, the parties will meet and confer concerning the manner of production of those reports.

(d) **Production of Pictures/Images.** Any photographic images created and/or maintained in electronic format will be produced in that format.

■ **Production Media.** The producing party will use the appropriate electronic media (CD, DVD or hard drive) for its ESI production, and will cooperate in good faith to use the highest-capacity available media to minimize associated overhead. The producing party will label the physical media with the producing party, production date, media volume name, and document number range.

■ **Avoidance of Duplicate Production.** Each producing party will take all reasonable steps to reduce duplication of ESI. De-duplication will be performed within a custodian. The producing party will maintain references to all removed duplicate files.

Appendix D

California Statutes Governing E-Discovery (including 2009 changes)

Appendix D contains the text of the principal California statutes relevant to the discovery of electronically stored information. It incorporates all codified legislative changes enacted in 2009 as part of the California Electronic Discovery Act [Stats. 2009 ch. 5], and includes relevant code sections that are discussed in this pamphlet even though

they are unaffected by the 2009 legislation. The headings appearing in **boldface** type at the beginning of each code section are prepared by the publisher for convenience of the reader and do not form a part of the actual text of the section as enacted or amended by the legislature.

Immediately following each code section, after the designation **Leg.H.**, is a chronological list of all statutes affecting the section since its enactment. Language deleted by the 2009 legislative amendments is indicated by bracketed numbers (e.g., "[1]") in the section at the point where the deletion was made, with the deleted language appearing in small type following the section. Language added by the 2009 legislation is indicated in **boldface** type.

California Code of Civil Procedure

Synopsis:

Selected Provisions of the Code of Civil Procedure

PART 4. MISCELLANEOUS PROVISIONS

Title 3. Of the Production of Evidence

Chapter 2. Means of Production

§ 1985.8. Subpoena-Electronically Stored Information; Access to Information by Party Serving Subpoena.

Title 4. Civil Discovery Act

Chapter 1. General Provisions

§ 2016.020. Definitions.

Chapter 2. Scope of Discovery

Article 1. General Provisions

§ 2017.010. What Matters May Be Subject to Discovery.

§ 2017.020. When Court May Limit Scope of Discovery; Motion for Protective Order; Monetary Sanction.

Chapter 14. Inspection and Production of Documents, Tangible Things, Land, and Other Property

Article 1. Inspection Demand

§ 2031.010. Right to Discovery by Inspecting, Copying, Testing, or Sampling Documents, Tangible Things, Land or Other Property, and Electronically Stored Information.

§ 2031.020. Demand for Inspection, Copying, Testing, or Sampling by Defendant Authorized at Any Time; When Plaintiff May Make Demand for Inspection, Copying, Testing, or Sampling.

§ 2031.030. Format and Requirements for Demands for Inspection, Copying, Testing, or Sampling.

§ 2031.040. Service of Demand for Inspection, Copying, Testing, or Sampling.

§ 2031.050. When Supplemental Demand May Be Propounded.

§ 2031.060. Motion for Protective Order; What Protective Order May Provide; Denial of Protective Order; Monetary Sanction.

Article 2. Response to Inspection Demand

§ 2031.210. Nature and Format of Response to Demand for Inspection, Copying, Testing, or Sampling.

§ 2031.220. Statement Regarding Compliance in Whole or in Part.

§ 2031.230. Representation of Inability to Comply.

§ 2031.240. Statements Regarding Demand That Is Objectionable in Whole or in Part.

§ 2031.250. Signing of Response to Demand.

§ 2031.260. Time for Service of Response; Unlawful Detainer Action.

§ 2031.270. Extension of Date for Inspection or Time for Service of Response; Written Confirmation of Agreement.

§ 2031.280. Production of Documents-Form; Date Specified; Production of Electronically Stored Information; Translation; Expense.

§ 2031.285. Production of Electronically Stored Information-Claim of Privilege or of Protection as Attorney Work Product; Notification to Receiving Party; Receiving Party's Responsibilities; Preclusion From Using or Disclosing Specified Information; Resolution.

§ 2031.290. Retention of Demand for Inspection, Copying, Testing, or Sampling, Proof of Service, and Response by Demanding Party.

§ 2031.300. Effect of Failure to Serve Timely Response to Demand for Inspection, Copying, Testing, or Sampling; Motion for Order; Monetary and Other Sanctions.

§ 2031.310. Motion for Order Compelling Further Response; Grounds; Notice; Waiver; Monetary and Other Sanctions.

§ 2031.320. Motion for Order Compelling Compliance on Failure to Permit Inspection, Copying, Testing, or Sampling in Accordance With Response; Monetary and Other Sanctions.

Text:

PART 4

Miscellaneous Provisions

TITLE 3

OF THE PRODUCTION OF EVIDENCE

CHAPTER 2

MEANS OF PRODUCTION

§ 1985.8. Subpoena-Electronically Stored Information; Access to Information by Party Serving Subpoena.

(a) (1) A subpoena in a civil proceeding may require that electronically stored information, as defined in Section 2016.020, be produced and that the party serving the subpoena, or someone acting on the party's request, be permitted to inspect, copy, test, or sample the information.

(2) Any subpoena seeking electronically stored information shall comply with the requirements of this chapter.

(b) A party serving a subpoena requiring production of electronically stored information may specify the form or forms in which each type of information is to be produced.

(c) Unless the subpoenaing party and the subpoenaed party otherwise agree or the court otherwise orders, the following shall apply:

(1) If a subpoena requiring production of electronically stored information does not specify a form or forms for producing a type of electronically stored information, the person subpoenaed shall produce the information in the form or forms in which it is ordinarily maintained or in a form that is reasonably usable.

(2) A subpoenaed person need not produce the same electronically stored information in more than one form.

(d) The subpoenaed person opposing the production, inspection, copying, testing, or sampling of electronically stored information on the basis that information is from a source that is not reasonably accessible because of undue burden or expense shall bear the burden of demonstrating that the information is from a source that is not reasonably accessible because of undue burden or expense.

(e) If the person from whom discovery of electronically stored information is subpoenaed establishes that the information is from a source that is not reasonably accessible because of undue burden or expense, the court may nonetheless order discovery if the subpoenaing party shows good cause, subject to any limitations imposed under subdivision (h).

(f) If the court finds good cause for the production of electronically stored information from a source that is not reasonably accessible, the court may set conditions for the discovery of the electronically stored information, including allocation of the expense of discovery.

(g) If necessary, the subpoenaed person, at the reasonable expense of the subpoenaing party, shall, through detection devices, translate any data compilations included in the subpoena into a reasonably usable form.

(h) The court shall limit the frequency or extent of discovery of electronically stored information, even from a source that is reasonably accessible, if the court determines that any of the following conditions exists:

(1) It is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive.

(2) The discovery sought is unreasonably cumulative or duplicative.

(3) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought.

(4) The likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues.

(i) If a subpoenaed person notifies the subpoenaing party that electronically stored information produced pursuant to a subpoena is subject to a claim of privilege or of protection as attorney work product, as described in Section 2031.285, the provisions of Section 2031.285 shall apply.

(j) A party serving a subpoena requiring the production of electronically stored information shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.

(k) An order of the court requiring compliance with a subpoena issued under this section shall protect a person who is neither a party nor a party's officer from undue burden or expense resulting from compliance.

(l) (1) Absent exceptional circumstances, the court shall not impose sanctions on a subpoenaed person or any attorney of a subpoenaed person for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system.

(2) This subdivision shall not be construed to alter any obligation to preserve discoverable information.
Leg.H. 2009 ch. 5 (AB 5) § 2, effective June 29, 2009.

TITLE 4

CIVIL DISCOVERY ACT

CHAPTER 1

GENERAL PROVISIONS

§ 2016.020. Definitions.

As used in this title:

(a) "Action" includes a civil action and a special proceeding of a civil nature.

(b) "Court" means the trial court in which the action is pending, unless otherwise specified.

(c) "Document" and "writing" mean a writing, as defined in *Section 250 of the Evidence Code*.

(d) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(e) "Electronically stored information" means information that is stored in an electronic medium. Leg.H. 2004 ch. 182 (AB 3081), operative July 1, 2005, 2009 ch. 5 (AB 5) § 3, effective June 29, 2009.

CHAPTER 2

SCOPE OF DISCOVERY

ARTICLE 1

General Provisions

§ 2017.010. What Matters May Be Subject to Discovery.

Unless otherwise limited by order of the court in accordance with this title, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may relate to the claim or defense of the party seeking discovery or of any other party to the action. Discovery may be obtained of the identity and location of persons having knowledge of any discoverable matter, as well as of the existence, description, nature, custody, condition, and location of any document, tangible thing, or land or other property. **Leg.H. 2004 ch. 182 (AB 3081), operative July 1, 2005.**

§ 2017.020. When Court May Limit Scope of Discovery; Motion for Protective Order; Monetary Sanction.

(a) The court shall limit the scope of discovery if it determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence. The court may make this determination pursuant to a motion for protective order by a party or other affected person. This motion shall be accompanied by a meet and confer declaration under Section 2016.040.

(b) The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. **Leg.H. 2004 ch. 182 (AB 3081), operative July 1, 2005.**

CHAPTER 14

INSPECTION AND PRODUCTION OF DOCUMENTS, TANGIBLE THINGS, LAND, AND OTHER PROPERTY

ARTICLE 1

Inspection Demand

§ 2031.010. Right to Discovery by Inspecting, Copying, Testing, or Sampling Documents, Tangible Things, Land or Other Property, and Electronically Stored Information.

(a) Any party may obtain discovery within the scope delimited by Chapters 2 (commencing with Section 2017.010) and 3 (commencing with Section 2017.710), and subject to the restrictions set forth in Chapter 5 (commencing with Section 2019.010), by inspecting, **copying, testing, or sampling** documents, tangible things, [1] land or other property [2], **and electronically stored information** in the possession, custody, or control of any other party to the action.

(b) A party may demand that any other party produce and permit the party making the demand, or someone acting on that party's behalf, to inspect and to copy a document that is in the possession, custody, or control of the party on whom the demand is made.

(c) A party may demand that any other party produce and permit the party making the demand, or someone acting on that party's behalf, to inspect and to photograph, test, or sample any tangible things that are in the possession, custody, or control of the party on whom the demand is made.

(d) A party may demand that any other party allow the party making the demand, or someone acting on that party's behalf, to enter on any land or other property that is in the possession, custody, or control of the party on whom the demand is made, and to inspect and to measure, survey, photograph, test, or sample the land or other property, or any designated object or operation on it.

(e) A party may demand that any other party produce and permit the party making the demand, or someone acting on that party's behalf, to inspect, copy, test, or sample electronically stored information in the possession, custody, or control of the party on whom demand is made. Leg.H. 2004 ch. 182 (AB 3081), operative July 1, 2005, 2009 ch. 5 (AB 5) § 4, effective June 29, 2009.

§ 2031.010. 2009 Deletes. [1] and [2] that are

§ 2031.020. Demand for Inspection, Copying, Testing, or Sampling by Defendant Authorized at Any Time; When Plaintiff May Make Demand for Inspection, Copying, Testing, or Sampling.

(a) A defendant may make a demand for inspection, **copying, testing, or sampling** without leave of court at any time.

(b) A plaintiff may make a demand for inspection, **copying, testing, or sampling** without leave of court at any time that is 10 days after the service of the summons on, or appearance by, the party to whom the demand is directed, whichever occurs first.

(c) Notwithstanding subdivision (b), in an unlawful detainer action or other proceeding under Chapter 4 (commencing with Section 1159) of Title 3 of Part 3, a plaintiff may make a demand for inspection, **copying, testing, or sampling** without leave of court at any time that is five days after service of the summons on, or appearance by, the party to whom the demand is directed, whichever occurs first.

(d) Notwithstanding subdivisions (b) and (c), on motion with or without notice, the court, for good cause shown, may grant leave to a plaintiff to make [1] a demand **for inspection, copying, testing, or sampling** at an earlier time. **Leg.H.** 2004 ch. 182 (AB 3081), operative July 1, 2005, 2007 ch. 113 (AB 1126) § 9, 2009 ch. 5 (AB 5) § 5, effective June 29, 2009.

§ 2031.020. 2009 Deletes. [1] an inspection

§ 2031.030. Format and Requirements for Demands for Inspection, Copying, Testing, or Sampling.

(a) (1) A party demanding [1] inspection, **copying, testing, or sampling** shall number each set of demands consecutively.

(2) A party demanding inspection, copying, testing, or sampling of electronically stored information may specify the form or forms in which each type of electronically stored information is to be produced.

(b) In the first paragraph immediately below the title of the case, there shall appear the identity of the demanding party, the set number, and the identity of the responding party.

(c) Each demand in a set shall be separately set forth, identified by number or letter, and shall do all of the following:

(1) Designate the documents, tangible things, [2] land or other property, **or electronically stored information** to be inspected, **copied, tested, or sampled** either by specifically describing each individual item or by reasonably particularizing each category of item.

(2) Specify a reasonable time for the inspection, **copying, testing, or sampling** that is at least 30 days after service of the demand, unless the court for good cause shown has granted leave to specify an earlier date. In an unlawful detainer action or other proceeding under Chapter 4 (commencing with Section 1159) of Title 3 of Part 3, the demand shall specify a reasonable time for the inspection, **copying, testing, or sampling** that is at least five days after service of the demand, unless the court, for good cause shown, has granted leave to specify an earlier date.

(3) Specify a reasonable place for making the inspection, copying, **testing, or sampling**, and performing any related activity.

(4) Specify any **inspection, copying, testing, sampling, or** related activity that is being demanded [3], as well as the manner in which that [4] activity will be performed, and whether that activity will permanently alter or destroy the item involved. **Leg.H.** 2004 ch. 182 (AB 3081), operative July 1, 2005, 2007 ch. 113 (AB 1126) § 10, 2009 ch. 5 (AB 5) § 6, effective June 29, 2009.

§ 2031.030. 2009 Deletes. [1] an [2] or [3] in addition to an inspection and copying [4] related

§ 2031.040. Service of Demand for Inspection, Copying, Testing, or Sampling.

The party [1] **making a demand for inspection, copying, testing, or sampling** shall serve a copy of the [2] demand on the party to whom it is directed and on all other parties who have appeared in the action. **Leg.H.** 2004 ch. 182 (AB 3081), operative July 1, 2005, 2009 ch. 5 (AB 5) § 7, effective June 29, 2009.

§ 2031.040. 2009 Deletes. [1] demanding an [2] inspection

§ 2031.050. When Supplemental Demand May Be Propounded.

(a) In addition to the [1] demands **for inspection, copying, testing, or sampling** permitted by this chapter, a party may propound a supplemental demand to inspect, **copy, test, or sample** any later acquired or discovered documents, tangible things, [2] land or other property [3], **or electronically stored information** in the possession, custody, or control of the party on whom the demand is made.

(b) A party may propound a supplemental [4] demand **for inspection, copying, testing, or sampling** twice before the initial setting of a trial date, and, subject to the time limits on discovery proceedings and motions provided in Chapter 8 (commencing with Section 2024.010), once after the initial setting of a trial date.

(c) Notwithstanding subdivisions (a) and (b), on motion, for good cause shown, the court may grant leave to a party to propound an additional number of supplemental demands for inspection, **copying, testing, or sampling**. **Leg.H.** 2004 ch. 182 (AB 3081), operative July 1, 2005, 2009 ch. 5 (AB 5) § 8, effective June 29, 2009.

§ 2031.050. 2009 Deletes. [1] inspection [2] or [3] that are [4] inspection

§ 2031.060. Motion for Protective Order; What Protective Order May Provide; Denial of Protective Order; Monetary Sanction.

(a) When an inspection, **copying, testing, or sampling** of documents, tangible things [1], places, **or electronically stored information** has been demanded, the party to whom the demand has been directed, and any other party or affected person [2], may promptly move for a protective order. This motion shall be accompanied by a meet and confer declaration under Section 2016.040.

(b) The court, for good cause shown, may make any order that justice requires to protect any party or other [3]

person from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense. This protective order may include, but is not limited to, one or more of the following directions:

(1) That all or some of the items or categories of items in the [4] demand need not be produced or made available at all.

(2) That the time specified in Section 2030.260 to respond to the set of [5] demands, or to a particular item or category in the set, be extended.

(3) That the place of production be other than that specified in the [6] demand.

(4) That the inspection, **copying, testing, or sampling** be made only on specified terms and conditions.

(5) That a trade secret or other confidential research, development, or commercial information not be disclosed, or be disclosed only to specified persons or only in a specified way.

(6) That the items produced be sealed and thereafter opened only on order of the court.

(c) The party or affected person who seeks a protective order regarding the production, inspection, copying, testing, or sampling of electronically stored information on the basis that the information is from a source that is not reasonably accessible because of undue burden or expense shall bear the burden of demonstrating that the information is from a source that is not reasonably accessible because of undue burden or expense.

(d) If the party or affected person from whom discovery of electronically stored information is sought establishes that the information is from a source that is not reasonably accessible because of undue burden or expense, the court may nonetheless order discovery if the demanding party shows good cause, subject to any limitations imposed under subdivision (f).

(e) If the court finds good cause for the production of electronically stored information from a source that is not reasonably accessible, the court may set conditions for the discovery of the electronically stored information, including allocation of the expense of discovery.

(f) The court shall limit the frequency or extent of discovery of electronically stored information, even from a source that is reasonably accessible, if the court determines that any of the following conditions exist:

(1) It is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive.

(2) The discovery sought is unreasonably cumulative or duplicative.

(3) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought.

(4) The likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues.

(g) If the motion for a protective order is denied in whole or in part, the court may order that the party to whom the demand was directed provide or permit the discovery against which protection was sought on terms and conditions that are just.

[7] (h) Except as provided in subdivision (i), the court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a

motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

(i) (1) Notwithstanding subdivision (h), absent exceptional circumstances, the court shall not impose sanctions on a party or any attorney of a party for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system.

(2) This subdivision shall not be construed to alter any obligation to preserve discoverable information.
Leg.H. 2004 ch. 182 (AB 3081), operative July 1, 2005, 2009 ch. 5 (AB 5) § 9, effective June 29, 2009.

§ 2031.060. 2009 Deletes. [1] or [2] or organization [3] natural person or organization [4] inspection [5] inspection [6] inspection [7] (d)

ARTICLE 2

Response to Inspection Demand

§ 2031.210. Nature and Format of Response to Demand for Inspection, Copying, Testing, or Sampling.

(a) The party to whom [1] **a demand for inspection, copying, testing, or sampling** has been directed shall respond separately to each item or category of item by any of the following:

(1) A statement that the party will comply with the particular demand for inspection, **copying, testing, or sampling** by the date set for **the inspection, copying, testing, or sampling** pursuant to paragraph (2) of subdivision (c) of Section 2031.030 and any related activities.

(2) A representation that the party lacks the ability to comply with the demand for inspection, **copying, testing, or sampling** of a particular item or category of item.

(3) An objection to the particular demand **for inspection, copying, testing, or sampling**.

(b) In the first paragraph of the response immediately below the title of the case, there shall appear the identity of the responding party, the set number, and the identity of the demanding party.

(c) Each statement of compliance, each representation, and each objection in the response shall bear the same number and be in the same sequence as the corresponding item or category in the demand, but the text of that item or category need not be repeated.

(d) If a party objects to the discovery of electronically stored information on the grounds that it is from a source that is not reasonably accessible because of undue burden or expense and that the responding party will not search the source in the absence of an agreement with the demanding party or court order, the responding party shall identify in its response the types or categories of sources of electronically stored information that it asserts are not reasonably accessible. By objecting and identifying information of a type or category of source or sources that are not reasonably accessible, the responding party preserves any objections it may have relating to

that electronically stored information. Leg.H. 2004 ch. 182 (AB 3081), operative July 1, 2005, 2007 ch. 738 (AB 1248) § 7, 2009 ch. 5 (AB 5) § 10, effective June 29, 2009.

§ 2031.210. 2009 Deletes. [1] an inspection

§ 2031.220. Statement Regarding Compliance in Whole or in Part.

A statement that the party to whom [1] a demand **for inspection, copying, testing, or sampling** has been directed will comply with the particular demand shall state that the production, inspection, **copying, testing, or sampling**, and related activity demanded, will be allowed either in whole or in part, and that all documents or things in the demanded category that are in the possession, custody, or control of that party and to which no objection is being made will be included in the production. **Leg.H.** 2004 ch. 182 (AB 3081), operative July 1, 2005, 2009 ch. 5 (AB 5) § 11, effective June 29, 2009.

§ 2031.220. 2009 Deletes. [1] an inspection

§ 2031.230. Representation of Inability to Comply.

A representation of inability to comply with the particular demand for inspection, **copying, testing, or sampling** shall affirm that a diligent search and a reasonable inquiry has been made in an effort to comply with that demand. This statement shall also specify whether the inability to comply is because the particular item or category has never existed, has been destroyed, has been lost, misplaced, or stolen, or has never been, or is no longer, in the possession, custody, or control of the responding party. The statement shall set forth the name and address of any natural person or organization known or believed by that party to have possession, custody, or control of that item or category of item. **Leg.H.** 2004 ch. 182 (AB 3081), operative July 1, 2005, 2009 ch. 5 (AB 5) § 12, effective June 29, 2009.

§ 2031.240. Statements Regarding Demand That Is Objectionable in Whole or in Part.

(a) If only part of an item or category of item in [1] a demand **for inspection, copying, testing, or sampling** is objectionable, the response shall contain a statement of compliance, or a representation of inability to comply with respect to the remainder of that item or category.

(b) If the responding party objects to the demand for inspection, **copying, testing, or sampling** of an item or category of item, the response shall do both of the following:

(1) Identify with particularity any document, tangible thing, [2] land, **or electronically stored information** falling within any category of item in the demand to which an objection is being made.

(2) Set forth clearly the extent of, and the specific ground for, the objection. If an objection is based on a claim of privilege, the particular privilege invoked shall be stated. If an objection is based on a claim that the information sought is protected work product under Chapter 4 (commencing with Section 2018.010), that claim shall be expressly asserted.

Leg.H. 2004 ch. 182 (AB 3081), operative July 1, 2005, 2009 ch. 5 (AB 5) § 13, effective June 29, 2009.

§ 2031.240. 2009 Deletes. [1] an inspection [2] or

§ 2031.250. Signing of Response to Demand.

(a) The party to whom the demand for inspection, **copying, testing, or sampling** is directed shall sign the response under oath unless the response contains only objections.

(b) If that party is a public or private corporation or a partnership or association or governmental agency, one of its officers or agents shall sign the response under oath on behalf of that party. If the officer or agent signing the response on behalf of that party is an attorney acting in that capacity for a party, that party waives any lawyer-client privilege and any protection for work product under Chapter 4 (commencing with Section 2018.010) during any subsequent discovery from that attorney concerning the identity of the sources of the information contained in the response.

(c) The attorney for the responding party shall sign any responses that contain an objection. **Leg.H.** 2004 ch. 182 (AB 3081), operative July 1, 2005, 2009 ch. 5 (AB 5) § 14, effective June 29, 2009.

§ 2031.260. Time for Service of Response; Unlawful Detainer Action.

(a) Within 30 days after service of [1] a demand **for inspection, copying, testing, or sampling**, the party to whom the demand is directed shall serve the original of the response to it on the party making the demand, and a copy of the response on all other parties who have appeared in the action, unless on motion of the party making the demand, the court has shortened the time for response, or unless on motion of the party to whom the demand has been directed, the court has extended the time for response.

(b) Notwithstanding subdivision (a), in an unlawful detainer action or other proceeding under Chapter 4 (commencing with Section 1159) of Title 3 of Part 3, the party to whom [2] a demand **for inspection, copying, testing, or sampling** is directed shall have at least five days from the date of service of the demand to respond, unless on motion of the party making the demand, the court has shortened the time for the response, or unless on motion of the party to whom the demand has been directed, the court has extended the time for response. **Leg.H.** 2004 ch. 182 (AB 3081), operative July 1, 2005, 2007 ch. 113 (AB 1126) § 11, 2009 ch. 5 (AB 5) § 15, effective June 29, 2009.

§ 2031.260. 2009 Deletes. [1] an inspection [2] an inspection

§ 2031.270. Extension of Date for Inspection or Time for Service of Response; Written Confirmation of Agreement.

(a) The party demanding [1] inspection, **copying, testing, or sampling** and the responding party may agree to extend the date for **the inspection, copying, testing, or sampling** or the time for service of a response to a set of [2] demands, or to particular items or categories of items in a set, to a date or dates beyond those provided in Sections

2031.030, 2031.210, 2031.260, and 2031.280.

(b) This agreement may be informal, but it shall be confirmed in a writing that specifies the extended date for inspection, **copying, testing, or sampling**, or **for the** service of a response.

(c) Unless this agreement expressly states otherwise, it is effective to preserve to the responding party the right to respond to any item or category of item in the demand to which the agreement applies in any manner specified in Sections 2031.210, 2031.220, 2031.230, 2031.240, and 2031.280. **Leg.H.** 2004 ch. 182 (AB 3081), operative July 1, 2005, 2007 ch. 738 (AB 1248) § 8, 2009 ch. 5 (AB 5) § 16, effective June 29, 2009.

§ 2031.270. 2009 Deletes. [1] an [2] inspection

§ 2031.280. Production of Documents-Form; Date Specified; Production of Electronically Stored Information; Translation; Expense.

(a) Any documents produced in response to [1] a demand **for inspection, copying, testing, or sampling** shall either be produced as they are kept in the usual course of business, or be organized and labeled to correspond with the categories in the demand.

(b) The documents shall be produced on the date specified in the [2] demand pursuant to paragraph (2) of subdivision (c) of Section 2031.030, unless an objection has been made to that date. If the date for inspection has been extended pursuant to Section 2031.270, the documents shall be produced on the date agreed to pursuant to that section.

(c) **If a party responding to a demand for production of electronically stored information objects to a specified form for producing the information, or if no form is specified in the demand, the responding party shall state in its response the form in which it intends to produce each type of information.**

(d) **Unless the parties otherwise agree or the court otherwise orders, the following shall apply:**

(1) If a demand for production does not specify a form or forms for producing a type of electronically stored information, the responding party shall produce the information in the form or forms in which it is ordinarily maintained or in a form that is reasonably usable.

(2) A party need not produce the same electronically stored information in more than one form.

(e) If necessary, the responding party at the reasonable expense of the demanding party shall, through detection devices, translate any data compilations included in the demand into reasonably usable form. **Leg.H.** 2004 ch. 182 (AB 3081), operative July 1, 2005, 2007 ch. 738 (AB 1248) § 9, 2009 ch. 5 (AB 5) § 17, effective June 29, 2009.

§ 2031.280. 2009 Deletes. [1] an inspection [2] inspection

§ 2031.285. Production of Electronically Stored Information-Claim of Privilege or of Protection as Attorney Work Product; Notification to Receiving Party; Receiving Party's Responsibilities; Preclusion From Using or Disclosing Specified Information; Resolution.

(a) If electronically stored information produced in discovery is subject to a claim of privilege or of protection as attorney work product, the party making the claim may notify any party that received the information of the claim and the basis for the claim.

(b) After being notified of a claim of privilege or of protection under subdivision (a), a party that received the information shall immediately sequester the information and either return the specified information and any copies that may exist or present the information to the court conditionally under seal for a determination of the claim.

(c) (1) Prior to the resolution of the motion brought under subdivision (d), a party shall be precluded from using or disclosing the specified information until the claim of privilege is resolved.

(2) A party who received and disclosed the information before being notified of a claim of privilege or of protection under subdivision (a) shall, after that notification, immediately take reasonable steps to retrieve the information.

(d) (1) If the receiving party contests the legitimacy of a claim of privilege or protection, he or she may seek a determination of the claim from the court by making a motion within 30 days of receiving the claim and presenting the information to the court conditionally under seal.

(2) Until the legitimacy of the claim of privilege or protection is resolved, the receiving party shall preserve the information and keep it confidential and shall be precluded from using the information in any manner. Leg.H. 2009 ch. 5 (AB 5) § 18, effective June 29, 2009.

§ 2031.290. Retention of Demand for Inspection, Copying, Testing, or Sampling, Proof of Service, and Response by Demanding Party.

(a) The [1] demand **for inspection, copying, testing, or sampling**, and the response to it, shall not be filed with the court.

(b) The party demanding an inspection, **copying, testing, or sampling** shall retain both the original of the [2] demand, with the original proof of service affixed to it, and the original of the sworn response until six months after final disposition of the action. At that time, both originals may be destroyed, unless the court, on motion of any party and for good cause shown, orders that the originals be preserved for a longer period. Leg.H. 2004 ch. 182 (AB 3081), operative July 1, 2005, 2009 ch. 5 (AB 5) § 19, effective June 29, 2009.

§ 2031.290. 2009 Deletes. [1] inspection [2] inspection

§ 2031.300. Effect of Failure to Serve Timely Response to Demand for Inspection, Copying, Testing, or Sampling; Motion for Order; Monetary and Other Sanctions.

If a party to whom [1] a demand **for inspection, copying, testing, or sampling** is directed fails to serve a timely response to it, the following rules shall apply:

(a) The party to whom the [2] demand **for inspection, copying, testing, or sampling** is directed waives any objection to the demand, including one based on privilege or on the protection for work product under Chapter 4 (commencing with Section 2018.010). The court, on motion, may relieve that party from this waiver on its determination that both of the following conditions are satisfied:

(1) The party has subsequently served a response that is in substantial compliance with Sections 2031.210, 2031.220, 2031.230, 2031.240, and 2031.280.

(2) The party's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect.

(b) The party making the demand may move for an order compelling response to the [3] demand.

(c) **Except as provided in subdivision (d)**, the court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a response to [4] **a demand for inspection, copying, testing, or sampling**, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. If a party then fails to obey the order compelling a response, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Chapter 7 (commencing with Section 2023.010). In lieu of or in addition to this sanction, the court may impose a monetary sanction under Chapter 7 (commencing with Section 2023.010).

(d) (1) Notwithstanding subdivision (c), absent exceptional circumstances, the court shall not impose sanctions on a party or any attorney of a party for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as a result of the routine, good faith operation of an electronic information system.

(2) This subdivision shall not be construed to alter any obligation to preserve discoverable information.
Leg.H. 2004 ch. 182 (AB 3081), operative July 1, 2005, 2005 ch. 22 (SB 1108) § 23, 2009 ch. 5 (AB 5) § 20, effective June 29, 2009.

§ 2031.300. 2009 Deletes. [1] an inspection [2] inspection [3] inspection [4] an inspection

§ 2031.310. Motion for Order Compelling Further Response; Grounds; Notice; Waiver; Monetary and Other Sanctions.

(a) On receipt of a response to [1] **a demand for inspection, copying, testing, or sampling**, the **demanding** party [2] may move for an order compelling further response to the demand if the demanding party deems that any of the following apply:

(1) A statement of compliance with the demand is incomplete.

(2) A representation of inability to comply is inadequate, incomplete, or evasive.

(3) An objection in the response is without merit or too general.

(b) A motion under subdivision (a) shall comply with both of the following:

(1) The motion shall set forth specific facts showing good cause justifying the discovery sought by the [3] demand.

(2) The motion shall be accompanied by a meet and confer declaration under Section 2016.040.

(c) Unless notice of this motion is given within 45 days of the service of the response, or any supplemental response, or on or before any specific later date to which the demanding party and the responding party have agreed in writing, the demanding party waives any right to compel a further response to the [4] demand.

(d) In a motion under subdivision (a) relating to the production of electronically stored information, the party or affected person objecting to or opposing the production, inspection, copying, testing, or sampling of electronically stored information on the basis that the information is from a source that is not reasonably accessible because of the undue burden or expense shall bear the burden of demonstrating that the information is from a source that is not reasonably accessible because of undue burden or expense.

(e) If the party or affected person from whom discovery of electronically stored information is sought establishes that the information is from a source that is not reasonably accessible because of the undue burden or expense, the court may nonetheless order discovery if the demanding party shows good cause, subject to any limitations imposed under subdivision (g).

(f) If the court finds good cause for the production of electronically stored information from a source that is not reasonably accessible, the court may set conditions for the discovery of the electronically stored information, including allocation of the expense of discovery.

(g) The court shall limit the frequency or extent of discovery of electronically stored information, even from a source that is reasonably accessible, if the court determines that any of the following conditions exists:

(1) It is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive.

(2) The discovery sought is unreasonably cumulative or duplicative.

(3) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought.

(4) The likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues.

(h) Except as provided in subdivision (j), the court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel further response to [5] a demand, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

[6] **(i) Except as provided in subdivision (j),** if a party fails to obey an order compelling further response, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Chapter 7 (commencing with Section 2023.010). In lieu of or in addition to that sanction, the court may impose a monetary sanction under Chapter 7 (commencing with Section 2023.010).

(j) (1) Notwithstanding subdivisions (h) and (i), absent exceptional circumstances, the court shall not impose sanctions on a party or any attorney of a party for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system.

(2) This subdivision shall not be construed to alter any obligation to preserve discoverable information.

Leg.H. 2004 ch. 182 (AB 3081), operative July 1, 2005, 2009 ch. 5 (AB 5) § 21, effective June 29, 2009.

§ 2031.310. 2009 Deletes. [1] an inspection [2] demanding an inspection [3] inspection [4] inspection [5] an inspection [6] (e)

§ 2031.320. Motion for Order Compelling Compliance on Failure to Permit Inspection, Copying, Testing, or Sampling in Accordance With Response; Monetary and Other Sanctions.

(a) If a party filing a response to a demand for inspection, **copying, testing, or sampling** under [1] **Sections 2031.210, 2031.220, 2031.230, 2031.240, and 2031.280** thereafter fails to permit the inspection, **copying, testing, or sampling** in accordance with that party's statement of compliance, the **demanding** party [2] may move for an order compelling compliance.

(b) **Except as provided in subdivision (d)**, the court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel compliance with [3] **a** demand, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

(c) **Except as provided in subdivision (d)**, if a party then fails to obey an order compelling inspection, **copying, testing, or sampling**, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Chapter 7 (commencing with Section 2023.010). In lieu of or in addition to that sanction, the court may impose a monetary sanction under Chapter 7 (commencing with Section 2023.010).

(d) **(1) Notwithstanding subdivisions (b) and (c), absent exceptional circumstances, the court shall not impose sanctions on a party or any attorney of a party for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system.**

(2) This subdivision shall not be construed to alter any obligation to preserve discoverable information.
Leg.H. 2004 ch. 182 (AB 3081), operative July 1, 2005, 2009 ch. 5 (AB 5) § 22, effective June 29, 2009.

§ 2031.320. 2009 Deletes. [1] Section [2] demanding the inspection [3] an inspection

Appendix E

California Rules of Court E-Discovery Rules

Appendix E contains the amended version of California Rules of Court, Rule 3.724, as adopted by the California

Judicial Council effective August 14, 2009. Language deleted by the 2009 changes is indicated by bracketed numbers (e.g., "[1]") in the section at the point where the deletion was made, with the deleted language appearing following the end of the section. Language added by the 2009 amendment is indicated in **boldface** type. For convenience, the text of Rule 3.728, which was unaffected by the final version of the 2009 amendments, is also included.

Synopsis:

Selected Provisions of the Rules of Court

Title 3. Civil Rules

Division 7. Civil Case Management

Chapter 3. Case Management

Rule 3.724. Duty to meet and confer

Rule 3.728. Case management order

Text:

TITLE 3

Civil Rules

Division 7

Civil Case Management

Chapter 3

Case Management

Rule 3.724. Duty to meet and confer

Unless the court orders another time period, no later than 30 calendar days before the date set for the **initial** case management conference, the parties must meet and confer, in person or by telephone, to consider each of the issues

identified in rule 3.727 and, in addition, to consider the following:

- (1) Resolving any discovery disputes and setting a discovery schedule;
- (2) Identifying and, if possible, informally resolving any anticipated motions;
- (3) Identifying the facts and issues in the case that are uncontested and may be the subject of stipulation;
- (4) Identifying the facts and issues in the case that are in dispute;
- (5) Determining whether the issues in the case can be narrowed by eliminating any claims or defenses by means of a motion or otherwise;
- (6) Determining whether settlement is possible;
- (7) Identifying the dates on which all parties and their attorneys are available or not available for trial, including the reasons for unavailability; **[1]**
- (8) Any issues relating to the discovery of electronically stored information, including:**
 - (A) Issues relating to the preservation of discoverable electronically stored information;**
 - (B) The form or forms in which information will be produced;**
 - (C) The time within which the information will be produced;**
 - (D) The scope of discovery of the information;**
 - (E) The method for asserting or preserving claims of privilege or attorney work product, including whether such claims may be asserted after production;**
 - (F) The method for asserting or preserving the confidentiality, privacy, trade secrets, or proprietary status of information relating to a party or person not a party to the civil proceedings;**
 - (G) How the cost of production of electronically stored information is to be allocated among the parties; and**
 - (H) Any other issues relating to the discovery of electronically stored information, including developing a proposed plan relating to the discovery of the information; and**

[2](9) Other relevant matters.

Rule 3.724 amended effective August 14, 2009, or earlier; adopted effective January 1, 2007.

Rule 3.724. 2009 Deletes. [1] and [2] (8)

Rule 3.728. Case management order

The case management conference must be conducted in the manner provided by local rule. The court must enter a case management order setting a schedule for subsequent proceedings and otherwise providing for the management of the case. The order may include appropriate provisions, such as:

- (1) Referral of the case to judicial arbitration or other alternative dispute resolution process;
- (2) A date for completion of the judicial arbitration process or other alternative dispute resolution process if the case has been referred to such a process;
- (3) In the event that a trial date has not previously been set, a date certain for trial if the case is ready to be set for trial;
- (4) Whether the trial will be a jury trial or a nonjury trial;
- (5) The identity of each party demanding a jury trial;
- (6) The estimated length of trial;
- (7) Whether all parties necessary to the disposition of the case have been served or have appeared;
- (8) The dismissal or severance of unserved or not-appearing defendants from the action;
- (9) The names and addresses of the attorneys who will try the case;
- (10) The date, time, and place for a mandatory settlement conference as provided in rule 3.1380;
- (11) The date, time, and place for the final case management conference before trial if such a conference is required by the court or the judge assigned to the case;
- (12) The date, time, and place of any further case management conferences or review; and
- (13) Any additional orders that may be appropriate, including orders on matters listed in rules 3.724 and 3.727.

Rule 3.728 adopted effective January 1, 2007.

Appendix F

E-Discovery Provisions of Federal Rules of Civil Procedure and Federal Rules of Evidence

Appendix E contains the full text of the Federal Rules of Civil Procedure and Federal Rules of Evidence that govern e-discovery in federal courts. They are included in this pamphlet for the convenience of readers and to provide a basis for comparison between the 2009 California changes discussed in this pamphlet and the corresponding provisions of federal law.

Synopsis:

Selected Provisions of the Federal Rules of Civil Procedure

Title I. Scope of Rules; Form of Action

Rule 1. Scope and Purpose

Title III. Pleadings and Motions

Rule 16. Pretrial Conferences; Scheduling; Management

Title V. Disclosures and Discovery

Rule 26. Duty to Disclose; General Provisions Governing Discovery

Rule 33. Interrogatories to Parties

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

Title VI. Trials

Rule 45. Subpoena

Text:

TITLE I

Scope of Rules; Form of Action

Rule 1. Scope and Purpose

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding. [*Adopted Dec. 20, 1937, effective Sept. 16, 1938; amended Dec. 29, 1948, effective Oct. 20, 1949; Feb. 28, 1966, effective July 1, 1966; Apr. 22, 1993, effective Dec. 1, 1993; last amended April 30, 2007, effective December 1, 2007.*]

Committee Note of 2007 to Rule 1

The language of Rule 1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. The merger of law, equity, and admiralty practice is complete. There is no need to carry forward the phrases that initially accomplished the merger. The former reference to "suits of a civil nature" is changed to the more modern "actions and proceedings." This change does not affect such questions as whether the Civil Rules apply to summary proceedings created by statute. *See SEC v. McCarthy*, 322 F.3d 650 (9th Cir. 2003); *see also New Hampshire Fire Ins. Co. v. Scanlon*, 362 U.S. 404 (1960).

TITLE III

Pleadings and Motions

Rule 16. Pretrial Conferences; Scheduling; Management

(a) Purposes of a Pretrial Conference. In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

- (1) expediting disposition of the action;
- (2) establishing early and continuing control so that the case will not be protracted because of lack of management;
- (3) discouraging wasteful pretrial activities;
- (4) improving the quality of the trial through more thorough preparation; and
- (5) facilitating settlement.

(b) Scheduling.

(1) **Scheduling Order.** Except in categories of actions exempted by local rule, the district judge-or a magistrate judge when authorized by local rule-must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference or by telephone, mail, or other means.

(2) **Time to Issue.** The judge must issue the scheduling order as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared.

(3) Contents of the Order.

(A) **Required Contents.** The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) **Permitted Contents.** The scheduling order may:

- (i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);
- (ii) modify the extent of discovery;
- (iii) provide for disclosure or discovery of electronically stored information;
- (iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced;
- (v) set dates for pretrial conferences and for trial; and

(vi) include other appropriate matters.

(4) **Modifying a Schedule.** A schedule may be modified only for good cause and with the judge's consent.

(c) Attendance and Matters for Consideration at a Pretrial Conference.

(1) **Attendance.** A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement.

(2) **Matters for Consideration.** At any pretrial conference, the court may consider and take appropriate action on the following matters:

(A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;

(B) amending the pleadings if necessary or desirable;

(C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;

(D) avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under *Federal Rule of Evidence 702*;

(E) determining the appropriateness and timing of summary adjudication under Rule 56;

(F) controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;

(G) identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial;

(H) referring matters to a magistrate judge or a master;

(I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;

(J) determining the form and content of the pretrial order;

(K) disposing of pending motions;

(L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(M) ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue;

(N) ordering the presentation of evidence early in the trial on a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

(O) establishing a reasonable limit on the time allowed to present evidence; and (P) facilitating in other ways the just, speedy, and inexpensive disposition of the action.

(d) Pretrial Orders. After any conference under this rule, the court should issue an order reciting the action taken.

This order controls the course of the action unless the court modifies it.

(e) Final Pretrial Conference and Orders. The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify an order issued after a final pretrial conference only to prevent manifest injustice.

(f) Sanctions.

(1) **In General.** On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney:

(A) fails to appear at a scheduling or other pretrial conference;

(B) is substantially unprepared to participate-or does not participate in good faith-in the conference; or

(C) fails to obey a scheduling or other pretrial order.

(2) **Imposing Fees and Costs.** Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses-including attorney's fees-incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust. *[Adopted Dec. 20, 1937, effective Sept. 16, 1938; amended Apr. 28, 1983, effective Aug. 1, 1983; Mar. 2, 1987, effective Aug. 1, 1987; Apr. 22, 1993, effective Dec. 1, 1993; Apr. 12, 2006, effective Dec. 1, 2006; last amended April 30, 2007, effective December 1, 2007.]*

Committee Note of 2007 to Rule 16 (style revision)

The language of Rule 16 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Committee Note of 2007 to Rule 16 (style-substance revision)

When a party or its representative is not present, it is enough to be reasonably available by any suitable means, whether telephone or other communication device.

TITLE V

Disclosures and Discovery

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

(1) Initial Disclosure.

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information-along with the subjects of that information-that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy-or a description by category and location-of all documents, electrically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party-who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) *Proceedings Exempt from Initial Disclosure.* The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) *Time for Initial Disclosures--In General.* A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) *Time for Initial Disclosures--For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a

different time is set by stipulation or court order.

(E) *Basis for Initial Disclosure; Unacceptable Excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) *Disclosure of Expert Testimony.*

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under *Federal Rule of Evidence* 702, 703, or 705.

(B) *Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) the data or other information considered by the witness in forming them;
- (iii) any exhibits that will be used to summarize or support them;
- (iv) the witness's qualifications, including a list of all publications authored in the previous ten years;
- (v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and
- (vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Time to Disclose Expert Testimony.* A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

- (i) at least 90 days before the date set for trial or for the case to be ready for trial; or
- (ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B), within 30 days after the other party's disclosure.

(D) *Supplementing the Disclosure.* The parties must supplement these disclosures when required under Rule 26(e).

(3) *Pretrial Disclosures.*

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

- (i) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises;
- (ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and
- (iii) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made-except for one under *Federal Rule of Evidence 402* or *403*-is waived unless excused by the court for good cause.

(4) ***Form of Disclosures.*** Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) Discovery Scope and Limits.

(1) ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense-including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

(2) Limitations on Frequency and Extent.

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

(3) Trial Preparation: Materials.

(A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) *Previous Statement.* Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording-or a transcription of it-that recites substantially verbatim the person's oral statement.

(4) *Trial Preparation: Experts.*

(A) *Expert Who May Testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is

provided.

(B) *Expert Employed Only for Trial Preparation.* Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(C) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (B); and

(ii) for discovery under (B), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) *Claiming Privilege or Protecting Trial-Preparation Materials.*

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed-and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Protective Orders.

(1) *In General.* A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted; (F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) *Ordering Discovery.* If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) *Awarding Expenses.* Rule 37(a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.

(1) *Timing.* A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) *Sequence.* Unless, on motion, the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(e) Supplementing Disclosures and Responses.

(1) ***In General.*** A party who has made a disclosure under Rule 26(a)-or who has responded to an interrogatory, request for production, or request for admission-must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) ***Expert Witness.*** For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) Conference of the Parties; Planning for Discovery.

(1) ***Conference Timing.*** Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable-and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b).

(2) ***Conference Content; Parties' Responsibilities.*** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) ***Discovery Plan.*** A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including-if the parties agree on a procedure to assert these claims after production-whether to ask the court to include their agreement in an order;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(4) ***Expedited Schedule.*** If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) **Signature Required; Effect of Signature.** Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name-or by the party personally, if unrepresented-and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) **Failure to Sign.** Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) **Sanction for Improper Certification.** If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation. [*Adopted Dec. 20, 1937, effective Sept. 16, 1938; amended Dec. 27, 1946, effective Mar. 19, 1948; Jan. 21, 1963, effective July 1, 1963; Feb. 28, 1966, effective July 1, 1966; Mar. 30, 1970, effective July 1, 1970; Apr. 29, 1980, effective Aug. 1, 1980; Apr. 28, 1983, effective Aug. 1, 1983; Mar. 2, 1987, effective Aug. 1, 1987; Apr. 22, 1993, effective Dec. 1, 1993; Apr. 17, 2000, effective Dec. 1, 2000; Apr. 12, 2006, effective Dec. 1, 2006; last amended April 30, 2007, effective December 1, 2007.*]

Committee Note of 2007 to Rule 26 (style revision)

The language of Rule 26 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. Former Rule 26(a)(5) served as an index of the discovery methods provided by later rules. It was deleted as redundant. Deletion does not affect the right to pursue discovery in addition to disclosure.

Former Rule 26(b)(1) began with a general statement of the scope of discovery that appeared to function as a preface to each of the five numbered paragraphs that followed. This preface has been shifted to the text of paragraph (1) because it does not accurately reflect the limits embodied in paragraphs (2), (3), or (4), and because paragraph (5) does not address the scope of discovery.

The reference to discovery of "books" in former Rule 26(b)(1) was deleted to achieve consistent expression throughout the discovery rules. Books remain a proper subject of discovery.

Amended Rule 26(b)(3) states that a party may obtain a copy of the party's own previous statement "on request." Former Rule 26(b)(3) expressly made the request procedure available to a nonparty witness, but did not describe the procedure to be used by a party. This apparent gap is closed by adopting the request procedure, which ensures that a party need not invoke Rule 34 to obtain a copy of the party's own statement.

Rule 26(e) stated the duty to supplement or correct a disclosure or discovery response "to include information thereafter acquired." This apparent limit is not reflected in practice; parties recognize the duty to supplement or correct by providing information that was not originally provided although it was available at the time of the initial disclosure or response. These words are deleted to reflect the actual meaning of the present rule.

Former Rule 26(e) used different phrases to describe the time to supplement or correct disclosure or discovery response. Disclosures were to be supplemented "at appropriate intervals." A prior discovery response must be "seasonably * * * amend[ed]." The fine distinction between these phrases has not been observed in practice. Amended Rule 26(e)(1)(A) uses the same phrase for disclosures and discovery responses. The party must supplement or correct "in a timely manner."

Former Rule 26(g)(1) did not call for striking an unsigned disclosure. The omission was an obvious drafting oversight. Amended Rule 26(g)(2) includes disclosures in the list of matters that the court must strike unless a signature is provided "promptly * * * after being called to the attorney's or party's attention."

Former Rule 26(b)(2)(A) referred to a "good faith" argument to extend existing law. Amended Rule 26(b)(1)(B)(i) changes this reference to a "nonfrivolous" argument to achieve consistency with Rule 11(b)(2).

Committee Note of 2007 to Rule 26 (style-substance revision)

As with the Rule 11 signature on a pleading, written motion, or other paper, disclosure and discovery signatures should include not only a postal address but also a telephone number and electronic-mail address. A signer who lacks one or more of those addresses need not supply a nonexistent item.

Rule 11(b)(2) recognizes that it is legitimate to argue for establishing new law. An argument to establish new law is equally legitimate in conducting discovery.

Rule 33. Interrogatories to Parties

(a) In General.

(1) **Number.** Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(2).

(2) **Scope.** An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to

fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.

(b) Answers and Objections.

(1) **Responding Party.** The interrogatories must be answered:

(A) by the party to whom they are directed; or

(B) if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party.

(2) **Time to Respond.** The responding party must serve its answers and any objections within 30 days after being served with the interrogatories. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(3) **Answering Each Interrogatory.** Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.

(4) **Objections.** The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure.

(5) **Signature.** The person who makes the answers must sign them, and the attorney who objects must sign any objections.

(c) Use. An answer to an interrogatory may be used to the extent allowed by the Federal Rules of Evidence.

(d) Option to Produce Business Records. If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

(1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and

(2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries. *[Adopted Dec. 20, 1937, effective Sept. 16, 1938; amended Dec. 27, 1946, effective Mar. 19, 1948; Mar. 30, 1970, effective July 1, 1970; Apr. 29, 1980, effective Aug. 1, 1980; Apr. 22, 1993, effective Dec. 1, 1993; Apr. 12, 2006, effective Dec. 1, 2006; last amended April 30, 2007, effective December 1, 2007.]*

Committee Note of 2007 to Rule 33

The language of Rule 33 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The final sentence of former Rule 33(a) was a redundant cross-reference to the discovery moratorium provisions of Rule 26(d). Rule 26(d) is now familiar, obviating any need to carry forward the redundant cross-reference.

Former Rule 33(b)(5) was a redundant reminder of Rule 37(a) procedure that is omitted as no longer useful.

Former Rule 33(c) stated that an interrogatory "is not necessarily objectionable merely because an answer * * * involves an opinion or contention * * *." "[I]s not necessarily" seemed to imply that the interrogatory might be objectionable merely for this reason. This implication has been ignored in practice. Opinion and contention interrogatories are used routinely. Amended Rule 33(a)(2) embodies the current meaning of Rule 33 by omitting "necessarily."

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information-including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations-stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(B) any designated tangible things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) Procedure.

(1) ***Contents of the Request.*** The request:

(A) must describe with reasonable particularity each item or category of items to be inspected;

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(C) may specify the form or forms in which electronically stored information is to be produced.

(2) ***Responses and Objections.***

(A) ***Time to Respond.*** The party to whom the request is directed must respond in writing within 30 days after being served. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) ***Responding to Each Item.*** For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons.

(C) ***Objections.*** An objection to part of a request must specify the part and permit inspection of the rest.

(D) ***Responding to a Request for Production of Electronically Stored Information.*** The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form-or if no form was specified in the request-the party must state the form or forms it intends to use.

(E) ***Producing the Documents or Electronically Stored Information.*** Unless otherwise stipulated or ordered by the

court, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.

(c) Nonparties. As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection. [*Adopted Dec. 20, 1937, effective Sept. 16, 1938; amended Dec. 27, 1946, effective Mar. 19, 1948; Mar. 30, 1970, effective July 1, 1970; Apr. 29, 1980, effective Aug. 1, 1980; Mar. 2, 1987, effective Aug. 1, 1987; Apr. 30, 1991, effective Dec. 1, 1991; Apr. 22, 1993, effective Dec. 1, 1993; Apr. 12, 2006, effective Dec. 1, 2006; last amended April 30, 2007, effective December 1, 2007.*]

Committee Note of 2007 to Rule 34

The language of Rule 34 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The final sentence in the first paragraph of former Rule 34(b) was a redundant

cross-reference to the discovery moratorium provisions of Rule 26(d). Rule 26(d) is now familiar, obviating any need to carry forward the redundant cross-reference.

The redundant reminder of Rule 37(a) procedure in the second paragraph of former Rule 34(b) is omitted as no longer useful.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(a) Motion for an Order Compelling Disclosure or Discovery.

(1) ***In General.*** On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(2) ***Appropriate Court.*** A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

(3) *Specific Motions.*

(A) ***To Compel Disclosure.*** If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(B) *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may

be made if:

- (i) a deponent fails to answer a question asked under Rule 30 or 31;
- (ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);
- (iii) a party fails to answer an interrogatory submitted under Rule 33; or
- (iv) a party fails to respond that inspection will be permitted-or fails to permit inspection-as requested under Rule 34.

(C) *Related to a Deposition.* When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(4) ***Evasive or Incomplete Disclosure, Answer, or Response.*** For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(5) *Payment of Expenses; Protective Orders.*

(A) *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion is granted-or if the disclosure or requested discovery is provided after the motion was filed-the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

- (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;
- (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or
- (iii) other circumstances make an award of expenses unjust.

(B) *If the Motion Is Denied.* If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) *If the Motion Is Granted in Part and Denied in Part.* If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(b) *Failure to Comply with a Court Order.*

(1) ***Sanctions in the District Where the Deposition Is Taken.*** If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court.

(2) *Sanctions in the District Where the Action Is Pending.*

(A) *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent-or a witness designated under Rule 30(b)(6) or 31(a)(4)-fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) *For Not Producing a Person for Examination.* If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person.

(C) *Payment of Expenses.* Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.

(1) ***Failure to Disclose or Supplement.*** If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

(2) ***Failure to Admit.*** If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.

(1) In General.

(A) *Motion; Grounds for Sanctions.* The court where the action is pending may, on motion, order sanctions if:

- (i) a party or a party's officer, director, or managing agent-or a person designated under Rule 30(b)(6) or 31(a)(4)-fails, after being served with proper notice, to appear for that person's deposition; or
- (ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

(B) *Certification.* A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(2) **Unacceptable Excuse for Failing to Act.** A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(3) **Types of Sanctions.** Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(e) Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

(f) Failure to Participate in Framing a Discovery Plan. If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure. [Adopted Dec. 20, 1937, effective Sept. 16, 1938; amended Dec. 29, 1948, effective Oct. 20, 1949; Mar. 30, 1970, effective July 1, 1970; Apr. 29, 1980, effective Aug. 1, 1980; Oct. 21, 1980, effective Oct. 1, 1981; Mar. 2, 1987, effective Aug. 1, 1987; Apr. 22, 1993, effective Dec. 1, 1993; Apr. 17, 2000, effective Dec. 1, 2000; Apr. 12, 2006, effective Dec. 1, 2006; last amended April 30, 2007, effective December 1, 2007.]

Committee Note of 2007 to Rule 37

The language of Rule 37 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

TITLE VI

Trials

Rule 45. Subpoena

(a) In General.

(1) Form and Contents.

(A) *Requirements-In General.* Every subpoena must:

(i) state the court from which it issued;

(ii) state the title of the action, the court in which it is pending, and its civil-action number;

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and

(iv) set out the text of Rule 45(c) and (d).

(B) *Command to Attend a Deposition-Notice of the Recording Method.* A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(C) *Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information.* A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(D) *Command to Produce; Included Obligations.* A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding party to permit inspection, copying, testing, or sampling of the materials.

(2) **Issued from Which Court.** A subpoena must issue as follows:

(A) for attendance at a hearing or trial, from the court for the district where the hearing or trial is to be held;

(B) for attendance at a deposition, from the court for the district where the deposition is to be taken; and

(C) for production or inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

(3) **Issued by Whom.** The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena as an officer of:

(A) a court in which the attorney is authorized to practice; or

(B) a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending.

(b) Service.

(1) **By Whom; Tendering Fees; Serving a Copy of Certain Subpoenas.** Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served, a notice must be served on each party.

(2) **Service in the United States.** Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:

(A) within the district of the issuing court;

(B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;

(C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or

(D) that the court authorizes on motion and for good cause, if a federal statute so provides.

(3) **Service in a Foreign Country.** 28 U.S.C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(4) **Proof of Service.** Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) Protecting a Person Subject to a Subpoena.

(1) **Avoiding Undue Burden or Expense; Sanctions.** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) **Appearance Not Required.** A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) **Objections.** A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person—except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) **Contempt.** The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii). [*Adopted Dec. 20, 1937, effective Sept. 16, 1938; amended Dec. 27, 1946, effective Mar. 19, 1948; Dec. 29, 1948, effective Oct. 20, 1949; Mar. 30, 1970, effective July 1, 1970; Apr. 29, 1980, effective Aug. 1, 1980; Apr. 29, 1985, effective Aug. 1, 1985; Mar. 2, 1987, effective Aug. 1, 1987; Apr. 30, 1991, effective Dec. 1, 1991; Apr. 25, 2005, effective Dec. 1, 2005; Apr. 12, 2006, effective Dec. 1, 2006; last amended April 30, 2007, effective December 1, 2007.*]

Committee Note of 2007 to Rule 45

The language of Rule 45 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The reference to discovery of "books" in former Rule 45(a)(1)(C) was deleted to achieve consistent expression throughout the discovery rules. Books remain a proper subject of discovery.

Former Rule 45(b)(1) required "prior notice" to each party of any commanded production of documents and things or inspection of premises. Courts have agreed that notice must be given "prior" to the return date, and have tended to converge on an interpretation that requires notice to the parties before the subpoena is served on the person commanded to produce or permit inspection. That interpretation is adopted in amended Rule 45(b)(1) to give clear notice of general present practice.

The language of former Rule 45(d)(2) addressing the manner of asserting privilege is replaced by adopting the wording of Rule 26(b)(5). The same meaning is better expressed in the same words.

Federal Rules of Evidence

Synopsis:

Selected Provisions of the Federal Rules of Evidence

Article V. Privileges

Rule 502. Attorney-client privilege and work product; limitations on waiver

Article X. Contents of Writings, Recordings, and Photographs

Rule 1001. Definitions

Rule 1002. Requirement of Original

Rule 1003. Admissibility of Duplicates

Rule 1004. Admissibility of Other Evidence of Contents

Text:

ARTICLE V

Privileges

Rule 502. Attorney-client privilege and work product; limitations on waiver

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work product protection.

(a) Disclosure made in a Federal proceeding or to a Federal office or agency; scope of a waiver. When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:

- (1) the waiver is intentional;
- (2) the disclosed and undisclosed communications or information concern the same subject matter; and
- (3) they ought in fairness to be considered together.

(b) Inadvertent disclosure. When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:

- (1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following *Federal Rule of Civil Procedure 26(b)(5)(B)*.

(c) Disclosure made in a State proceeding. When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a Federal proceeding; or

(2) is not a waiver under the law of the State where the disclosure occurred.

(d) Controlling effect of a court order. A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court-in which event the disclosure is also not a waiver in any other Federal or State proceeding.

(e) Controlling effect of a party agreement. An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Controlling effect of this rule. Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.

(g) Definitions. In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial. [*Sept. 19, 2008, P.L. 110-322, § 1(a), 122 Stat. 3537.*]

Notes

Application of rule. Act Sept. 19, 2008, P.L. 110-322, § 1(c), 122 Stat. 3538, provides: "The amendments made by this Act [adding this rule] shall apply in all proceedings commenced after the date of enactment of this Act and, insofar as is just and practicable, in all proceedings pending on such date of enactment."

Committee note. This new rule has two major purposes:

(1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product-specifically those disputes involving inadvertent disclosure and subject matter waiver.

(2) It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however

innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery. *See, e.g., Hopson v. City of Baltimore*, 232 F.R.D. 228, 244 (D.Md. 2005) (electronic discovery may encompass "millions of documents" and to insist upon "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation").

The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work product protection. Parties to litigation need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court's order will be enforceable. Moreover, if a federal court's confidentiality order is not enforceable in a state court then the burdensome costs of privilege review and retention are unlikely to be reduced.

The rule makes no attempt to alter federal or state law on whether a communication or information is protected under the attorney-client privilege or work product immunity as an initial matter. Moreover, while establishing some exceptions to waiver, the rule does not purport to supplant applicable waiver doctrine generally.

The rule governs only certain waivers by disclosure. Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product. *See, e.g., Nguyen v. Excel Corp.*, 197 F.3d 200 (5th Cir. 1999) (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); *Ryers [Byers] v. Burleson*, 100 F.R.D. 436 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.

Subdivision (a). The rule provides that a voluntary disclosure in a federal proceeding or to a federal office or agency, if a waiver, generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary. *See, e.g., In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994) (waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain tactical advantage). Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver. claw back Rule 502(b). The rule rejects the result in *In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

The language concerning subject matter waiver-"ought in fairness"-is taken from Rule 106, because the animating principle is the same. Under both Rules, a party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation.

To assure protection and predictability, the rules provides that if a disclosure is made at the federal level, the federal rule on subject matter waiver governs subsequent state court determinations on the scope of the waiver by that disclosure.

Subdivision (b). Courts are in conflict over whether an inadvertent disclosure of a communication or information protected as privileged or work product constitutes a waiver. A few courts find that a disclosure must be intentional to be a waiver. Most courts find a waiver only if the disclosing party acted carelessly in disclosing the communication or information protected under the attorney-client privilege or as work product constitutes a waiver without regard to the protections taken to avoid such a disclosure. *See generally Hopson v. City of Baltimore*, 232 F.R.D. 228 (D. Md. 2005), for a discussion of this case law.

The rule opts for the middle ground: inadvertent disclosure of protected communications or information in connection with a federal proceeding or to a federal office or agency does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver.

Cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D. Cal. 1985), set out a multi-factor test for determining whether inadvertent disclosure is a waiver. The stated factors (none of which are dispositive) are the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness. The rule does not explicitly codify that test, because it is really a set of non-determinative guidelines that vary from case to case. The rule is flexible enough to accommodate any of those listed factors. Other considerations bearing on the reasonableness of a producing party's efforts include the number of documents to be reviewed and the time constraints for production. Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken "reasonable steps" to prevent inadvertent disclosure. The implementation of an efficient system of records management before litigation may also be relevant.

The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently.

The rule applies to inadvertent disclosures made to a federal office or agency, including but not limited to an office or agency that is acting in the course of its regulatory, investigative or enforcement authority. The consequences of waiver, and the concomitant costs of pre-production privilege review, can be as great with respect to disclosures to offices and agencies as they are in litigation.

Subdivision (c). Difficult questions can arise when 1) a disclosure of a communication or information protected by the attorney-client privilege or as work product is made in a state proceeding, 2) the communication or information is offered in a subsequent federal proceeding on the ground that the disclosure waived the privilege or protection, and 3) the state and federal laws are in conflict on the question of waiver. The Committee determined that the proper solution for the federal court is to apply the law that is most protective of privilege and work product. If the state law is more protective (such as where the state law is that an inadvertent disclosure can never be a waiver), the holder of the privilege or protection may well have relied on that law when making the disclosure in the state proceeding. Moreover, applying a more restrictive federal law of waiver could impair the state objective of preserving the privilege or work-product protection for disclosures made in state proceedings. On the other hand, if the federal law is more protective, applying the state law of waiver to determine admissibility in federal court is likely to undermine the federal objective of limiting the costs of production.

The rule does not address the enforceability of a state court confidentiality order in a federal proceeding, as that question is covered both by statutory law and principles of federalism and comity. See 28 U.S.C. § 1738 (providing that state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."). See also *Tucker v. Ohtsu Tire & Rubber Co.*, 191 F.R.D. 495, 499 (D. Md. 2000) (noting that a federal court considering the enforceability of a state confidentiality order is "constrained by principles of comity, courtesy, and . . . federalism"). Thus, a state court order finding no waiver in connection with a disclosure made in a state court proceeding is enforceable under existing law in subsequent federal proceedings.

Subdivision (d). Confidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery. But the utility of a confidentiality order in reducing discovery costs is substantially diminished if it provides no protection outside the particular litigation in which the order is entered. Parties are unlikely to be able to reduce the costs of pre-production review for privilege and work

product if the consequence of disclosure is that the communications or information could be used by non-parties to the litigation.

There is some dispute on whether a confidentiality order entered in one case is enforceable in other proceedings. See generally *Hopson v. City of Baltimore*, 232 F.R.D. 228 (D. Md. 2005), for a discussion of this case law. The rule provides that when a confidentiality order governing the consequences of disclosure in that case is entered in a federal proceeding, its terms are enforceable against non-parties in any federal or state proceeding. For example, the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the rule contemplates enforcement of "claw-back" and "quick peek" arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product. See *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting that parties may enter into "so-called 'claw-back' agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privilege documents"). The rule provides a party with a predictable protection from a court order-predictability that is needed to allow the party to plan in advance to limit the prohibitive costs of privilege and work product review and retention.

Under the rule, a confidentiality order is enforceable whether or not it memorializes an agreement among the parties to the litigation. party agreement should not be a condition of enforceability of a federal court's order.

Subdivision (e). Subdivision (e) codifies the well-established proposition that parties can enter an agreement to limit the effect of waiver by disclosure between or among them. Of course such an agreement can bind only the parties to the agreement. The rule makes clear that if parties want protection against non-parties from a finding of waiver by disclosure, the agreement must be made part of a court order.

Subdivision (f). The protections against waiver provided by Rule 502 must be applicable when protected communications or information disclosed in federal proceedings are subsequently offered in state proceedings. Otherwise, the holders of protected communications and information, and their lawyers, could not rely on the protections provided by the Rule, and the goal of limiting costs in discovery would be substantially undermined. Rule 502(g) [sic] is intended to resolve any potential tension between the provisions of Rule 502 that apply to state proceedings and the possible limitations on the applicability of the Federal Rules of Evidence otherwise provided by Rules 101 and 1101.

The rule is intended to apply in all federal court proceedings, including court-annexed and court-ordered arbitrations, without regard to any possible limitations of Rules 101 and 1101. This provision is not intended to raise an inference about the applicability of any other rule of evidence in arbitration proceedings more generally. The costs of discovery can be equally high for state and federal causes of action, and the rule seeks to limit those costs in all federal proceedings, regardless of whether the claim arises under state or federal law. Accordingly, the rule applies to state law causes of action brought in federal court.

Subdivision (g). The rule's coverage is limited to attorney-client privilege and work product. The operation of waiver by disclosure, as applied to other evidentiary privileges, remains a question of federal common law. Nor does the rule purport to apply to the Fifth Amendment privilege against compelled self-incrimination.

The definition of work product "materials" is intended to include both tangible and intangible information. See *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 662 (3d Cir. 2003) ("work product protection extends to both tangible and intangible work product").

ARTICLE X

Contents of Writings, Recordings, and Photographs

Rule 1001. Definitions

For purposes of this article the following definitions are applicable:

(1) **Writings and recordings.** "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) **Photographs.** "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) **Original.** An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".

(4) **Duplicate.** A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original. (*Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1945.*)

Rule 1002. Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress. (*Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1946.*)

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original. (*Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1946.*)

Rule 1004. Admissibility of Other Evidence of Contents

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if-

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue. (*Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1946; Oct. 1, 1987.*)

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Rabiej on the Options When Little or No ESI is Produced in Discovery

2009 Emerging Issues 3808

John K. Rabiej on the Requesting Party's Options When Little or No ESI is Produced in Discovery

By John K. Rabiej

June 18, 2009

SUMMARY: When faced with a seemingly inadequate response to a discovery request that produces little or no ESI, a party is often hard pressed to substantiate its suspicions that relevant ESI was actually withheld or destroyed. This Emerging Issues Analysis sets out some of the criteria that the courts rely on to handle these vexing disputes.

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ARTICLE: John K. Rabiej on the Requesting Party's Options When Little or No ESI is Produced in Discovery

Producing Little or No ESI in Response to Discovery Request

A spate of recent cases address recurring ESI discovery disputes that involve a common fact pattern. In response to a request for all information relevant to a particular issue, a party produces little or no electronically stored information (ESI) even though it maintains a huge volume of electronic records. The responding party defends its production by asserting that its search for relevant ESI was thorough, and that no ESI was found simply because none exists. The requesting party is suspicious that the search was not adequately performed or that ESI was destroyed or withheld. It files a motion asking the court to compel the responding party to conduct another search or impose an appropriate sanction. The developing case law provides guidance to practitioners on the criteria courts rely on to handle such vexing disputes.

When a party produces little or no ESI in response to a discovery request, the opposing party typically files a motion objecting. Often the objection is based solely on a general suspicion that is grounded in common experience that some ESI, especially email messages, had to exist relevant to the pertinent discovery request. In such cases, the party typically offers no direct evidence showing that the opposing party deleted or withheld specific relevant ESI. Instead, the party contends that the failure to produce ESI must have been caused either by the opposing party's deletion of relevant ESI, often as a result of an auto delete program, or the party's failure to search all ESI sources thoroughly.

Objections by the Requesting Party

The requesting party in each of the following cases did not substantiate with any evidence its conclusory allegation that the responding party failed to conduct a thorough search or that specific relevant ESI was destroyed or withheld.

The ruling in each case is the same.

In *Superior Prod. P'ship v. Gordon Auto Body Parts Co., Ltd.*, 2009 U.S. Dist. LEXIS 25890, at *5-8 (S.D. Ohio, Mar. 12, 2009), the defendant acknowledged that he did not search several sources of ESI because he believed that no relevant ESI was located there. And at the same time, the defendant did not place a specific litigation hold on the information maintained by its employees. Consequently, ESI was being routinely deleted during the litigation. The plaintiff claimed that the defendant's inadequate searching was the reason why no relevant ESI was produced, but the plaintiff failed to identify the specific missing ESI.

In *Bianco v. GMAC Mortgage Corp.*, 2008 U.S. Dist. LEXIS 84950, at *3 (E.D. Pa. Oct. 22, 2008), the plaintiff asserted that the defendant failed to produce a specific ESI document, a contingency plan that listed the positions in the company's legal department that would be eliminated in an effort to reduce costs. One of the defendant's employees admitted during a deposition that he had drafted the contingency plan on his company's laptop computer. Yet despite repeated requests for the contingency plan, the defendant failed to produce it, asserting that it had performed an extensive search of the employee's laptop computer and that it had produced all relevant information. The plaintiff did not provide any evidence that the defendant engaged in discovery misconduct.

In *Ford Motor Co. v. Edgewood Prop., Inc.*, 2009 U.S. Dist. LEXIS 42001, at *22-25 (D.N.J. May 19, 2009), the defendant asserted that there was a noticeable absence of documents in Ford's production related to key decisions critical to the litigation. The defendant requested the court to compel the plaintiff to run a narrowly tailored key word search on the plaintiff's ESI records to confirm the adequacy of the plaintiff's search. The defendant did not provide any evidence that Ford intentionally or negligently withheld ESI.

In *Phillips v. Potter, Postmaster Gen., U.S. Postal Serv.*, 2009 U.S. Dist. LEXIS 40550, at *15-16 (W.D. Pa. May 14, 2009), the plaintiff asserted that the report of a co-worker to a manager that the plaintiff had been harassed and was requesting the alleged offender to stop was memorialized in an email that the manager had shown to the co-worker and presumably forwarded to the alleged offender. The email, however, was not produced in discovery. The defendant admitted that it failed to place a timely litigation hold on relevant ESI and that ESI was deleted in accordance with an automatic deletion system. Notwithstanding the admission of evidence of a declaration by the co-worker that he had seen the email in question, no email was produced. The plaintiff did not provide any evidence that the email was sent or later destroyed, though the defendant admitted that he failed to place a litigation hold.

Conclusory Allegations Insufficient

The result in each of the above cases was the same. Though sympathetic to the requesting party and its claim that the responding party did not produce all responsive ESI or that it failed to meet its preservation obligations and deleted evidence, the court in each case denied relief. Courts consistently have held that a party's conclusory allegations that the only explanation for the non-production of relevant ESI is that the responding party destroyed or withheld it is insufficient to overcome an opposing party's good faith assertion that, after searching the records, relevant ESI does not exist. *Ford Motor Co.*, at *24-25. A party's good faith assertion that it had searched its records is also sufficient to withstand an opposing party's conclusory allegations that it is unable or unwilling to search for the requested information or that it is withholding the requested ESI. *Bianco*, at *5. The courts denied relief in these cases despite recognizing that in some situations no litigation hold was in place or an auto-delete program was not suspended, resulting in the deletion of ESI.

Faced with a good faith declaration that a party has conducted a diligent search of ESI on the one hand and a conclusory allegation that the party's efforts were inadequate or that relevant ESI is missing on the other hand, courts have placed the burden on the requesting party to identify the specific missing ESI and submit some evidence showing that relevant ESI had been destroyed or withheld. *Phillips*, at *16. Of course, a showing that the responding party acted in bad faith in failing to conduct a thorough search or intentionally deleted or intentionally withheld relevant ESI may itself be sufficient to sanction the party.

Not knowing the extent or the thoroughness of the search nor having direct access to the ESI, it is often difficult for a requesting party to substantiate its claims that the responding party destroyed or withheld relevant ESI. This holds true even if the opposing party acknowledges that ESI was being deleted during the litigation. Yet a party who suspects that not all relevant ESI has been produced is not without recourse. In the first instance, a party should depose the opposing party's witnesses who have knowledge in these areas, as noted in *Ford Motor Co.* at *26. The deposition of the responding party, including any of its employees, may reveal that not all sources of ESI were searched or that specific relevant ESI was deleted. Often such direct evidence is sufficient for relief and in many cases that ends the matter, as discussed below.

Direct Evidence

A party's acknowledgment in a deposition that specific relevant ESI was destroyed or withheld is usually sufficient to refute the responding party's assertion that it had conducted a diligent search. Under these circumstances, the responding party may be sanctioned, or the court may require the party to conduct a more thorough search. In *Canon U.S.A., Inc. v. S.A.M., Inc.*, 2008 U.S. Dist. LEXIS 47712, at *5 (E.D. La. June 20, 2008), the defendant acknowledged during his deposition that he had not searched all sources of ESI, including a server, because he was unable to access the server. The defendant's admission was sufficient for the court to order the defendant to hire a forensic expert at defendant's expense to search the server. In *Surplus Source Group, LLC v. Mid America Engine, Inc.*, 2009 U.S. Dist. LEXIS, at *5 (E.D. Tex. Apr. 8, 2009), the defendants had assisted the plaintiff in crafting a set of key words to search the defendant's database, but ESI critical to the resolution of material issues to the case remained missing. The court ordered the defendant to search the ESI again based on the defendant's admission that the initial search was inadequate. In an earlier case, the court in *Mosaid Tech. Inc. v. Samsung Elec. Co., Ltd.*, 348 F. Supp. 2d 332, 336 (D.N.J. 2004) ruled that the defendant's failure to implement an effective litigation hold and suspend the automatic deletion system resulted in the non-production of any relevant ESI. An affidavit of the defendant's memory designer substantiated the allegations that email communications were extensively used within Samsung and that the subject matter of the litigation was often discussed in those emails. The party was sanctioned for failure to produce relevant ESI.

Circumstantial Evidence May Be Sufficient

In many cases when little or no ESI has been produced, however, direct evidence is not available to show that the responding party deliberately destroyed or withheld specific relevant ESI. Court rulings recognize that circumstantial evidence often can provide the only means to show that relevant ESI has been deleted or withheld. The standard was stated in *Gates Rubber Co. v. Bando Chem. Indus.*, 167 F.R.D. 90, 115 (D. Colo. 1996) when the court said that sanctions are appropriate when something is not produced or disappears which is known to exist, which ought to exist, or which may reasonably be inferred to exist. In asserting such a claim, a party must be able to identify the purportedly missing ESI with some specificity, though the identification need not be exact. It is not incumbent upon the plaintiff to show that specific documents were lost. It would be enough to demonstrate that certain types of relevant documents existed and that they were necessarily destroyed by the operation of the autodelete function...or by other features of its routine document retention program. *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 372 (S.D.N.Y. 2006).

The court in *Superior Prod. P'ship v. Gordon Auto Body Parts Co., Ltd.*, 2009 U.S. Dist. LEXIS 25890, at *8 (S.D. Ohio, Mar. 12, 2009), gives two helpful examples of the types of circumstantial evidence that may be used to overcome a party's assertion that no relevant ESI exists. A showing that selected groups of documents were retained from a certain point in time, and not beyond, can raise the inference that the same documents did exist for earlier time periods but have simply been deleted. The record-keeping practices of other companies engaged in similar business, which show that certain documents that the responding party had not produced are routinely retained by similarly situated companies, provides another example of adequate circumstantial evidence. Such circumstantial evidence was presented in *Adams & Assoc., L.L.C. v. Dell, Inc.*, 2009 U.S. Dist. LEXIS 26964, at *43 (D. Utah Mar. 30, 2009). In this patent infringement case, the plaintiff listed a number of documents that every company doing business similar to the defendant's would be expected to retain, including test programs' source code, motherboard testing results, and communications with suppliers and design experts. None of these documents was produced in response to the plaintiff's discovery request.

The court sanctioned the defendant for its failure to produce any of these ESI documents.

Another example of circumstantial evidence is provided in *Plunk v. Vill. of Elwood*, 2009 U.S. Dist. LEXIS 42952, at *40-41 (N.D. Ill. May 20, 2009). The court ruled that plaintiff's evidence showing that several of the defendant's emails were missing from relevant email chains overcame the defendant's claim that the dearth of ESI is simply because there were few e-mails ... that were responsive to discovery requests. Though the circumstantial evidence was insufficient to show that relevant ESI was deleted intentionally and justify a default judgment, the court ruled that it was sufficient to give an adverse inference jury instruction.

Best Practices

Unless a party can show that a search was performed in bad faith or that specific relevant ESI was deliberately destroyed or withheld improperly, it must provide some evidence that the responding party destroyed or withheld specific relevant ESI. Conclusory allegations are insufficient. Under these circumstances, a party can substantiate its allegation with circumstantial evidence showing that specific relevant ESI was destroyed or withheld. Such circumstantial evidence may be sufficient to overcome a responding party's assertion that it conducted a thorough ESI search. Best practices recommend that a practitioner depose witnesses of the opposing party for information explaining the missing ESI, specify the missing ESI or at least the category of ESI documents missing, review the record for any direct or indirect references to the purportedly missing ESI, indicate how the responding party deleted or failed to produce the specific relevant ESI, and compare the record-keeping practices of other companies doing similar business.

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Westermeier on Recent Ethics Opinion on Metadata Support New Best Practice

2009 Emerging Issues 3791

Westermeier on Recent Ethics Opinion on Metadata Support New Best Practice

By J. T. Westermeier

June 16, 2009

SUMMARY: The American Bar Association, a number of State Bars and the D.C. Bar have issued legal ethics opinions regarding metadata that is embedded in electronic documents that are transmitted and received by attorneys. What affect do these legal ethics opinions have on document retention policies? This important issue is analyzed by J. ("Jay") T. Westermeier, of counsel at Finnegan, Henderson, Farabow, Garrett & Dunner, LLP.

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ARTICLE: The American Bar Association n1, a number of State Bars n2 and the D.C. Bar n3 have issued legal ethics opinions regarding metadata that is embedded in electronic documents that are transmitted and received by attorneys. What affect do these legal ethics opinions have on document retention policies?

In this article we argue that in most circumstances draft electronic documents with metadata embedded in them should be purged after the matter for which the documents were created has been completed and recommend that companies adopt a post-transaction due diligence process to purge files of draft documents containing metadata. Below we will discuss our rationale for adopting this policy.

Definition of Metadata

Metadata is defined simply as data about data. DC Bar Ethics Opinion 341 refers to metadata as "electronically stored information, typically not visible from the face of the document as printed out or as initially shown on the computer screen, but which is embedded in the software and retrievable by various means." n4 This DC Bar Ethics Opinion further notes that "metadata provides information regarding the creation or modification of a document and sometimes includes comments by persons participating in the creation or modification of the document." n5 Though metadata is often of little or no interest, as the D.C. Bar Ethics Opinion observes, "in some instances it may reveal significant information." n6

Legal Ethics Opinions

Most (but not all) of the legal ethics opinions issued regarding the obligations of lawyers regarding the treatment of electronic documents with metadata embedded impose upon the sending lawyer an obligation to exercise reasonable care when transmitting electronic documents to ensure that the lawyer does not disclose his or her client's secrets and

confidences. n7 These ethics opinions take the position that the lawyers duty respecting confidentiality extends to metadata. As the D.C. Bar Ethics Opinion provides, a lawyers obligation to use reasonable steps to use available technical means to remove such metadata before sending the document. n8 Most of the ethics legal opinions require the sending lawyer to use reasonable care to avoid transmitting metadata to the other party's lawyer inadvertently. n9 We believe removal of metadata documents remaining in a company's files once they are no longer needed is consistent with the legal obligation imposed upon the sending lawyer given the risks relating to discovery of these documents in the event of litigation or compliance with a subpoena.

Distinguishing Between the Kind of Electronic Documents

Several of the Bars in their metadata ethics opinions have recognized a distinction between electronic documents provided in discovery or pursuant to a subpoena from those electronic documents voluntarily provided by opposing counsel in a transaction or other non-contentious matter. n10 The policy recommended in this article seeks to avoid having to deal with electronic documents containing metadata in discovery or subpoena compliance.

With respect to discovery and subpoena compliance additional rules relating to electronic discovery beyond the ethics rules apply to metadata provided in discovery or pursuant to a subpoena. n11 Under these rules parties are required to consult at the outset of a case about the nature of pertinent electronic documents they maintain, including specific discussions concerning the production of documents containing metadata and whether the sending party wishes to assert a claim of privilege as to some or all of the metadata. n12 The review of the metadata in each document to determine whether to assert privilege as to specific metadata information is likely to be time-consuming and costly.

Metadata has been shown in some cases to be probative evidence in litigation. n13 Documents containing metadata are different versions of the document without metadata. Each version is subject to production in discovery or pursuant to a subpoena. Metadata may also result in additional questions during depositions or at trial. If the metadata is "scrubbed" from documents during discovery or in connection with complying with a subpoena the other party may compel production of the metadata and the "scrubbing" party may be found to have destroyed evidence. Since it is impermissible to alter electronic evidence that constitute tangible evidence, the removal of metadata may be prohibited as well. The alteration or destruction of evidence may result in discovery sanctions in some circumstances.

There are very compelling reasons for not maintaining intermediate copies of electronic documents that contain metadata. There is a risk that these documents will be subject to be produced in discovery or pursuant to a subpoena, and may, in such circumstances, require an extensive review of the metadata to determine whether attorney-client privilege, confidentiality or other issues relating to the metadata need to be asserted. Maintaining metadata documents once they are no longer needed is fraught with significant risks and may prove extremely costly. Metadata documents should be purged from company files once they are no longer needed.

Recommended Document Retention Policy

Companies should remove electronic documents containing metadata after the documents containing metadata are no longer needed. Given the potential rises and added costs relating to electronic discovery and subpoena compliance if metadata documents are involved document retention policies should include purging files of any metadata documents as soon as possible once they are no longer needed. The policy should be implemented and applied on a routine and consistent basis before any duty to preserve evidence has been triggered.

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n1 American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal

Opinion 06-442; Formal Opinion 05-437.

n2 See, e.g., Alabama State Bar Office of General Counsel, Formal Opinion 2007-02; State Bar of Arizona Ethics Committee, Ethics Opinion 07-03; Colorado Bar Association Ethics Committee, Ethics Opinion 119; The Florida Bar Ethics Department, Ethics Opinion 06-02; Main Board of Overseers of the Bar Professional Ethics Commission, Opinion #196; Maryland State Bar Association Committee on Ethics, Ethics Docket No. 2007-09; New Hampshire Bar Association, Ethics Committee Opinion 2008-2009/4; New York State Bar Association -- Committee on Professional Ethics, Opinion 749, 782; Association of the Bar of the City of New York -- Committee on Professional and Judicial Ethics, Formal Opinion 2003-04.

n3 D.C. Bar Legal Ethics Committee, D.C. Bar Opinion 341 (September 2007).

n4 Id. page 1.

n5 Id.

n6 Id.

n7 Id.

n8 Id.

n9 See, e.g., Alabama State Bar Office of General Counsel, Formal Opinion 2007-02; State Bar of Arizona Ethics Committee, Ethics Opinion 07-03; Colorado Bar Association Ethics Committee, Ethics Opinion 119; The Florida Bar Ethics Department, Ethics Opinion 06-02; Main Board of Overseers of the Bar Professional Ethics Commission, Opinion #196; Maryland State Bar Association Committee on Ethics, Ethics Docket No. 2007-09; New Hampshire Bar Association, Ethics Committee Opinion 2008-2009/4; New York State Bar Association -- Committee on Professional Ethics, Opinion 749, 782; Association of the Bar of the City of New York -- Committee on Professional and Judicial Ethics, Formal Opinion 2003-04.

n10 See, e.g., D.C. Bar Ethics Opinion 341; Florida Bar Opinion 06-2; Alabama State Bar, Office of General Counsel, Opinion No. RO-2007-02

n11 In D.C. Bar Ethics Opinion 341 refers to the Federal Rules of Civil Procedure that now provide steps to identify and address issues related to electronic discovery.

n12 See D.C. Bar Ethics Opinion 341 at p. 3.

n13 D.C. Bar Ethics Opinion 341 refers to *Williams v. Spring/United Management*, 230 F.R.D. 640 (D. Kan. 2005), as an example of how metadata may be considered probative evidence in litigation. The defendant had "scrubbed" the metadata from spreadsheets before producing them. The court ruled that since the metadata could be relevant the defendants had to provide the metadata to the plaintiffs.

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Judith A. McMorrow on Attorney Conduct and the SEC

2009 Emerging Issues 3724

Judith A. McMorrow on Attorney Conduct and the Securities and Exchange Commission

By Judith A. McMorrow

June 9, 2009

SUMMARY: This Emerging Issues Analysis explores professional responsibility issues that arise for attorneys practicing before the Securities and Exchange Commission. The Emerging Issues Analysis addresses the SEC Rules of Practice, the changes implemented from the Sarbanes-Oxley legislation, and the actions taken by the Commission in developing norms of professional conduct for attorneys.

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ARTICLE: Rule 102(e)(1) Allows SEC to Suspend Lawyers Who Lack Requisite Qualifications, Character or Integrity, Engage in Unethical or Improper Professional Conduct, or Willfully Violate Securities Laws. Rule 102(e)(1) of the Security Exchange Commission's Rules of Practice authorizes the Commission to censure or suspend from practicing before it any person who, after notice and a hearing, it has found does not possess the requisite qualifications to represent others,' is lacking in character or integrity' or has engaged in unethical or improper professional conduct,' or who has willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.' n1 The terms "requisite qualifications," "character," and "integrity" are not defined or explained under Rule 102(e). The Commission has not recently relied on these provisions as the basis for a Rule 102(e) proceeding against attorneys. Terms similar to these, such as conduct unbecoming a member of the bar' have been applied in other attorney conduct proceedings. The Commission may avoid using these general terms because of concern about potential constitutional challenges. In addition, the more targeted prohibitions provide ample authority for the Commission to address the conduct of greatest concern.

The Commission regulations provide specific guidance to accountants on what constitutes improper professional conduct,' but prior to the passage of Sarbanes-Oxley had provided little guidance for attorneys on the meaning of this phrase. n2

Suspension of lawyers under Rule 102(e) is often the result of a settlement in which the attorney is accused of violating or aiding and abetting violations of the securities laws and agrees to be suspended from practicing before the Commission. n3 The scope of this provision is enhanced by the Commission's view that willful' means only that the respondent intentionally committed the act that was found to have violated the securities laws. n4

Rule 102(e)(2) Supports Reciprocal Discipline. The Commission may also suspend from practicing before it any

attorney who has been suspended or disbarred by a court of the United States or of any State or any person who has been convicted of a felony or a misdemeanor involving moral turpitude. n5 This is often referred to as reciprocal discipline and provides a basis to automatically suspend or disbar an attorney who, after due process, has been found to have engaged in misconduct in another forum. For example, lawyers have been disbarred under: SEC Rule 102(e)(2) for wire fraud convictions, n6 conspiracy to engage in securities fraud, obstruction of justice, and perjury, n7 and suspended after a state bar disciplined the lawyer for misappropriation of client funds. n8

Rule 102(e)(3) Allows SEC to Temporarily Suspend an Attorney. The Commission may also temporarily suspend an attorney from practicing before it, without a preliminary hearing, when the attorney has been permanently enjoined by any court of competent jurisdiction, by reason of his or her misconduct in an action brought by the Commission, from violating or aiding and abetting the violation of any provision of the Federal securities laws or of the rules and regulations thereunder;' or found by any court of competent jurisdiction in an action brought by the Commission to which he or she is a party or found by the Commission in any administrative proceeding to which he or she is a party to have violated (unless the violation was found not to have been willful) or aided and abetted the violation of any provision of the Federal securities laws or of the rules and regulations thereunder.' n9 For example, the Commission has suspended attorneys from practicing before it as a result of an offer of settlement when the attorneys have already been enjoined by a court from violating the securities laws. n10

Courts and SEC Consistently Uphold Commission's Authority to Regulate Attorneys. The Commission's Rules of Practice have asserted authority to regulate attorneys and agents who appear before the SEC since soon after the formation of the agency. n11 The SEC examined the history of Rule 102(e) and the SEC's authority to issue it in its seminal 1981 opinion of *Carter and Johnson* and concluded that it had full authority to regulate attorney conduct before the SEC. n12 Courts have also confirmed that the SEC has authority to regulate the conduct of professionals who appear before it, and that Rule 102(e) and its predecessor are a valid exercise of that authority. n13

While courts and the SEC have consistently argued that the Commission has power to discipline attorneys, there were some opposing views prior to the passage of Sarbanes-Oxley. One SEC Commissioner dissented from disciplinary proceedings against an attorney arguing that Rule 102(e) exceeded the agency's rulemaking authority, and as a policy matter was a bad idea. n14 Any doubt about the SEC's authority to regulate attorneys was laid to rest with the passage of the Sarbanes-Oxley Act, which codified Rule 102 and made it part of the Exchange Act, giving it the status of statutory law. n15

Sarbanes-Oxley Act Clarified Scope and Extent of SEC's Power to Regulate Attorneys. Congress became actively involved in regulating corporate counsel with the passage of the Sarbanes-Oxley Act (known as SOX). n16 In addition to establishing specific duties for corporate lawyers, § 307 of the Sarbanes-Oxley Act directed the Securities and Exchange Commission to set minimum standards of professional conduct for attorneys who appear before it. n17

SOX required the SEC to include a protocol for reporting material violations of the securities laws. With this legislation Congress has expanded both the congressional and executive role in regulating attorney conduct. Commentators have described this as expanding the gatekeeper role" of attorneys practicing before the SEC. n18

In compliance with the Sarbanes-Oxley Act, the SEC created rules of professional conduct for attorneys who appear and practice before it on behalf of issuers. n19 The SEC initially proposed more expansive regulations, which sparked significant debate within the legal community because of an initial proposal to require attorneys to report client misconduct to the SEC. n20 The SEC eventually backed off the more expansive proposal and imposed the obligations discussed below.

Expansive Definition of Practicing Before SEC. The SEC asserts authority to regulate the conduct of attorneys who appear and practice before the SEC. For purposes of the SEC's authority to regulate attorneys generally, the term practicing before the Commission' is expansively defined in Rule 102(f): n21

(f) Practice defined. For the purposes of these Rules of Practice, practicing before the Commission shall include, but shall not be limited to:

(1) Transacting any business with the Commission; and

(2) The preparation of any statement, opinion or other paper by any attorney, accountant, engineer or other professional or expert, filed with the Commission in any registration statement, notification, application, report or other document with the consent of such attorney, accountant, engineer or other professional or expert.

For purposes of the duty to respond to client misconduct, as set out in 17 C.F.R. § 205, the definition of practicing before the SEC is both more expansive and narrower.

Attorneys Have Obligation Not to Violate Securities Laws or Aid and Abet Violations

Attorneys Have an Obligation Not to Violate the Securities Laws. Attorneys, like all other individuals, must not violate the securities laws, either directly or indirectly. When they function as business actors and make decisions to proceed with conduct that violates the securities laws, they are subject to sanction by the Commission in the same way that a company CEO would be sanctioned. n22 When lawyers knowingly provide legal services to violate the securities laws, they can also be held responsible as a primary wrongdoer. For example, knowingly providing an opinion letter or disclosure document with a misstatement of fact can subject the attorney to liability under the securities laws. n23

In-House Counsel Who Function as Both Legal and Business Advisor Face Particular Challenges. In-house counsel often serve as both business and legal advisor to the corporate client. Consequently, the general counsel may be characterized as a decision-maker and held responsible for any securities violations in the same way that any other corporate decision-maker would be responsible. n24

***In re Carter and Johnson* Established Lawyer Responsibility.** The SEC's seminal 1981 opinion in *In re Carter and Johnson* clarified the professional obligations of attorneys to avoid willful aiding and abetting in violations of the securities laws. n25 *Carter and Johnson* focused on lawyers engaged in an ongoing disclosure program of a corporate client. The Commission held that lawyers, like other actors, can be found liable by the Commission for aiding and abetting a violation of the federal securities law when: n26

1. There exists an independent securities law violation committed by some other party;
2. The aider and abettor knowingly and substantially assisted the conduct that constitutes the violation; and
3. The aider and abettor was aware or knew that his or her role was part of an activity that was improper or illegal.

In *Carter and Johnson*, the Commission found substantial assistance when a lawyer performs professional duties. n27 The Commission said explicitly that it will not distinguish between professional advice given orally or in writing. *Carter and Johnson* concluded that a finding of willful aiding and abetting within the meaning of Rule 2(e)(1)(iii) requires a showing that respondents were aware or knew that their role was part of an activity that was improper or illegal.' n28 In *Carter and Johnson*, the Commission reversed an Administrative Law Judge finding of liability because the evidence did not show that the attorneys fully appreciated the materiality of the information they participated in distributing and did not have the requisite intent to aid the violations by their inaction. The Commission went on to analyze additional professional responsibilities' that the attorneys owed and concluded that when a lawyer learns that a client is about to violate the federal securities laws, the attorney must make all efforts within reason to persuade his client to avoid or terminate proposed illegal action. Such efforts could include, where appropriate, notification of the board of directors of a corporate client.' n29 The Commission was not aggressive in applying the Carter and Johnson standard until it was strengthened and codified through the passage of SOX.

The legal basis for aiding and abetting liability was challenged in *Central Bank of Denver v. First Interstate Bank*

of *Denver* in 1994 when the Supreme Court held that there was no private civil liability for aiders and abettors of securities law violations and in the process called into question the SEC's right to pursue such actions. n30 Following the Supreme Court's decision, Congress clarified the SEC's ability to pursue aiders and abettors in all enforcement actions. n31 Even with this change, earlier jurisprudence on aiding and abetting developed in private right of action cases may still have force. This is important to note because the circuits do not always agree on the conditions for aiding and abetting liability. n32 As a practical matter, most Commission cases pursuing a lawyer on an aiding and abetting theory do not reach the courts.

Examples of Aiding and Abetting. Lawyers can be responsible for aiding and abetting by failing to provide the client with balanced advice that identifies contrary positions taken by the Commission. n33 Attorneys have also been held liable by the Commission as aiders and abettors where they have clearly provided erroneous advice and should have known better. n34

Lawyers Are Not Liable for Aiding and Abetting Because of Mere Negligence. Lawyers are not liable for aiding and abetting merely because the lawyer's advice, when followed by the client, is ultimately determined to be wrong. n35 The Commission has also stated that it will not pursue attorneys merely for providing negligent legal advice. n36

That being said, lawyers should proceed with caution. Recklessness is a fairly elastic concept. Deliberate ignorance could support a finding of professional misconduct for aiding and abetting a violation of the securities laws. n37 Silence or inaction when the lawyer has a duty to act can also support a finding of aiding and abetting. n38 In addition, lawyers could be liable for malpractice, even if the Commission did not pursue the lawyer.

Sarbanes-Oxley Imposes Additional Obligations to Respond to Material Violations of Securities Laws

Lawyer Owes Primary Obligation to Issuer, Not to Individual Officer or Director. With the passage of Section 307 of the Sarbanes-Oxley Act, the Commission was given much stronger authority to issue regulations governing attorney conduct. The thrust of the new Commission rules is that an attorney appearing before the Commission in the representation of an issuer owes professional and ethical duties to the issuer as an organization, not to any individual officer, director or employee. n39 This obligation is consistent with the well-established obligations under the rules of professional conduct that govern most lawyers. A continuing challenge for corporate attorneys is keeping the interests of the corporation as an entity dominant when the individual corporate agent is the person with whom the lawyer interacts. n40

Lawyer Must Act When There Is Evidence of Material Violation by Officer, Director, Employee or Agent of Issuer. Section 307 functions as a mandate to the Commission to establish professional norms for attorneys appearing and practicing before the Commission. Section 307, now codified at 15 U.S.C. § 7245, states: n41

§ 7245. Rules of professional responsibility for attorneys

Not later than 180 days after the date of enactment of this Act [enacted July 30, 2002], the Commission shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule--

(1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and

(2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of

directors not employed directly or indirectly by the issuer, or to the board of directors.

The Commission's rules of professional conduct promulgated pursuant to Sarbanes-Oxley, codified at 17 C.F.R. § 205, set out in greater detail the course of action a lawyer who appears or practices before the Commission must take when confronted with evidence of a material violation of the securities laws.

Appearing or Practicing Before the Commission Defined. The duty to respond to a material violation of the securities laws under § 205 applies to anyone who is appearing or practicing' before the Commission. The definition of this phrase is somewhat different than the definition used for general sanctioning power under § 201. Appearing and practicing encompasses transacting business with the Commission, including communications n42 and representing an issuer in connection with a Commission action. n43 Appearing and practicing also includes providing advice with respect to the securities laws or Commission rules and regulations regarding any document the attorney has notice will be submitted to the Commission or incorporated into any document that will be filed, n44 or advising an issuer about whether information is required to be submitted. n45 Appearing or practicing before the Commission only includes the above activities that are part of providing legal services to an issuer with whom the attorney has an attorney-client relationship. n46 The duty to respond to a material violation of the securities laws does not include the attorney who is a non-appearing foreign attorney. n47 To eliminate any doubt about the expansiveness of the definition, the regulations go on to state that a lawyer is deemed to represent an issuer if the lawyer provides legal services, even if not employed or retained by the issuer. n48 In other words, a lawyer who has notice that the lawyer's work product will be incorporated into a document filed or submitted with the Commission will be deemed to be practicing before the Commission and come within the scope of § 205 obligations.

Issuer Defined. The term issuer' under § 205 is defined as having the same meaning as it has in the Securities Exchange Act of 1934 (15 U.S.C. § 78c), and includes publicly traded companies, the people who work for those companies, and anyone who files auditing reports for those companies. n49

Evidence of Material Violation Incorporates Reasonableness Standard. The Commission defines evidence of a material violation as credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur.' n50 Reasonableness is conduct that would not be unreasonable for a prudent and competent attorney.' n51 Reasonably believes means that an attorney believes the matter in question and that the circumstances are such that the belief is not unreasonable.' n52 The comments accompanying the regulations express the Commission's desire to incorporate an objective standard, with the hopes of crafting a workable rule while recognizing that there is a range of conduct in which an attorney may engage without being unreasonable. n53

Definition of Material Violation. The definition of material violation' is linked to substantive law. Section 205.2(i) states that material violation means a material violation of an applicable United States federal or state securities law, a material breach of fiduciary duty arising under United States federal or state law, or a similar material violation of any United States federal or state law.' n54 A duty to report is not triggered by a material violation of foreign laws. n55 The Commission believed it was unnecessary to define the word "material" since it has a well-established meaning under federal securities laws. n56 In the context of disclosure, the Supreme Court has adopted an objective standard to define materiality as facts that a reasonable person would recognize as important. n57

Reporting to Qualified Legal Compliance Committee When Confronted With Material Violation. An attorney who becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer' has an affirmative duty to report evidence of a material violation to either the company's chief legal officer or to both the chief legal officer and the chief executive officer (or their equivalents). n58 Alternatively, the rule allows the lawyer to report the problem directly to the corporation's qualified legal compliance committee (QLCC), if the company has established one prior to the report of a material violation. n59 Under the regulations, at least one member of the QLCC has to be from the company's audit committee and two or more members have to be on the board of directors, but not employed either directly or indirectly by the company, and not an interested person' within the

meaning of the Investment Company Act of 1940. n60 The QLCC must also have written procedures and been duly established by the Board of Directors, with the authority and responsibility to respond as designated in the regulations. n61 A lawyer who takes this route of reporting directly to a qualified legal compliance committee, if available, will have satisfied his or her responsibilities under the Act and will not have to follow up on the committee's response. n62

Despite the benefit that a qualified legal compliance committee would have for a reporting attorney, relatively few companies have actually taken advantage of a QLCC. n63 Issuers may shy away from QLCCs because of concern about balkanization of boards, corporate liability or excluding involvement of the chief legal officer. n64

Chief Legal Officer Has Duty to Investigate and Take Reasonable Steps When Confronted With Evidence of Material Violation. If an attorney reports to the chief legal officer, it is the chief legal officer's responsibility to investigate whether a material violation has occurred, is ongoing, or is about to occur. The chief financial officer must then take all reasonable steps to cause the company to adopt an appropriate response, and inform the reporting lawyer of this action. n65 If the chief legal officer determines that the evidence of the material violation is groundless, then he or she shall notify the reporting attorney and advise the reporting attorney of the basis for such determination.' n66 Alternatively, instead of investigating the evidence of a material violation, the chief legal officer is allowed to refer the report to a qualified legal compliance committee if the company has established one prior to the report of the material violation. n67

Obligations of Subordinate and Supervising Attorneys. An attorney who supervises or directs another attorney is a supervisory attorney' within the meaning of § 205. An issuer's chief legal officer is automatically a supervisory attorney within the meaning of the act. n68 An attorney who is under the supervision or direction of another attorney is a subordinate attorney.' n69

A subordinate attorney is responsible for complying with § 205 even if acting under the direction or supervision of another attorney. n70 A subordinate attorney complies with the reporting obligations if the attorney reports evidence of a material violation to his or her supervising attorney. n71 The regulations give some small protection to subordinate attorneys by stating that a subordinate attorney may' take the steps permitted or required by § 205.3(b) on mandatory reporting if the subordinate attorney reasonably believes that a supervisory attorney to whom he or she has reported evidence of a material violation has failed to comply' with the reporting requirements. n72 A supervisory attorney is required to make reasonable efforts' to ensure that a subordinate attorney conforms to § 205. n73 If a subordinate attorney appears and practices before the Commission, the supervisory attorney is also deemed to be appearing and practicing. n74

Reporting Attorney Has Ongoing Obligations. If the attorney who reported the evidence of a material violation believes that the chief legal counsel or the chief executive officer has not provided an appropriate response within a reasonable time, then the attorney shall' report the evidence of a material violation to: n75

- (1) The audit committee of the issuer's board of directors;
- (2) Another committee of the issuer's board of directors consisting solely of directors who are not employed, directly or indirectly, by the issuer and are not, in the case of a registered investment company, "interested persons"; or
- (3) The issuer's board of directors (if the issuer's board of directors has no committee consisting solely of directors who are not employed, directly or indirectly, by the issuer and are not, in the case of a registered investment company, interested persons').

The regulations list four exceptions to the obligation to report up the ladder. First, an attorney has no obligation to report up the ladder if he or she has been retained or directed by the chief legal officer to investigate evidence of a material violation and after reporting the results of this investigation to the chief legal officer either both the attorney and the chief legal officer reasonably believe there is no material violation, or the chief legal officer sends the report up the ladder. n76 A second exception exists when the attorney has been retained by the chief legal counsel to assert a

colorable defense on behalf of the company in any investigation or judicial or administrative proceeding relating to such evidence of a material violation,' and the chief legal officer provides reasonable and timely reports of the progress and outcome of those proceedings to the appropriate persons within the company (board of directors, board committee, or a qualified legal compliance committee). n77 Third, an attorney will not have any obligation to report evidence of a material violation if the attorney was retained or directed by a qualified legal compliance committee to investigate evidence of a material violation. n78 Finally, an attorney who has been retained or directed by a qualified legal compliance committee to assert a defense on behalf of the company will also have no obligation to report up the ladder. n79

Sarbanes-Oxley Has Particular Impact on In-House Counsel. The regulations' definition of a supervisory attorney, coupled with its expansive definition of knowledge, has resulted in significant additional obligations imposed on in-house counsel. As one court noted, the § 205 regulations functionally mean that a general counsel has an affirmative duty to inspect the truthfulness of the SEC filings.' n80 Failure to meet that obligation can result in SEC sanctions. n81 It can also potentially subject the general counsel to liability under state corporate law and for malpractice. n82

Commission Allows, but Does Not Require, Attorneys to Report to Commission. The Commission regulations allow, but do not require, a lawyer to disclose confidential information related to the representation of the corporation to the Commission under certain circumstances. n83 Evidence of a material violation reported by an attorney may be used by an attorney in connection with any investigation, proceeding, or litigation in which the attorney's compliance with the Commission rule is at issue.' n84 This provision is generally in alignment with the self-defense exceptions to the duty of confidentiality in the Rules of Professional Conduct as adopted in most jurisdictions. n85 A broader and more controversial provision is contained in 17 C.F.R. § 205.3(d)(2), which states that an attorney may reveal to the Commission confidential information related to the representation [of the issuer] to the extent the attorney reasonably believes necessary' to (1) prevent the company from committing a material violation that is likely to cause substantial injury to the financial interest or property' of the company or its investors; (2) to prevent the company from committing perjury or fraud upon the Commission in a SEC investigation or administrative proceeding; or (3) to rectify the consequences of a material violation by the company that caused, or may cause, substantial injury to the financial interest or property of the company or its investors in the furtherance of which the attorney's services were used.' n86 The initial Commission regulations would have imposed an mandatory obligation to report in the circumstances above, but after a sharp and critical response from the organized bar the Commission made what is called the reporting out' obligation permissive rather than mandatory. n87

Sanctions and Discipline for Violating § 205. Violation of the reporting obligations can subject the attorney to the penalties and remedies available for violation of the securities laws, including disciplinary actions under § 201. n88 The regulations invoke the Supremacy Clause by stating that [a]n attorney who complies in good faith with the provisions of this part shall not be subject to discipline or otherwise liable under inconsistent standards imposed by any state or other United States jurisdiction where the attorney is admitted or practices.' n89 The protections of this provision apply only to actions taken pursuant to the Securities Acts. n90

An attorney practicing in a foreign jurisdiction is not required to comply with the reporting obligations of § 205 to the extent that compliance is prohibited by applicable foreign law. n91 Violation of the requirements of § 205 does not create a private right of action against the offending attorney, law firm or issuer. n92

Interplay Between Rules of Professional Conduct and Commission Requirements

Commission Had Strong Influence on ABA Rules. The legal obligations established by the Commission had a strong influence on the professional obligations required by state bars. Six months after the passage of the Commission's new standards, the American Bar Association amended the Model Rules of Professional Conduct involving representing corporate clients (Rule 1.13) and confidentiality obligations (Rule 1.6). n93 Many states, in turn, have reviewed the changes and embraced them. As discussed in greater detail below, not all states have adopted the recommended

changes, so lawyers must carefully review their own Rules of Professional Conduct to determine the scope of their duty under state law to maintain confidences and properly represent organizational clients. If a matter is also pending in federal court, federal court local rules, which may incorporate inconsistent state standards, will not be effective to the extent they are inconsistent with the Sarbanes-Oxley. n94

Model Rule 1.13, Organization as Client. Rule 1.13 clarified the professional obligation of lawyers when confronted with misconduct of a corporate agent. Before the amendment, Rule 1.13 stated that if a lawyer knew of a violation of a legal obligation then the lawyer shall proceed as is reasonably necessary in the best interest of the organization' but only mentioned referring the matter to a higher authority within the organization as one of the possible measures a lawyer could chose to take. n95 The revised Rule 1.13(b) states that unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.' n96

Rule 1.13 was also modified to allow an attorney to disclose confidential information about the corporate client. Under the earlier rule, a lawyer confronted with a violation of the law had to take a far more conservative approach if the company did not agree to conform to the law, with resignation as the only listed option. Under the new Rule 1.13, if the highest authority able to act within the company refuses to address the problem in a timely manner then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.' n97

Model Rule 1.6, Confidentiality. New exceptions to a lawyer's duty of confidentiality were added to Model Rule 1.6 to address the challenges of corporate representation where financial injury is a common consequence of client misconduct. The Model Rules now allow, but do not require, a lawyer to reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: n98

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.

Although these amendments have essentially aligned the Model Rules with the Commission's standards, not every state has followed the ABA's example. n99 In addition, Model Rule 1.6 only allows disclosure as to client crime or fraud in furtherance of which the client has used the lawyer's services.' The obligation to act under the SOX regulations is much broader and requires the lawyer to respond to material violations even if the lawyer's services were not used. The SOX regulations also permit, but do not require, the lawyer to disclose outside the corporation if necessary.

Many States Have Followed ABA Recommendations and Amended Their Rules of Conduct. Although a majority of jurisdictions use the ABA's Model Rules as the basis for their standards of professional conduct, many states altered the recommendations of the ABA when adopting the rules. n100 States also periodically review their Rules of Professional Conduct to determine whether to embrace suggested changes. n101 Because not every state has amended their rules relating to client confidentiality, there are still some cases where the Commission's rule would conflict with a lawyer's duty of confidentiality. Several jurisdictions would prohibit the disclosure of that type of information allowed under the Commission's rule. n102 For example, as of 2008 California's state rules would not allow an attorney to report out financial crimes since the exceptions to the duty of confidentiality in California only apply to information where the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.' n103

Resolving Conflicts Between Commission Requirements and State Rules of Professional Conduct. The course of action that the Commission standards allow has the potential to conflict with state codes of professional conduct, particularly if the state Rules have not embraced the ABA recommended changes. Under *Fidelity Federal v. de la Cuesta*, federal regulation preempts conflicting state law if the agency intended to preempt state law and the agency action was within the scope of its delegated authority. n104 The Commission regulations state that [w]here the standards of a state or other United States jurisdiction where an attorney is admitted or practices conflict with this part, this part shall govern,' indicating an intent to preempt conflicting state law. n105

Some commentators question whether there may still be irreconcilable conflicts. n106 There is a plausible question whether the Commission was acting within the scope of its delegated authority. Section 307 of Sarbanes-Oxley Act gave the Commission the authority to issue rules setting forth minimum standards of professional conduct' for attorneys appearing and practicing before it. n107 The remaining two paragraphs of Section 307 describe what later became the Commission's reporting up rule, but there is no further instructions detailing a reporting out rule. Some authors have argued that there is no evidence that Congress wanted the Commission to override state rules on client confidentiality and therefore a court should conclude that neither Section 307 of the Sarbanes-Oxley Act nor the Part 205 Rules preempt state regulation of the attorney-client relationship and the prohibition of an attorney disclosing confidential information of a client without its consent.' n108

The question of whether the Commission's standards preempt contrary state codes of conduct has not been settled, but bar associations have offered advisory opinions. For example, the North Carolina State Bar Association agreed with the Commission and issued a formal ethics opinion saying the Rule 205 should be followed unless either the Fourth Circuit Court of Appeals or the U.S. Supreme Court determines that the rule was not validly promulgated. n109 Other bars have concluded that the Commission rules do not preempt state ethics rules. n110

Commission Has Multiple Procedures for Disciplining Attorneys

Overview of Commission Actions Directed at Attorneys. The Commission has multiple procedures for disciplining attorneys for misconduct. Commission actions have been prosecuted as civil injunctive actions in federal district courts under section 20(b) of the Securities Act of 1933 and section 21(d) of the Securities Exchange Act of 1934, as administrative proceedings under Rule 102(e) of the SEC's Rules of Practice, and as administrative cease-and-desist proceedings. n111 In the two years after the passage of Sarbanes-Oxley, the SEC stepped up their scrutiny of lawyers in corporate fraud investigations and brought over 30 enforcement actions against lawyers using these various procedural mechanisms. n112 The choice of procedural devices appears to be based on the nature of the conduct in question and the remedy the Commission seeks.

Civil Injunctions. The SEC has the authority under section 20(b) of the Securities Act of 1933 to institute civil proceedings to enjoin a violation of the securities acts. n113 This provides the Commission authority to use the court system to stop violators. It also provides the threat of future action if the conduct continues. For the injunction to be granted, the SEC must make a proper showing,' which consists of two elements: (1) positive proof of the violation alleged and (2) evidence that there is a reasonable likelihood of future violations of the statutory provisions. n114 While there is no private right of action against aiders and abettors under the Securities laws, Congress gave the Commission authority to pursue aiders and abettors as part of the Private Securities Litigation Reform Act of 1995.

The vast majority of proceedings seeking a civil injunction against attorneys are settled in proceedings brought against both the primary violators and the attorneys as aiders and abettors. n115 If the lawyer then engages in what the Commission believes is a subsequent violation, the lawyer's ability to practice before the Commission can be automatically suspended.

Civil Monetary Penalties. The Securities Act of 1933 gives the Commission the authority to use the federal court system to seek civil monetary penalties for securities violations. The statute grants the Commission authority to seek a civil monetary penalty and specifies a three-tiered system for the amount based on the grievousness of the offense.

n116 The first tier, which applies to the least serious violations, provides that the penalty shall not exceed the greater of (i) \$5,000 for a natural person or \$50,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation.' n117 Tier 2 increases the penalties, stating that they shall not exceed the greater of (i) \$50,000 for a natural person or \$250,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation,' but adding a requirement that the violation be one that involved involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.' n118 Tier 3 further increases the amount, setting a limit per violation of \$100,000 for a natural person or \$500,000 for any other person, or the gross amount of pecuniary gain to such defendant as a result of the violation,' but also adding a requirement that the violation, in addition to the requirements of tier 2, be one that directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.' n119

The Commission has pursued lawyers under this power. Substantial civil penalties against lawyers have been based on falsifying records, aiding and abetting the client's reporting violations and lying to auditors. n120 Such penalties have also been on assisting the client in the creation of misleading public statements about efforts to obtain regulatory approval of the company's product. n121 The majority of reported cases against attorneys for civil penalties appear to fall in the \$25,000 range. n122

This type of civil action is hardly exclusive and may be combined with any other action that the Commission or the attorney general is entitled to bring against a violator. n123

Disgorgement. In civil actions brought by the SEC against attorneys, the courts also have the authority to order disgorgement of ill-gotten gains in order to prevent the wrongdoer from profiting from the wrongdoing. n124 Disgorgement has been used several times against attorneys for having participated in violations of the securities laws. n125 Disgorgement can range from a small, almost symbolic figure to substantial funds. n126

Administrative Cease-and-Desist Proceedings. The SEC may elect to use internal administrative proceedings, either by seeking a cease-and-desist order or proceeding directly under § 201.102(e). Cease-and-desist orders are sought pursuant to § 8A of the Securities Act of 1933, which authorizes the Commission to issue permanent and temporary cease-and-desist orders. The cease-and-desist orders are administrative remedies that direct a person to refrain from engaging in conduct or practices that violate the registration or anti-fraud provisions of the act. n127 The Commission may seek a cease-and-desist order, rather than an injunction in federal court, in order to avoid excessive collateral consequences, or to facilitate an easier negotiated settlement, or to resolve matters more quickly. n128 It is particularly appropriate for what appears to be an isolated violation. For example, the Commission sought a cease-and-desist order against the general counsel of Google for violations of the registration provisions of Sections 5(a) and (c) of the Securities Act of 1933. n129

Administrative Proceedings Under Rule 102(e) Directly Regulate Lawyer as Lawyer. Both civil proceedings and cease-and-desist orders are based on the lawyer's primary violation of the securities acts or aiding and abetting violation of the securities acts. As set out in detail above, Rule 102(e) of the Commission regulations allows the Commission to essentially disbar an attorney for misconduct. After the high profile case of *Carter and Johnson*, the Commission has more often pursued actions for aiding and abetting than for a claim of unprofessional conduct under 102(e).

Proceedings Under Rule 102(e) Are Public. Rule 102(e) proceedings to discipline an attorney are public unless otherwise ordered by the Commission on its own motion or after considering the motion of a party.' n130 The Commission made disciplinary actions under Rule 102(e) public in 1988 for the express purpose of promoting awareness of ethical and professional conduct issues. n131 This has increased transparency in the Commission's actions against attorneys.

Statute of Limitations and Laches in Actions Against Attorneys

Statute of Limitations. There is no statute of limitations that expressly applies to SEC actions. The generally applicable statute of limitations, 28 U.S.C. § 2462, states that [e]xcept as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued' n132 The SEC has taken the position that there is no statute of limitations that is generally applicable to the Commission's institution of administrative proceedings. n133 However, some courts have disagreed and concluded that § 2462 applies to administrative actions. n134 In particular, the D.C. Circuit has held that § 2462 applies to SEC actions to censure and suspend a securities advisor. n135 This is consistent with a generally accepted principle that suspension or revocation of a professional license is a penalty. n136 The five-year statute of limitations may not apply, however, to actions to restore the status quo, such as a proceeding for restitution or disgorgement. n137

Laches. The defense of laches is an equitable doctrine that focuses on the fairness of permitting a claim to be enforced. n138 For the defense to succeed, the court must find both that the plaintiff delayed unreasonably and inexcusably in commencing the action and that the defendant suffered prejudice as a result. n139 Historically, laches does not run against the United States unless the government specifically consents. n140 If the government is seeking to vindicate purely private rights, however, then laches may be applied. n141 Even so, the defense has been held inapplicable where a government agency is acting in the public interest. n142 This category includes Commission actions to seek equitable relief, such as an injunction, to enforce the securities laws. n143

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n1 17 C.F.R. § 201.102(e)(1).

n2 See 17 C.F.R. § 201.102(e)(1)(iv)(A).

n3 See, e.g., In re James A Fitzhenry, Securities Exchange Act Release No. 46870 (Nov. 21, 2002) (5 year suspension by consent); *SEC v. Craig Scott*, SEC Litigation Release No. 19077, 84 SEC Docket 3048 (Feb. 14, 2005) (3-year suspension by consent).

n4 J. William Hicks, Civil Liabilities: Enforcement and Litigation Under the 1933 Act § 2.115.

n5 17 C.F.R. § 201.102(e)(2); cf. ABA Model Code of Professional Responsibility DR 1-102(A)(3) (A lawyer shall not [e]ngage in illegal conduct involving moral turpitude.).

n6 See, e.g., In re F. Thomas Eck, III, Exchange Act Release No. 52,246 (Aug. 12, 2005).

n7 See, e.g., *In re Michael Rosoff*, Securities Act Release No. 50,566, 83 SEC Docket 3037 (Oct. 18, 2004).

n8 *In re Shawn F. Hackman*, Securities Act Release No. 46,478, 78 SEC Docket 1210 (Sept. 10, 2002).

n9 17 C.F.R. § 201.102(e)(3)(i).

n10 See, e.g., *In re Robert J. Cassandro*, Securities Act Release No. 50,938, 84 S.E.C. Docket 2062 (Dec. 28, 2004); *In re Michael W. Smith*, Securities Act Release No. 50,566, 83 SEC Docket 3064 (Oct. 20, 2004); *In re John B. Zankowski*, Securities Act Release No. 52,487 (Sept. 21, 2005) (default judgment).

n11 Note, *Disciplinary Proceedings Against Attorneys Under Rule 2(e)*, 79 Mich. L. Rev. 1270, 1271 (1981).

n12 *In re William R. Carter, Charles J. Johnson, Jr.*, 47 S.E.C. 471 (SEC 1981).

n13 *Touche Ross & Co. v. SEC*, 609 F.2d 570, 582 (2d Cir. 1979); *Davy v. SEC*, 792 F.2d 1418, 1421 (9th Cir. 1986); *Checkosky v. SEC*, 23 F.3d 452, 456 (D.C. Cir. 1994).

n14 *In re Keating, Meuthing & Klekamp*, 47 S.E.C. 95 (1979).

n15 Sarbanes-Oxley Act of 2002, § 602, 15 U.S.C. § 78d-3.

n16 Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

n17 15 U.S.C. § 7245; see Standards of Professional Conduct for Attorneys Appearing and Practicing Before the SEC in Representing an Issuer, 68 *Fed. Reg.* 50,955 (Feb. 6, 2003) (codified at 17 C.F.R. § 205.3(d)(2)), available at <http://www.sec.gov/rules/final/33-8185.htm>.

n18 See, e.g., Fred C. Zacharias, *Coercing Clients: Can Lawyer Gatekeeper Rules Work?*, 47 *B.C.L. Rev.* 455 (2005); John C. Coffee, Jr., *Regulating the Lawyer: Past Efforts and Future Possibilities: The Lawyer as Gatekeeper: An Agenda for the SEC*, 103 *Colum. L. Rev.* 1293 (2003); Lisa H. Nicholson, *A Hobson's Choice For Securities Lawyers in the Post-Enron Environment: Striking a Balance Between the Obligation of Client Loyalty and Market Gatekeeper*, 16 *Geo. J. Legal Ethics* 91 (2002).

n19 Implementation of Standards of Professional Conduct for Attorneys, 68 *Fed. Reg.* 6320 (Feb. 6, 2003) (codified at 17 C.F.R. § 205); see e.g., Robert J. Jossen, *Dealing With the Lawyer's Responsibilities Under the Sarbanes-Oxley Act of 2002: Ethical Dilemmas and Practical Considerations*, SL027 ALI-ABA 417, 430 (2005).

n20 See, e.g., Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* § 9.8[7].

n21 17 C.F.R. § 201.102(f).

n22 See Giovanni P. Prezioso, Remarks before the Spring Meeting of the Association of General Counsel, April 28, 2005, Pebble Beach, CA, available online at <http://www.sec.gov/news/speech/spch042805gpp.htm>.

n23 *Ackerman v. Schwartz*, 947 *F.2d* 841, 848 (7th Cir. 1991) (for 10(b) and Rule 10b-5 allegations, if the attorney authorized the inclusion of the [opinion] letter with the offering documents, then he appears as a principal . . . and not as an aider or abettor').

n24 See, e.g., *SEC v. Jacob Alexander, David Kreinberg, and William F. Sorin*, *Litigation Release No. 19796*, 88 *S.E.C. Docket* 2122 (Aug. 9, 2006) (charging former general counsel in a scheme to routinely backdate stock option grants); *In re Google, Inc. and David C. Drummond*, *Rel. No. 33-8523*, 84 *S.E.C. Docket* 2293 (Jan. 13, 2005) (finding that general counsel violated Section 5 of the Securities Act where he met with board to discuss need for stock option plans without advising board of relevant law regarding registration requirements relating to option grants); *In re George Kern*, slip op. at 46-48 (Nov. 14, 1988) (ALJ opinion), *proceedings dismissed on procedural grounds*, *Rel. No. 34-29356* (June 21, 1991) (outside counsel and director

to issuer delegated task of making necessary Commission filings in connection with hostile takeover attempt, but did not update original filing even after final agreement was reached with purchaser).

n25 47 S.E.C. 471 (SEC 1981).

n26 *In re William R. Carter, Charles J. Johnson, Jr.*, 47 S.E.C. 471, 503 (SEC 1981).

n27 *In re William R. Carter, Charles J. Johnson, Jr.*, 47 S.E.C. 471, 503 (SEC 1981).

n28 *In re William R. Carter, Charles J. Johnson, Jr.*, 47 S.E.C. 471, 504 (SEC 1981).

n29 *In re William R. Carter, Charles J. Johnson, Jr.*, 47 S.E.C. 471, 504 (SEC 1981).

n30 *See Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 191, 114 S. Ct. 1439, 128 L. Ed. 2d 119 (1994).

n31 *See* 15 U.S.C. § 78t(e).

n32 *See Walck v. American Stock Exchange, Inc.*, 687 F.2d 778, 791 (3d Cir. 1982) (mere inaction cannot amount to aiding and abetting); *Metge v. Baehler*, 762 F.2d 621, 625 (8th Cir. 1985) (when aider and abettor owes the plaintiff an independent duty to act or to disclose, inaction can be a proper basis for liability under the substantial assistance test); *Woods v. Barnett Bank of Ft. Lauderdale*, 765 F.2d 1004, 1010 (11th Cir. 1985) (applying a higher standard of scienter--severe recklessness--when liability is based on conduct alone).

n33 *See, e.g., In re Jeffrey L. Feldman*, Rel. No. 33-7014 (Sept. 20, 1993) (attorney aided and abetted § 5 violations by persisting in advising client of an erroneous legal position even after being put on notice that the Commission staff disagreed with position).

n34 *SEC v. Fehn*, 97 F.3d 1276, 1294 (9th Cir. 1996); *see also* Restatement (Third) of Law Governing Lawyers § 94, cmt. c ("A lawyer's intent to facilitate or encourage wrongful action may be inferred if in the circumstances it should have been apparent to the lawyer that the client would employ the assistance to further the client's wrongful conduct and the lawyer nonetheless provided the assistance.") .

n35 *In re William R. Carter, Charles J. Johnson, Jr.*, 47 S.E.C. 471, 503 (SEC 1981); *In re Scott G. Monson*, SEC Release No. 312429 (Sept. 25, 2006).

n36 *In re Scott G. Monson*, S.E.C. Release No. 312429 (Sept. 25, 2006)); *see also* John C. Dickey and Jeffrey A. Minnery, *Trends in Claims Against Lawyers*, Securities Litigation Report, Volume 4, Number 2 (Feb. 2007).

n37 *See SEC v. Fehn*, 97 F.3d 1276, 1294 (9th Cir. 1996); *In re Stanly P. Silverstein, Exchange Act Release No. 49676*, 82 S.E.C. Docket 2943 (May 11, 2004); *see generally In re Silicon Graphics Inc. Securities Litigation, Litigation Release No. 15243*, 63 S.E.C. Docket 2066 (Feb. 3, 1997).

n38 *SEC v. National Student Marketing Corp.*, 457 F. Supp. 682, 713 (D.D.C. 1978).

n39 17 C.F.R. § 205.3(a); *see also* SECURITIES LAW TECHNIQUES, Ch. 88A, *The SEC Standards of Professional Conduct for Attorneys* (Matthew Bender).

n40 William H. Simon, *Whom (Or What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 Calif. L. Rev. 57 (2003).

n41 15 U.S.C. § 7245.

n42 17 C.F.R. § 205.2(a)(1)(i).

n43 17 C.F.R. § 205.2(a)(1)(ii).

n44 17 C.F.R. § 205.2(a)(1)(iii).

n45 17 C.F.R. § 205.2(a)(1)(iv).

n46 17 C.F.R. § 205.2(a)(2).

n47 17 C.F.R. § 205.2(a)(2).

n48 17 C.F.R. § 205.2(g).

n49 17 C.F.R. § 205.2(h); *see also* SECURITIES LAW TECHNIQUES, § 88A.02 (Matthew Bender).

n50 17 C.F.R. § 205.2(e).

n51 17 C.F.R. § 205.2(l).

n52 17 C.F.R. § 205.2(m).

n53 *See* Implementation of Standards of Professional Conduct for Attorneys, 67 *Fed. Reg.* 71,670, 71,678 (Dec. 2, 2002) (codified at 17 C.F.R. § 205.2).

n54 17 C.F.R. § 205.2(i).

n55 See Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71,670, 71,679 (Dec. 2, 2002) (codified at 17 C.F.R. § 205.2).

n56 See Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71,670, 71,679 (Dec. 2, 2002) (codified at 17 C.F.R. § 205.2).

n57 *Basic Inc. v. Levinson*, 485 U.S. 224, 231, 108 S. Ct. 978, 99 L. Ed. 2d 194 (1988); *TSC Industries v. Northway, Inc.*, 426 U.S. 438, 449, 96 S. Ct. 2126, 48 L. Ed. 2d 757 (1976).

n58 17 C.F.R. § 205.3(b); SECURITIES LAW TECHNIQUES, § 88A.04 (Matthew Bender).

n59 17 C.F.R. § 205.3(c).

n60 17 C.F.R. § 205.2(k).

n61 17 C.F.R. § 205.2(k)(2), (3).

n62 17 C.F.R. § 205.3(c).

n63 See Thomas G. Bost, *Corporate Lawyers After the Big Quake: The Conceptual Fault Line In the Professional Duty of Confidentiality*, 19 Geo. J. Legal Ethics 1089 (2006); Stanley Keller, *Implementing the SEC's Standards of Professional Conduct For Attorneys*, SM101 ALI-ABA 699 (June 28-29, 2007); Robert Eli Rosen, *Resistance to Reforming Corporate Governance: the Diffusion of QLCCS*, 74 Fordham L. Rev. 1251, 1252 (2005).

n64 Sanley Keller, *Implementing the SEC's Standards of Professional Conduct For Attorneys*, SM101 ALI-ABA 699 (June 28-29, 2007).

n65 17 C.F.R. § 205.3(b)(2); SECURITIES LAW TECHNIQUES, § 88A.04 (Matthew Bender).

n66 17 C.F.R. § 205.3(b)(2).

n67 17 C.F.R. § 205.2(k) (providing rules for what constitutes a qualified legal compliance committee as well as its role and responsibility).

n68 17 C.F.R. § 205.4(a).

n69 17 C.F.R. § 205.5(a).

n70 17 C.F.R. § 205.5(b).

n71 17 C.F.R. § 205.5(c).

n72 17 C.F.R. § 205.5(d); *see* Implementation of Standards of Professional Conduct for Attorneys, 67 *Fed. Reg.* 71,670, 71,675 (Dec. 2, 2002) (codified at 17 C.F.R. § 205.5).

n73 17 C.F.R. § 205.4(b).

n74 17 C.F.R. § 205.4(b).

n75 17 C.F.R. § 205.3(b)(3).

n76 17 C.F.R. § 205.3(b)(6)(i).

n77 17 C.F.R. § 205.3(b)(6)(ii).

n78 17 C.F.R. § 205.3(b)(7)(i).

n79 17 C.F.R. § 205.3(b)(7)(ii).

n80 *Miller v. McDonald (In re World Health Alternatives, Inc.)*, 385 B.R. 576, 591 (Bankr. D. Del. 2008).

n81 *See, e.g., SEC v. Craig Scott, SEC Litigation Release No. 19077, 84 S.E.C. Docket 3048* (Feb. 14, 2005) (general counsel liable for preparing false and misleading notices of late filing, and causing company to file them); *In re Stanley P. Silverstein, Securities Exchange Release No. 49676, 82 S.E.C. Docket 2943* (May 11, 2004) (general counsel found liable for approving and allowing to be filed a misleading Form 10-K); *see Jonathan C. Dickey and Jeffery A. Minnery, Trends in Claims Against Lawyers*, 4 No. 2 Sec. Litig. Rep. 5 (Feb. 2007); 4 Bromberg and Lowenfels on Securities Fraud § 7:395.30 (2d ed.).

n82 *Miller v. McDonald (In re World Health Alternatives, Inc.)*, 385 B.R. 576, 593, 598 (Bankr. D. Del. 2008) (general counsel owes fiduciary duty to corporation under both Florida and Connecticut corporate law).

n83 17 C.F.R. § 205.3(d).

n84 17 C.F.R. § 205.3(d)(1).

n85 See generally Model Rule of Professional Conduct 1.6(b)(5).

n86 17 C.F.R. § 205.3(d)(2).

n87 See, e.g., Thomas Lee Hazen, Treatise on the Law of Securities Regulation § 9.8[7]; C. Evan Stewart, *The Pit, the Pendulum, and the Legal Profession: Where Do We Stand After Five Years of Sarbanes-Oxley*, Securities Regulation & Law Report, Vol 40, No. 7 (Feb. 18, 2008) at 247 (available at: <http://www.mondaq.com/article.asp?articleid=63936>).

n88 17 C.F.R. § 205.6(a).

n89 17 C.F.R. § 205.6(c).

n90 *Bishop v. PCS Admin. (USA), Inc.*, 2006 U.S. Dist. LEXIS 37230, at *30 (N.D. Ill. May 23, 2006) (there is nothing in the Sarbanes-Oxley Act or in the Sentencing Guidelines that mandates ex ante any particular form of corporate compliance program.').

n91 17 C.F.R. § 205.6(d).

n92 17 C.F.R. § 205.7.

n93 See American Bar Association, Center for Professional Responsibility, available at http://www.abanet.org/cpr/mrpc/model_rules.html; Timothy P. Chinaris, *More Than the Camel's Nose: The Sarbanes-Oxley Act As Bad News for Lawyers, Their Clients, and The Public*, 31 Ohio N.U.L. Rev. 359, 374 (2005).

n94 *Fed. R. Civ. P. 83(a)(1)*.

n95 Pre-2003 version of Rule 1.13(c) available at <http://www.abanet.org/cpr/e2k/e2k-rule113.html>.

n96 ABA Model Rules of Prof'l Conduct R. 1.13(b).

n97 ABA Model Rules of Prof'l Conduct R. 1.13(c).

n98 ABA Model Rules of Prof'l Conduct R. 1.6(b)(2), (b)(3).

n99 *See, e.g., California Rules of Professional Conduct 3-100.*

n100 *See Janelle L. Davis, Sticks and Stones May Break My Bones, But Names Could Get Me A Mistrial: An Examination of Name-Calling in Closing Argument In Civil Cases, 42 Gonz. L. Rev. 133, 147 (2006-2007).*

n101 *See American Bar Association, Status Of State Review Of Professional Conduct Rules*, available at http://www.abanet.org/cpr/jclr/ethics_2000_status_chart.pdf (provides links to each state's rules of ethics as well as tracks which states have adopted the ABA's amendments).

n102 *See Christopher M. Fairman, Protecting Consumers: Attorney Ethics and the Law Governing Lawyers, 60 Consumer Fin. L.Q. Rep. 529, 531 (2006) (as of 2006, 8 states plus D.C.).*

n103 California Rules of Professional Conduct 3-100.

n104 See *Fidelity Federal v. de la Cuesta*, 458 U.S. 141, 152154, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982); see, e.g., Christopher Fairman, *Protecting Consumers: Attorney Ethics And The Law Governing Lawyers*, 60 Consumer Fin. L.Q. Rep. 529, 531 (2006).

n105 17 C.F.R. § 205.1.

n106 See, e.g., Thomas G. Bost, *Corporate Lawyers After the Big Quake: The Conceptual Fault Line In the Professional Duty of Confidentiality*, 19 Geo. J. Legal Ethics 1089, 1108 (2006); Christopher M. Fairman, *Protecting Consumers: Attorney Ethics and the Law Governing Lawyers*, 60 Consumer Fin. L.Q. Rep. 529, 531 (2006).

n107 15 U.S.C. § 7245.

n108 Corporations Committee of the Business Law Section of the State Bar of California, *Conflicting Currents: The Obligation to Maintain Inviolable Client Confidences and the New SEC Attorney Conduct Rules*, 32 Pepp. L. Rev. 89, 148 (2004).

n109 See N.C. St. Bar Ass'n, 2005 Formal Ethics Op. 9 (Jan. 20, 2006), available at <http://www.ncbar.com/ethics/ethics.asp>.

n110 Washington State Bar Association, *Interim Formal Ethics Opinion Re: The Effect of the SEC's Sarbanes-Oxley Regulations on Washington Attorneys' Obligations Under the RPCs* (June 1, 2003); Corporations Committee of the Business Law Section of the State Bar of California, *Conflicting Currents: The Obligation to Maintain Inviolable Client Confidences and the New SEC Attorney Conduct Rules*, 32 Pepp. L. Rev. 89, 148 (2004).

n111 Bromberg & Lowenfels on Securities Fraud § 7:395.10 (2d. ed.).

n112 Stephen M. Cutler, Director of the SEC Division of Enforcement, *The Themes of Sarbanes-Oxley as Reflected in the Commission's Enforcement Program*, Address at the UCLA School of Law, Los Angeles, Cal. (Sept. 20, 2004), available at <http://www.sec.gov/news/speech/spch092004smc.htm>; see also John C. Dickey

and Jeffrey A. Minnery, *Trends in Claims Against Lawyers*, 4 No. 2 Sec. Litig. Rep. 5 (Feb. 2007).

n113 15 U.S.C. § 77t (b); see Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* § 16.2[2][A].

n114 J. William Hicks, *Civil Liabilities: Enforcement and Litigation Under the 1933 Act* § 2.41.

n115 See, e.g., *In re Leonard Goldner*, Securities Exchange Act Release No. 53375 (Feb. 27, 2006); *In re L. Van. Stillman*, Securities Act Release No. 51218, 84 S.E.C. Docket 3013 (Feb. 17, 2005); *In re David S. Pearl*, Securities Act Release No. 1827, 80 SEC Docket 2216 (July 30, 2003).

n116 15 U.S.C. § 77t(d)(2).

n117 15 U.S.C. § 77t(d)(2)(A).

n118 15 U.S.C. § 77t(d)(2)(B).

n119 15 U.S.C. § 77t(d)(2)(C).

n120 SEC v. Henry C. Yuen, SEC Litigation Release No. 19047, 84 SEC Docket 2599 (Jan. 21, 2005) (\$150,000 civil penalty ordered against attorney). See Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* § 16.2[5].

n121 SEC v. Biopure Corporation, SEC Litigation Release No. 19825 (Sept. 12, 2006) (\$40,000 penalty ordered).

n122 See, e.g., *SEC v. Integrated Services Group, Inc., et al.*, SEC Litigation Release No. 19476, 86 SEC Docket 2002 (Nov. 29, 2005) (\$25,000 penalty for violating sections 5(a) and 5(c) of the Securities Act of 1933); *In re Robert J. Cassandro*, Securities Act Release No. 50938, 84 SEC Docket 2062 (Dec. 28, 2004); *SEC v. Rocky Mountain Energy Corp, Inc., et al.*, SEC Litigation Release No. 18522, 81 SEC Docket 3043 (Dec. 23, 2003) (\$25,000 penalty after being accused of participating in an illegal distribution of approximately 47 millions shares of Rocky Mountain stock in four unregistered share-exchange transactions); *SEC v. Jack D. Weiss*, SEC Litigation Release No. 19002, 84 S.E.C. Docket 2026 (Dec. 17, 2004) (\$25,000 penalty by consent against outside securities counsel for aiding and abetting a fraudulent scheme to inflate assets of an Israeli company).

n123 J. William Hicks, Civil Liabilities: Enforcement and Litigation Under the 1933 Act § 2.52.

n124 See *SEC v. Huffman*, 996 F.2d 800, 802 (5th Cir. 1993); Thomas Lee Hazen, Treatise on the Law of Securities Regulation § 16.2[4][B].

n125 *SEC v. Integrated Services Group, Inc.*, SEC Litigation Release No. 19476, 86 SEC Docket 2002 (Nov. 29, 2005); *SEC v. Henry C. Yuen*, SEC Litigation Release No. 19047, 84 SEC Docket 2599 (Jan. 21, 2005); *In re Robert J. Cassandro*, Securities Act Release No. 50938, 84 SEC Docket 2062 (Dec. 28, 2004).

n126 *SEC v. Henry C. Yuen*, SEC Litigation Release No. 19047, 84 SEC Docket 2599 (Jan. 21, 2005) (\$150,000 in disgorgement ordered for attorney as a result of his participating in overstating revenues during his time as general counsel); *In re Robert J. Cassandro*, Securities Act Release No. 50938, 84 SEC Docket 2062 (Dec. 28, 2004) (\$950 in disgorgement related to attorney's role as outside counsel in drafting a false and misleading form 8-K to conceal the true ownership company).

n127 15 U.S.C. § 77h-1(a); J. William Hicks, Civil Liabilities: Enforcement and Litigation Under the 1933 Act § 2.89.

n128 Hicks, at § 2.89.

n129 *In re Google, Inc. and David C. Drummond*, Securities Act Release No. 8523, 84 S.E.C. Docket 2293 (Jan. 13, 2005).

n130 17 C.F.R. § 201.102(e)(7).

n131 Disciplinary Proceedings Involving Professionals Practicing Before the Commission, 39 Fed. Reg. 13,288 (Apr. 12, 1974) (to be codified at 17 C.F.R. pt. 201). T

n132 28 U.S.C. § 2462.

n133 *Johnson v. SEC*, 87 F.3d 484, 486487 (D.C. Cir. 1996); Thomas Lee Hazen, Treatise on the Law of Securities Regulation § 16.2.

n134 *3M Co. v. Browner*, 17 F.3d 1453, 1454 (D.C. Cir. 1994) (§ 2462 applies to EPA administrative proceedings).

n135 *Johnson v. SEC*, 87 F.3d 484, 492 (D.C. Cir. 1996).

n136 *In re Ruffalo*, 390 U.S. 544, 550, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968) (disbarment of attorney is a penalty).

n137 *Johnson v. SEC*, 87 F.3d 484, 492 (D.C. Cir. 1996); *SEC v. Lorin*, 869 F. Supp. 1117, 11221123 (S.D.N.Y. 1994) (disgorgement is not a fine, penalty, or forfeiture' within the meaning of § 2462 since it is strictly remedial').

n138 *Holmberg v. Armbrrecht*, 327 U.S. 392, 396, 66 S. Ct. 582, 90 L. Ed. 743 (1946); *SEC v. Willis*, 777 F. Supp. 1165, 1174 (S.D.N.Y. 1991).

n139 *Lottie Joplin Thomas Trust v. Crown Publishers, Inc.*, 592 F.2d 651, 655 (2d Cir. 1978); *SEC v.*

Willis, 777 F. Supp. 1165, 1174 (S.D.N.Y. 1991).

n140 *United States v. Summerlin*, 310 U.S. 414, 416, 60 S. Ct. 1019, 84 L. Ed. 1283 (1940) ("It is well settled that the United States is not subject to the defense of laches in enforcing its rights"); *SEC v. Penn Cent. Co.*, 425 F. Supp. 593, 599 (E.D. Pa. 1976).

n141 *SEC v. Willis*, 777 F. Supp. 1165, 1175 (S.D.N.Y. 1991); see *Penn Cent. Co.*, 425 F. Supp. 593, 599 (E.D. Pa. 1976).

n142 *SEC v. Willis*, 777 F. Supp. 1165, 1175 (S.D.N.Y. 1991); *SEC v. Gulf and Western Indus., Inc.*, 503 F. Supp. 343, 348 (D.D.C. 1980).

n143 *S.E.C. v. McCaskey*, 56 F. Supp. 2d 323, 327 (S.D.N.Y. 1999).

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John K. Rabiej on the Risks Associated with Keyword Searches

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John K. Rabiej on the Risks Associated with Keyword Searches

By John K. Rabiej

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SUMMARY: Parties routinely use selected keywords to search massive amounts of ESI electronically. The search technique is quick and inexpensive. But an inadequately planned keyword search can produce disappointing results, and it can risk severe consequences. Recent case law highlights the pitfalls of inadequate keyword searches undertaken by individuals who have little or no relevant expertise.

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ARTICLE: Lawyers often rely on automated keyword searches to facilitate the examination of electronically stored information (ESI). *See, e.g., Victor Stanley, Inc. v. Creative Pipe, Inc.*, 2008 U.S. Dist. LEXIS 42025, at *15 (D. Md. May 29, 2008) (it is universally acknowledged that keyword searches are useful tools for search and retrieval of ESI). Keyword searching offers a useful tool to minimize the volume of ESI that lawyers must review. As the term implies, keyword searching locates documents containing a specific word or words regardless of context. Lawyers are familiar with the general technique, using it in automated legal research. In general, lawyers rely on keyword searches in discovery to: (1) identify ESI that must be preserved; (2) locate relevant ESI responsive to discovery requests; and (3) identify privileged and work product ESI. Though quick and efficient, keyword searches are inherently limited and can produce incomplete results that can have serious consequences. Their use must therefore be tempered with caution, especially because courts are open to challenges about their reasonableness and completeness. *See Autotech Tech. v. Automationdirect.com, Inc.*, 2008 U.S. Dist. LEXIS 23498, at *11B12 (N.D. Ill. Mar. 25, 2008) (party did not fashion adequate search protocol and was responsible for additional costs incurred to retrieve information).

Keyword Searching Limitations

Studies have shown that untutored keyword searches miss many relevant documents. The most famous study concluded that keyword searches identify only 20% of the relevant ESI, though the participating attorneys believed that they were collecting 75% or more. *See Blair & Moron, An Evaluation of Retrieval Effectiveness for a Fulltext Document Retrieval System, Communication of the ACM*, Vol. 28 No. 3, March 1985; *see also Tomlinson, Oard, Baron, and Thompson, Overview of the TREC 2007 Legal Track*, 1 (2007) (On average (over 43 topics), the reference Boolean query found just 22% of the relevant documents that are estimated to exist. Its precision averaged 29%.'). The low success rate is caused by the richness and ambiguity of the English language and the overly simplistic techniques used in the searches. At the other extreme, keyword searches can capture too many non-relevant documents. *See, e.g., Ross v.*

Abercrombie & Fitch Co., 2008 U.S. Dist. LEXIS 87039 (S.D. Ohio Oct. 27, 2008) (parties collaboratively selected 120 keywords, which produced large number of hits; parties later refined search, using 123 keywords, producing one million pages of documents; court declined to require party to review documents identified after yet another refined search identified 1.3 million pages and suggested that subsequent searches be performed on smaller data sets). The frequency of false positives can be high because such searches locate designated words regardless of context. For example, a search for the word "strike" in the context of a labor union protest will capture the word when it means to hit someone or something or missing a pitch in a baseball game.

Selecting proper keywords can be complicated and a thorough search procedure can involve the sciences of computer technology, statistics, and linguistics. See, e.g., *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 2008 U.S. Dist. LEXIS 42025, at *15B16, *26B33 (D. Md. May 29, 2008) (extensive discussion of literature explaining keyword search techniques, their deficiencies and limitations). Unless well designed, keyword searches will omit relevant information, including misspelled words, singular or plural forms of words, words containing an extra space, or acronyms. See, *United States v. O'Keefe, Sr.*, 2008 U.S. Dist. LEXIS 12220, at *23B24 (D.D.C. Feb. 18, 2008) (lawyers and judges typically are not competent to develop and apply appropriate keyword searches and should rely on experts because developing proper keywords for ESI searching is "clearly beyond the ken of a layman"). Inadequate keyword searches restricted to certain electronic files will also fail to retrieve data located in mislabeled file types. For example, a text document can be stored inadvertently or deliberately in a file typically used to store an image, i.e., .jpg file. Failure to test the results of a keyword search for quality assurance is a factor in determining the reasonableness and completeness of a discovery search. See, e.g., *In re Seroquel Prods. Liab. Litig.*, 244 F.R.D. 650, 662 (M.D. Fla. 2007) (Common sense dictates that sampling and other quality assurance techniques must be employed to meet requirements of completeness.').

The consequences of an inadequate keyword search were highlighted in *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 2008 U.S. Dist. LEXIS 42025 (D. Md. May 29, 2008). In this case, the defendant purportedly used five pages of keywords to identify privileged and protected documents. The search failed to identify 165 privileged or protected documents, which were produced in discovery. The court commented on the benefits of keyword searches in general, but it could not determine whether the keyword search in the instant case was sufficiently reasonable to prevent waiving the privilege or protection. Though the defendant had the burden to show it had taken reasonable steps to prevent the disclosure of privileged or protected documents, it did not give the court information regarding the adequacy of the search. The defendant failed to inform the court about the keywords used, the rationale for their selection, the qualifications of the individuals to design a reliable search, the use of any sampling to test the results for quality assurance, and the specific search technique used. Absent an explanation of the keyword search, the court could not rule on its reasonableness. It granted the plaintiff's motion, finding the defendant's production of the documents waived any privileged or protected status. The holding in *Victor Stanley* underscores not only the need to fully document search protocols but also the major advantages offered by a court order entered under newly enacted Federal Rule of Evidence 502, which would have averted this problem by protecting the privileged or protected status of documents disclosed in discovery.

Effective Keyword-Search Strategies

Though keyword searching offers a good tool, expectations should be tempered with an understanding of its limits. Keyword searching is best used as a filtering tool, reducing the volume of ESI as a "first cut" that must be reviewed. It should not be relied on as the exclusive tool to locate specific ESI. Courts are beginning to scrutinize the efficacy of keyword lists, finding some search techniques inadequate. A party can take several steps to enhance keyword searching. In general, adopting a list of about 30 to 50 terms will retrieve the relevant evidence without being too inclusive or restrictive. Whole words should be selected and "noise" words, e.g., it, a, and the should be avoided to limit the number of irrelevant hits. It is important to constantly sample the results of the keyword searching to determine whether it is too narrow or inclusive. The great advantage of keyword searching is that it can be easily adjusted to minimize or expand the number of hits retrieved. Employing an electronic evidence expert should be considered if the volume of ESI is large.

Collaboration

Typically, the producing party creates a list of key words to search its records in response to a discovery request. The opposing party may be permitted to scrutinize the list and raise objections to the court about its effectiveness in identifying relevant evidence. *See William A. Gross Constructon Assoc., Inc. v. American Manufacturers Mutual Ins. Co.*, 2009 U.S. Dist. LEXIS 22903, at *9 (S.D.N.Y. Mar. 19, 2009) (opposing party objected to search terms, proposing many others). Best practices recommend that parties make a good faith effort to collaborate on the use of searching methods, including agreement on the keywords. *See, e.g., The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery* 189, 211 (2007) (Parties should make a good faith attempt to collaborate on the use of particular search and information retrieval methods, tools and protocols (including as to keywords, concepts, and other types of search parameters).'). The Rule 26(f) conference presents a good opportunity to discuss the selection of keywords. But lawyers must exercise due care in drafting and agreeing to any search protocols.

In Re: Fannie Mae Secs. Litig., 552 F.3d 814 (D.C. Cir. 2009), offers a lesson on the consequences of imprecise search protocols. In this case, the ESI records of the Office of the Federal Housing Enterprise Oversight (OFHEO) were subpoenaed under Rule 34. Defendants in the case contended that OFHEO, a third party, failed to produce the requested ESI in a timely manner. In accordance with a search protocol stipulated between OFHEO and the defendants, OFHEO reviewed 660,000 documents based on 400 selected keywords after hiring 50 contract attorneys solely for that purpose and expending more than \$6 million, approximately 9 percent of the agency's entire annual budget. When it sought an extension of time to file the required privilege logs after failing to meet two earlier extensions of time, the district court granted the defendant's motion holding OFHEO in contempt. Though sympathetic to OFHEO's seemingly herculean efforts, the district court ruled that OFHEO was bound to comply with the conditions contained in its stipulated order, which specified the following: "OFHEO will work with the Individual Defendants to provide the necessary information (without individual review) to develop appropriate search terms. By October 19, 2007, the Individual Defendants will specify the search terms to be used." As construed by the court, the stipulated order imposed no limits on the number or types of search terms nor did it give OFHEO any role in developing or rejecting the search terms, other than a consultative one. And even though the search terms retrieved approximately 80% of the office's entire email messages, OFHEO could not rely on the Rule 45 safeguards against unreasonable discovery demands because it was bound by its stipulated order. The appellate court upheld the lower court's finding.

Collaboration with an opposing party does not mean that a party is obligated to accept key words proposed by the other party. *See, e.g., Treppel v. Biovail Corp.*, 233 F.R.D. 363 (S.D.N.Y. 2006) (party can reject list of key words proposed by opposing party, but must proceed with its own key word list rather than produce nothing). Nor should a party rely solely on inadequate keywords supplied by the opposing party to meet its discovery burden. *See, e.g., Spieker v. Quest Cherokee, LLC*, 2008 U.S. Dist. LEXIS 88103, at *8-9 (D. Kan. Oct. 30, 2008) (Defendant cannot escape its burden of production by now arguing that plaintiffs' suggested search terms are 'specific enough.' If the search terms need to be more specific to answer plaintiffs' production requests, defendant should modify the terms accordingly.)

Alternative Searching Techniques

Keyword searching is rigidly precise and locates only the exact version of a word, which means that misspelled words, synonyms, acronyms, and other abbreviations are omitted. Most search engines now employ Boolean search criteria, which permit more sophisticated word searches narrowing the scope of a search by using word connectors, e.g., and' (requires two or more keywords together), or' (requires either keyword), and w/5' (requires presence of keyword within designated number of words), and a wildcard' denoted as an asterisk (*), which retrieves words based on the search term's root or suffix. Boolean searching is the most common way of electronically searching data. Several alternative searching techniques have been developed to address the major drawbacks with keyword searching. *See e.g., Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 261 (D. Md. 2008) (advanced search techniques include probabilistic search models, fuzzy search models, clustering searches, and concept and categorization searches).

Keyword searching based on stemming techniques focus on parts of a word. Though similar to a Boolean-wildcard search, stemming is based on linguistics analysis. Fuzzy queries are based on relevance analysis and designed to retrieve information with content similar to a specific term or phrase. *See, e.g., The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery* 189, 219 (2007) (Fuzzy search is an attempt to improve search recall by matching more than the exact word: fuzzy matching techniques try to reduce words to their core and then match all forms of the word.'). It is used often to search information that has undergone an Optical Character Recognition conversion from paper documents.

More sophisticated searches employ cutting-edge technology based on concept searches and artificial intelligence that identify words in similar categories, much like a "Google" search. Searches are conducted to ascertain the number of times a particular search term is used in a given document or a set of documents, which result in relevancy rankings that can provide useful guidance in refining a search. The greater the number of hits in an individual document, the higher its "term frequency," while the greater the number of documents containing the search term, the higher its "inverse document frequency."

Concept and context searching are new technologies that rely on linguistic analysis of sentence structures, parts of speech, and noun phrases. The technologies base their search on the associations among the designated words within the collected documents. *See, e.g., The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery* 189, 202 (2007) (The classic example is the concept search that will recognize that documents about Eskimos and igloos are related to Alaska, even if they do not specifically mention the word 'Alaska. '). Some of these methodologies rely on thesauri, which identify and group synonyms and similar words. Searches using a "clustering" technique batch similar documents together based on the concepts contained in each document. The results of these searches can be most useful in identifying "code" or "alias" words used as substitutes to prevent detection. The track record of these technologies is not proven. Moreover, they can be expensive. These emerging technologies, nevertheless, can be used effectively to supplement or refine the other culling techniques as part of an overall filtering strategy, especially by companies faced with constant litigation, who have dedicated qualified IT personnel.

Conclusions

Keyword searches are often the only practical means of reviewing ESI. Though accurate in operation, the results can be disappointing. A practitioner who fails to recognize the inherent limitations of keyword searches risks incomplete results that can compromise the production and preservation of relevant ESI and the identification of privileged and protected ESI. Best practices recommend that a practitioner: (1) develop a search protocol with care, relying on experienced experts when appropriate, (2) collaborate with the opposing party's counsel to develop a search protocol, including agreed-upon keywords, (3) take advantage of emerging search techniques to supplement Boolean keyword searches, and (4) document thoroughly the details of the search protocol.

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Why Lawyers Should Request Court to Enter Rule 502(d) Confidentiality Order

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John K. Rabiej on Why Lawyers Should Routinely Request Court to Enter Rule 502(d) Confidentiality Order

By John K. Rabiej

May 7, 2009

SUMMARY: A court order under FRE 502(d) protects a party from the threat of waiving the attorney-client privilege or work-product protection when privileged or protected information is disclosed. Few requests for the court order have been reported, because the bench and bar are unfamiliar with the new rule (enacted in Sept. 2008). Best practices call for lawyers to request the court to enter the order routinely in every discovery-intensive case.

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ARTICLE: A rule of evidence enacted in 2008 holds great promise for substantial discovery savings and expediting discovery, but it has been little used to date. Under Federal Rule of Evidence 502(d), a federal court can order that the attorney-client privilege or work-product protection is not waived when privileged or protected information has been disclosed. The rule "responds to the widespread complaint that litigation costs necessary to protect against the waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information." *See* Fed. R. Evid. 502, Committee Note (2008). The new rule's protection is so effective and its benefits so substantial that a lawyer should have a very good reason not to request the court to enter a Rule 502(d) confidentiality order in every discovery-intensive case.

The advantages of a Rule 502(d) court order present a "win-win" option for all parties. The Committee Note to Rule 502 recognizes the principal utility of the court order: "The rule provides a party with a predictable protection from a court order -- predictability that is needed to allow the party to plan in advance to limit the prohibitive costs of privilege and work product review and retention." If extensive discovery is pursued in a case, especially discovery of electronically stored information, a Rule 502(d) order can significantly reduce costs for the responding party by eliminating the threat of a waiver that would otherwise compel it to screen exhaustively all information subject to discovery for privilege or work product. *See Spieker v. Quest Cherokee, LLC, 2008 U.S. Dist. LEXIS 88103*, at *13 (D. Kan. Oct. 30, 2008) (court ordered parties to address cost savings features under Rule 502 in any future discussions regarding projected \$250,000 privilege and relevance review of electronically stored information). The elimination of the threat of a waiver also removes the primary cause for contesting a request to produce discovery, which in turn benefits the requesting party by expediting the production of discovery. The rule does not require any showing of special need or justification for the Rule 502(d) order, and courts have been encouraged to grant them routinely. Yet the reported number of Rule 502(d) orders remains modest. The bench's and bar's unfamiliarity with the rule seems to be

the only obstacle preventing more frequent reliance.

Under Rule 502(d), a federal court may order that information protected under the attorney-client privilege or work-product doctrine disclosed in connection with a federal proceeding does not waive the privilege or protection in any ongoing or subsequent litigation. A court order under the rule eliminates not only the risk that the privilege or protection is waived regarding the specific disclosed information, but it also eliminates the risk that the privilege or protection is waived regarding the "subject matter" of the disclosed information.

Most importantly, Rule 502(d) extends its protection against privilege and protection waiver regarding information disclosed in the case to all ongoing or subsequent litigation, including state court litigation. That means that a party no longer must exhaustively review documents before disclosing them in discovery for fear that an inadvertent disclosure of privileged or protected information will waive the privilege or protection in a later lawsuit. Though a party should remain vigilant in ensuring that it does not inadvertently disclose documents containing important confidential matter, an order entered by the court under Rule 502(d) eliminates the privilege-waiver and protection-waiver threats. *See, e.g., Alcon Manufacturing, Ltd. v. Apotex Inc., 2008 U.S. Dist. LEXIS 96630*, at *18 (S.D. Ind. Nov. 26, 2008) (expensive, painstaking review is precisely what new Evidence Rule 502 and the protective order in this case were designed to avoid').

Parties should discuss early in the litigation whether they can agree to request a Rule 502(d) order jointly. If no agreement can be reached, a single party may make the request or the court itself may enter the order to facilitate the discovery process. At the Rule 26(f) discovery-planning conference, parties are directed to address any issue relating to the assertion of an attorney-client privilege or work-product protection claim. The conference offers a discrete opportunity to discuss requesting the court to enter the Rule 502(d) confidentiality order. An excellent example of a draft Rule 502(d) order has been prepared by Gregory P. Joseph, of Gregory P. Joseph Law Offices LLP in New York, former Litigation Section Chair of the American Bar Association: *The Impact of Rule 502 on Protective Orders.pdf* (Document attached to end of this document).

Though a Rule 502(d) court order is clearly preferable in many cases, other provisions of Rule 502 were enacted to clarify the law governing the consequences of disclosing privileged or protected information when no Rule 502(d) order has been entered. But the protection against waiving the privilege or protection is neither as extensive nor as clear-cut as that provided under Rule 502(d). In general, the waiver of the privilege or protection is determined on a case-by-case basis, subject to all the vicissitudes inherent in the judicial decisionmaking process. *See Rhoads Indus., Inc. v. Building Materials Corp. of America, 2008 U.S. Dist. LEXIS 93504*, at *6-7 (E.D. Pa. Nov. 14, 2008) (applies multi-factor test to determine reasonableness of party's inadvertent disclosure).

Thus, absent a Rule 502(d) order, a lawyer must demonstrate that the disclosure of privileged or protected information was inadvertent, that the lawyer took reasonable steps to prevent disclosure, and that the lawyer attempted promptly to rectify the error. The inquiry is fact intensive and decided on a case-by-case basis. A large body of court rulings in individual cases constitute the case law. *See Moore's Federal Practice 3rd Edition*, § 37A.32[5]. The court rulings can be surprising at times.

For instance, the Committee Note to Rule 502 points out that "depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken 'reasonable steps' to prevent inadvertent disclosure." *See Fed. R. Evid. 502(b), Committee Note (2008); see also Rhoads Indus., Inc. v. Building Materials Corp. of America, 2008 U.S. Dist. LEXIS 93504*, at *29-32 (E.D. Pa. Nov. 14, 2008) (court approvingly cites Committee Note to Rule 502). Despite a general presumption of "reasonableness," courts have scrutinized the steps taken to prevent disclosure and carefully examined the effectiveness of the automated privilege review software. In one important case decided a few months before enactment of Rule 502, the court evaluated the search of keywords used in identifying privileged electronically stored information and faulted the parties for failing to develop a more effective search. *See, e.g., Victor Stanley Inc. v. Creative Pipe Inc.*, (D. Md. May 29, 2008) (court faulted search of electronically stored information because party failed to describe how key words

were selected, qualifications of individuals selecting key words, how search was conducted, implementation of quality controls, and any sampling or test runs employed to assure accuracy). Though rulings like *Victor Stanley* undercut a party's confidence in using software to screen for privilege and work product, they underscore the advantages of a Rule 502(d) court order, where the cost-savings benefit of a software application to screen documents for privilege or work product can be realized without jeopardizing privilege or work product.

Other provisions of Rule 502 deal with other aspects of the attorney-client privilege and work-product protection. For example, waiver of the privilege or protection regarding the subject-matter' of the disclosed privileged or protected information is limited only to situations in which a party intentionally discloses the information in a selective, misleading, or unfair manner. *See* Fed. R. Evid. 502, Committee Note (2008). Rule 26(b)(5)(B) sets up procedures to assert privilege and work-product protection claims after production, freezing the status quo and deferring the decision to determine whether a privilege or protection has been waived until a court rules on the privilege or protection claim. Under the rule, the receiving party must return, sequester, or destroy the claimed privileged or protected information if the responding party produced the information and then notified the party of the claim.

Rule 502 also recognizes the well-established practice of parties entering into agreements limiting the effect of privilege or protection waiver when the information is disclosed during discovery. But the agreement can only bind the consenting parties. Nonparties may be bound only if the agreement is incorporated into a court order under Rule 502(d). Such agreements can include 'clawback' provisions designed to permit a producing party to retrieve inadvertently disclosed confidential information, or 'quick peek' provisions designed to permit the requesting party an opportunity to examine all information on condition that neither agreement prevents the producing party from asserting a privilege or protection claim. *See* Fed. R. Civ. P. 26(f) Fed. R. Civ. P. 26(f), Committee Note (2006); *see, e.g., American Econ. Ins. Co. v. Schoolcraft*, 2006 U.S. Dist. LEXIS 42519, at *8 (D. Colo. June 23, 2006) (example of stipulated confidentiality order allowing party to demand return of inadvertently disclosed privileged matter without waiving privilege). The parties may request the court to incorporate the agreement into the court's case-management order, which may protect the privilege or protection claim in subsequent litigation. Illustrative Civil Form 35 includes a provision for the parties to describe their agreement or an order regarding claims of privilege or protection as trial preparation materials asserted after production.

Rule 502 clarifies the consequences of disclosing privileged or protected information and applies more consistent standards to ascertain the reasonableness of a party's actions in safeguarding privileged and protected information from disclosure. But it does not eliminate the second-guessing of a party's steps to prevent the disclosure or the steps taken to rectify the error, which can have disastrous results in a given case. A court order under Rule 502(d) renders these risks moot. Rule 502(d) sets up a simple procedure to request the court for the order, which parties can pursue jointly or individually. Sample confidentiality orders are readily available. The cost savings, expedited discovery production, and elimination of wasteful satellite litigation under Rule 502(d) can benefit all parties in litigation. All that is required for full realization of the rule's benefits is greater bench and bar familiarity with it.

Gregory P. Joseph n1

On September 19, 2008, the President signed into law Federal Rule of Evidence 502 (Attorney-Client Privilege and Work Product; Limitations on Waiver). It applies to previously filed cases in the discretion of the trial judge and to all cases filed on and after September 19, 2008, without exception.

Rule 502(d) is the most innovative aspect of the new Rule, and it dictates that protective orders be drafted differently than they have in the past. Subdivision (d) provides that a federal court order governing waiver through disclosure of privileged or protected information is binding on all other courts and third parties:

(d) Controlling effect of a court order. -- A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court -- in which event the disclosure is also not a waiver in any other federal or state proceeding.

For years, it has been common practice to include in protective orders claw-back provisions to address the inadvertent production of material protected by the attorney-client privilege or work product protection. Rule 502(d) resolves a vexing, pre-existing problem -- that the court-ordered return and protection of inadvertently produced material in Case 1 did not afford any protection from the discovery demands of litigants in Case 2. But it does more, too.

Current Short-Form Order

Prior to Rule 502(d), a typical short-form version of such a provision provided:

If a party inadvertently produces information that it later discovers to be privileged, the production of that information shall not be deemed to constitute the waiver of any applicable privileges, provided that the producing party promptly informs the receiving party of the inadvertent production and requests the return or confirmed destruction of the privileged information, including any copies or derivative works that have been made of that inadvertent production. Within three (3) business days of receiving such notification, the receiving party shall return or confirm destruction of all such privileged Information, including any copies or summaries thereof.

Four observations in light of Rule 502(d). First, this order is limited by its term to *privilege*. While conventional practice in the past has been to read "privilege" expansively to include work product protection, Rule 502 clearly distinguishes between the two, and so should court orders now. Otherwise, a reference only to privilege is subject to the argument that it reflects a negotiated narrowing of the Rule's protection.

Second, this order focuses on inadvertent *production* of information, rather than *disclosure* of information. Inadvertent disclosure can occur many ways -- *e.g.*, at deposition, by email, in extrajudicial conversations relating to the case. The language of Rule 502(d) is broad enough to cover all of these, and the order should do so as well (absent specific reasons not to).

Third, Rule 502(d) does not impose a *promptness* requirement on any request to return the information. A promptness requirement may be desirable, depending on many factors, including the magnitude of the anticipated discovery. Further, lawyers may choose to distinguish party disclosures from third-party responses to subpoenas, as to which it may be desirable to maintain a promptness requirement.

Fourth, and perhaps most important, this form of order is limited to *inadvertent* disclosure. It may be in any given case that limiting the scope of the order to inadvertent production is prudent. But that is a choice for counsel to make (more about the consequences of this choice below).

Form of Order -- Inadvertent Production

Taking Rule 502(d) into account, this is a provision that is limited to protecting *inadvertent* disclosure:

(a) If, in connection with the pending litigation, a party (the "Disclosing Party") inadvertently discloses information subject to a claim of attorney-client privilege or attorney work product protection ("Inadvertently Disclosed Information"), the disclosure of the Inadvertently Disclosed Information shall not constitute or be deemed a waiver or forfeiture of any claim of privilege or work product protection that the Disclosing Party would otherwise be entitled to assert with respect to the Inadvertently Disclosed Information and its subject matter.

(b) If a claim of inadvertent disclosure is made by a Disclosing Party with respect to Inadvertently Disclosed Information, the Receiving Party shall, within five business days, return or destroy all copies of the Inadvertently Disclosed Information and provide a certification of counsel that all such Inadvertently Disclosed Information has been returned or destroyed.

(c) Within five business days of the notification that such Inadvertently Disclosed Information has been returned or

destroyed, the Disclosing Party shall produce a privilege log with respect to the Inadvertently Disclosed Information.

(d) The receiving party may move the Court for an Order compelling production of the Inadvertently Disclosed Information (a "Privilege Motion"). The Privilege Motion shall be filed under seal and shall not assert as a ground for entering such an Order the fact or circumstances of the inadvertent production.

(e) The Disclosing Party retains the burden of establishing privileged or protected nature of any Inadvertently Disclosed Information. Nothing in this paragraph shall limit the right of any party to petition the Court for an *in camera* review of the Inadvertently Disclosed Information.

This model has the following salient characteristics:

First, it is not limited to *privilege* but explicitly applies to *work product protection* as well.

Second, it extends beyond *production* to *disclosure* of information. True, it is clumsy in its operation as to the proverbial blurt-out of privileged information at a deposition or an extrajudicial statement (how do you return or destroy that?). But the operational issue is not the real problem. Subject matter waiver is the problem, and this order prevents it. It is also consistent with the holdings of various courts a blurt-out of protected information at a deposition does not affect a subject matter waiver. *See e.g., In re County of Erie*, 2008 U.S. App. LEXIS 21496 (2d Cir. Oct. 14, 2008); *Pinnacle Pizza Co. v. Little Caesar Enters.*, 2007 U.S. Dist. LEXIS 488845 (D. S.D. July 3, 2007).

Third, this provision eliminates any *promptness* requirement for requests for the return of protected information. If a promptness requirement is deemed appropriate, it can be added as a proviso at the end of paragraph (a), using the language of the dependent clause at the end of first sentence of the Current Short-Form Order, above.

Fourth, this model is limited to disclosures "in connection with the pending litigation." The rulemakers placed that limitation in Rule 502(d) to prevent parties from using the courts to protect non-litigation-related disclosures, as to regulatory agencies. Query how effective that limitation is. If a regulatory agency serves a subpoena and the receiving party seeks to quash it in court, that court action is presumably a "litigation" to which Rule 502(d) applies. The limitation in the Rule does, however, eliminate its application to voluntary disclosures to regulators, and that could require parties to decide whether they want to force the issuance of subpoenas (which, in some circumstances, may require the commencement of formal regulatory proceedings that become disclosable events).

Form of Order -- Not Limited to Inadvertent Production

Rule 502(d) is not limited to *inadvertent* disclosure. It protects against waiver by disclosure of any type, whether inadvertent or intentional. It therefore permits a party to open its files to an adversary; allows the adversary decide what information it considers relevant and wants to use; and permits the disclosing party to assert privilege thereafter (or not to do so) -- as in the quick-peek approach to electronic discovery. The Rule also permits a disclosing party to selectively waive privilege or work product protection, which raises a specter addressed below.

A provision that is not limited to inadvertent disclosure could take this form:

(a) If, in connection with the pending litigation, a party (the "Disclosing Party") discloses information subject to a claim of attorney-client privilege or attorney work product protection ("Disclosed Protected Information"), the disclosure of the Disclosed Protected Information shall not constitute or be deemed a waiver or forfeiture of any claim of privilege or work product protection that the Disclosing Party would otherwise be entitled to assert with respect to the Disclosed Protected Information and its subject matter.

(b) A Disclosing Party may assert in writing attorney-client privilege or work product protection with respect to Disclosed Protected Information. The Receiving Party shall, within five business days of receipt of that writing, return or destroy all copies of the Disclosed Protected Information and provide a certification of counsel that all such

Disclosed Protected Information has been returned or destroyed.

(c) Within five business days of the notification that such Disclosed Protected Information has been returned or destroyed, the Disclosing Party shall produce a privilege log with respect to the Disclosed Protected Information.

(d) The receiving party may move the Court for an Order compelling production of the Disclosed Protected Information (a "Privilege Motion"). The Privilege Motion shall be filed under seal and shall not assert as a ground for entering such an Order the fact or circumstances of the inadvertent production.

(e) The Disclosing Party retains the burden of establishing privileged or protected nature of any Disclosed Protected Information. Nothing in this paragraph shall limit the right of any party to petition the Court for an *in camera* review of the Disclosed Protected Information.

(f) If, at trial, at a hearing, at a deposition, or on a motion, a Disclosing Party marks for identification or offers into evidence Disclosed Protected Information -- or proffers or elicits testimonial or other evidence that incorporates or relies on Disclosed Protected Information, including evidence within Federal Rule of Evidence 703 -- that act shall be deemed to effect a waiver and forfeiture by the Disclosing Party of attorney-client privilege and work product protection that would otherwise apply to undisclosed information concerning the same subject matter, within Federal Rule of Evidence 502(a). The preceding sentence shall not apply to (i) proceedings to determine whether the Disclosed Protected Information is privileged or protected or subject to discovery or disclosure, or (ii) Disclosed Protected Information that is marked for identification, offered into evidence, or incorporated in evidence proffered or elicited by an adverse party, or relied on by a witness proffered by an adverse party.

The key to this form of order is subdivision (f), which takes into account the most dangerous threat posed by Rule 502(d) in the context of intentional disclosure of protected information -- namely, that a party could use the privilege as both a sword and a shield. The Rule is intended to facilitate discovery. It is not intended to permit a party affirmatively to introduce a favorable piece of privileged or protected information while simultaneously protecting unfavorable information. Subdivision (f) is intended to preclude this result. Note that (1) it prevents back-dooring privileged information through experts, and (2) it permits a party to use its own Disclosed Protected Information where an adversary first proffers it and thereby opens the door.

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Dorsaneo on 2008 Amendments to Texas Rules of Appellate Procedure

2009 Emerging Issues 3326

Dorsaneo on 2008 Amendments to Texas Rules of Appellate Procedure

By William Dorsaneo III

February 6, 2009

SUMMARY: The Texas Supreme Court and Court of Criminal Appeals of Texas promulgated significant amendments to the Texas Rules of Appellate Procedure which took effect on September 1, 2008. This commentary, written by William V. Dorsaneo, III, author of the renowned treatise Texas Litigation Guide, discusses these amendments and their implications.

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ARTICLE: *Introduction.*

The Texas Supreme Court and Court of Criminal Appeals of Texas have promulgated significant amendments to the Texas Rules of Appellate Procedure which took effect on September 1, 2008. (Tex. Sup. Ct. Amendments to the Texas Rules of Appellate Procedure, Misc. Docket No. 08-9115 published in *71 Tex. B.J.* 676-687 (2008); Technical Corrections to the Amendments to the Texas Rules of Appellate Procedure, Misc. Docket No. 08-9115a, published in *71 Tex. B.J.* 762 (2008); Tex. Sup. Ct. Order Amending Texas Rules of Appellate Procedure, Misc. Docket No. 08-9017 published in *71 Tex. B.J.* 286-297 (2008); Court Crim. App. Order Amending Texas Rules of Appellate Procedure, Misc. Docket No. 08-102, published in *71 Tex. B.J.* 676-687 (2008); Court of Crim. App. Order for Amendments to the Texas Rules of Appellate Procedure, Misc. Docket No. 08-103, published in *71 Tex. B.J.* 837 (2008)).

Accelerated Appeals in Civil Cases.

Appeals as of Right. Former Appellate Rule 28 provided very incomplete guidance concerning the situations in which an appeal is accelerated in the courts of appeals. To remedy this problem, Appellate Rule 28.1 comprehensively defines the types of accelerated appeals as appeals permitted by statute from interlocutory orders, appeals in quo warranto proceedings, appeals required by statute to be accelerated or expedited as well as all appeals required by statute to be filed or perfected within less than 30 days after the date of the order or judgment being appealed. Tex. R. App. P. 28.1(a).

Proposed Appellate Rule 28.1 was drafted to provide a more uniform appellate timetable and to supersede statutes containing shorter deadlines for perfecting an appeal. For example, under Family Code Sections 109.002(a) and

263.405(a) in an appeal from a final order in a suit in which termination of the parent-child relationship, the procedures for an accelerated appeal under the Texas Rules of Appellate Procedure apply. Similarly, under Health and Safety Code Section 81.191(b) [n]otice of appeal must be filed no later than the 10th day after the date on which the order is signed; *see also* Health & Safety C. 574.070(b) (notice must be filed not later than the 10th day after the date on which the order is signed); Elec. C. § 232.014 (establishing fast appellate track for election contests).

As originally proposed and published in the April 2008 Bar Journal, proposed Appellate Rule 28.1 made all accelerated appeals subject to a uniform appellate timetable prescribed by Rule 26.1(b) regardless of any statutory deadlines. (*see* 71 Tex. B. J. at 291, Misc. Docket No. 08-9017).

As finally promulgated, however, in response to public comment regarding certain statutes, such as Election Code Section 232.014, Appellate Rule 28.1(b) takes the opposite approach and makes it clear that statutory timetables for perfecting accelerated appeals as defined in Rule 28.1(a) govern over the deadlines prescribed in Rule 26.1(b). Although the text of Appellate Rule 28.1 warns that the time for perfecting an accelerated appeal may be provided by statute and the comment to the rule makes it clear that there are many statutes that contain statutory deadlines, as finally promulgated, neither one provides more specific guidance. In fact, the second sentence in the revised comment is arguably misleading because it states that Rule 28 provides a uniform appellate timetable, before the third sentence in the comment makes it clear that there are many statutory deadlines, which govern over deadlines provided in the rule.

For additional discussion of these issues *see* Ch. 153, *Accelerated Appeals* § 153.03.

Procedure for Permissive Interlocutory Appeals. Amended Appellate Rule 28.2 is designed to establish the procedure for taking a permissive interlocutory appeal under Texas Civil Practice and Remedies Code Sections 51.014 (d)-(e) enacted by the 77th Legislature in 2001 and amended by the 79th Legislature in 2005. To perfect such an appeal, unless the court of appeals extends the time to perfect the appeal, a party to the trial court proceeding must file a notice of accelerated appeal as provided in Rule 25.1 with the trial court clerk not later than the 20th day after the date the trial court signs a written order granting permission to appeal. Tex. R. App. P. 28.2. In other words, Appellate Rule 28.2 resolves important questions, which are not answered by the current statute, about what must be filed to perfect the appeal and whether the time to perfect appeal runs from the date of the underlying order that is the subject of the permissive accelerated appeal or from the date of the trial courts order permitting the appeal.

As originally published and as finally promulgated, Appellate Rule 28.2 provides the appeal is perfected by filing a notice of appeal and clearly chooses the written order granting permission to appeal as the order that triggers the commencement of the time for perfecting the appeal. Recent case law demonstrates that the courts of appeals needed guidance on these issues. *See e.g., Inliner Americas, Inc. v. Macomb Funding Group, L.L. C.*, 244 S.W.3d 427, 430 (Tex. App.--Houston [14th Dist.] 2007, pet. dismd, as moot) (time to perfect appeal runs from date of order being appealed not order permitting interlocutory appeal).

For a step-by-step explanation of the procedure, the current statute, and proposed Appellate Rule 28.2, *see* Ch. 153 *Accelerated Appeals* § 153.04.

Use of Precedent in Cases Transferred to Other Courts of Appeals. The precedential value of prior decisions of the courts of appeals in transferred cases has vexed appellate courts and practitioners for a number of years. This problem has been addressed and probably resolved by Appellate Rule 41.3. *See Am. Natl Ins. Co. v. Intl Bus., Machines Corp.*, 933 S.W.2d 685, 689 (Tex. App.--San Antonio 1996, writ denied) (Duncan J., concurring and dissenting opinion); *see also* Wade Glover, *Comment, Docket Equalization: Turning the Texas Court System Into a Crapshoot and How Your Case May Be Affected*, 40 Tex. Tech L. Rev. 295 (2008).

If a case is transferred for docket equalization or other purposes by the Texas Supreme Court under Government Code § 73.001 from Dallas to El Paso or to Eastland, but the Dallas Courts view of Texas law as reflected in its decisions differs from the precedent of the transferee courts, what precedent should the transferee courts apply in

deciding the appeal? Appellate Rule 41.3 answers this question. The transferee courts (El Paso or Eastland) must decide the case in accordance with the precedent of the transferor court under principles of stare decisis if the transferee courts decision otherwise would have been inconsistent with the precedent of the transferor court. Tex. R. App. P. 41.3.

Counsel should note that the Appellate Rules pragmatic recognition that different opinions about Texas law exist among the courts of appeals is not meant to suggest that Texas law is different in different courts of appeals districts as many have assumed or suggested. *See e.g.* Andrew T. Solomon, *A Simple Prescription for Texass Ailing Court System: Stronger Stare Decisis*, 37 *St. Marys L.J.* 417, 439 (2006).

Finally, the Texas Supreme Courts adoption of the doctrine of stare decisis as the standard for applying the transferor courts precedent normally should provide the transferee court with sufficient latitude in the decision-making process to avoid adherence to decisions that are plainly wrong. *See Gutierrez v. Collins*, 583 S.W.3d 312, 317 (Tex. 1979).

Suspending Enforcement of Trial Court Judgments. Appellate Rule 24.2 modifies the still cumbersome procedure for determining the amount a judgment debtor must post as security to suspend enforcement of a trial courts judgment. As a result of amendments made to the Civil Practice and Remedies Code in 2003, the amount of security needed to supersede a money judgment must equal the sum of compensatory damages awarded in the judgment, interest for the estimated duration of the appeal, and costs awarded in the judgment. *See* Tex. Civ. Prac. & Rem. Code § 52.006 (a)-(c); Tex. R. App. P. 24.2 (a)(1). In addition, the amount of security could not exceed the lesser of 50 percent of the judgment debtors net worth or \$25 million. Tex. Civ. Prac. & Rem. Code § 52.006(b); Tex. R. App. P. 24.2(a).

As reflected in *In re Smith*, 192 S.W.3d 564, 568 (Tex. 2006) (per curiam), these amendments spawned the development of postjudgment disputes concerning the judgment debtors net worth. In such cases, trial courts may have difficulty in complying with the requirement contained in Appellate Rule 24.2 of not only determining the judgment debtors net worth, but also stating with particularity the factual basis for that determination. For example, if the judgment debtor claims to have a very low or even a negative net worth but does not provide detailed information about assets and liabilities in the debtors affidavit of net worth, the judgment creditor will need to provide the court with the information, which normally will be ascertainable only after the judgment creditor conducts postjudgment discovery concerning the debtors assets and liabilities.

The Appellate Rule amendments provide a clearer procedural picture of how a postjudgment net worth controversy must be litigated to facilitate the presentation of evidence sufficient to enable the trial judge to perform the courts obligation. However, attempts to simplify the process and the trial judges responsibility to state the basis for the determination of the judgment debtors net worth were not successful.

For a complete discussion of the procedure, *see* Ch. 148 *Suspending Enforcement of the Judgment* § 148.04.

Revised Rules Concerning Availability of Oral Argument. After Justice Jane Bland (First Court) apprised the Advisory Committee of statistics showing a marked decline in the number of oral arguments in the courts of appeals for the last decade, Justice Bland, Justice Terry Jennings (First Court) and Justice David Gaultney (Beaumont) together with other members of the Appellate Rules Subcommittee took the lead in recommending amendments to Appellate Rules 38 and 39. As originally proposed, these revisions would have required oral submission unless the justices on the panel to which the case was assigned unanimously voted to deny argument as unnecessary for any of the reasons specified in Appellate Rule 39.1 ((a) the appeal is frivolous; (b) the dispositive issue or issues have been authoritatively decided; (c) the facts and legal arguments are adequately presented in the briefs and record; or (d) the decisional process would not be significantly aided by oral argument.).

To facilitate the determination, amended Appellate Rule 38.1 states that an appellate brief may include a statement explaining why oral argument, should or should not be permitted. Tex. R. App. P. 38.1(e) Any such statement must not exceed one page and should address how the courts decisional process would, or would not; be aided by oral argument

Tex. R. App. P. 38.1(e). Regardless of whether a brief includes a statement regarding oral argument, a request for oral argument must be noted on the front cover of the brief of a party requesting oral argument. See Tex. R. App. P. 39.7.

Ultimately, however, as a result of opposition to the unanimity requirement for denying argument from the Council of Chief Justices, Appellate Rule 39.1 was changed by providing for a decision to deny argument by the court instead of the panel and by omission of the proposed unanimity requirement, see Tex. R. App. P. 39.1; see also Joseph D. Hughes, *Brief Histories of Select Proposed Appellate Rule Changes*, 20 APP. ADVOC. 258 (Summer 2008).

Although the Court added a precatory comment to the final version of amended Rule 39, which provides that an appellate court must evaluate these reasons in view of the traditional importance of oral argument, it remains to be seen what impact these rule changes will have on the courts of appeals and on appellate practice.

For further discussion, see Ch., 150, *Appellate Proceedings in Court of Appeals* § 150.03.

Postjudgment Motion for Rehearing Practice in the Court of Appeals; Relationship to Petition for Review Practice.

Overview. Amendments to a number of appellate rules change the relationship between and the timetables for filing motions for rehearing and motions for en banc reconsideration in the courts of appeals and, as explained below, petitions for review in the Texas Supreme Court. See Tex. R. App. P. 49, 53. Companion changes were also made in order to clarify the duration of the court of appeals plenary power. Tex. R. App. P. 19. In addition, Appellate Rule 49.5 was amended to permit a party to file a further motion for rehearing when a court of appeals issues a different opinion in granting a motion for rehearing, regardless of whether the opinion is issued in connection with the overruling of a prior motion for rehearing. see Tex. R. App. P. 49.5(c); cmt. Finally, the requirement for a certificate of conference for motions for rehearing and for motions for en banc reconsideration was eliminated because it is presumed that non-movants will routinely oppose relief sought by such motions. See Tex. R. App. P. 10.1, 49.12, cmt.

Amendments to Appellate Rule 49. As originally published in the April 2008 Bar Journal, proposed Appellate Rule 49 in order to clarify that a motion for en banc reconsideration did not need to be filed simultaneously with a motion for panel rehearing made a clear distinction between motions for rehearing and motions for en banc reconsideration. (71 Tex. B.J. at 295). Unfortunately, this distinction was not carried forward in the final version of the Appellate Rule 49.

As under previous practice, motions for rehearing may be filed within 15 days after the court of appeals renders its judgment or order. After a motion for rehearing is decided, another motion for rehearing may be filed within 15 days after the court's action if the court: (1) modifies its judgment; (2) vacates its judgment and renders a new judgment; or (3) issues a different opinion. Tex. R. App. P. 49.5.

The final version of Appellate Rule 49.7 also provides that a motion for en banc reconsideration may be filed, as a separate motion, with or without filing a motion for rehearing, within 15 days after the court of appeals judgment or order is rendered. Tex. R. App. P. 49.7. Unfortunately, as finally promulgated, Appellate Rule 49.7 also states that when permitted a motion for en banc reconsideration must be filed within 15 days after the court of appeals denial of the party's last timely filed motion for rehearing or en banc reconsideration. Tex. R. App. P. 49.7.

In contrast, the original version of the proposed rule published in the April 2008 Bar Journal clearly authorized the filing of a motion for en banc reconsideration, without permission, within 15 days after the overruling of the same party's last timely filed motion for rehearing or en banc consideration. Proposed Tex. R. App. P. 49.6. (71 Tex. B.J. at 295).

Apparently influenced by the Courts most recent decision concerning en banc reconsideration (*City of San Antonio v. Hartman*, 201 S.W.3d 687, 670-671 (Tex. 2006), holding that a motion for en banc reconsideration is a type of motion for rehearing that is timely filed, as long as the court of appeals retains plenary power over its judgment)), the second half of the second sentence of the final version of the en banc reconsideration provision is much less clear than the

original version.

Based on the wording of the final version of the en banc reconsideration rule and the first sentence of the revised comment, a motion for en banc reconsideration may be filed as a separate motion or in combination with an ordinary motion or rehearing within 15 days of the court of appeals judgment or order. Tex. R. App. P. 49.7; cmt (Rule 49 is revised to treat a motion for en banc reconsideration as a motion for rehearing and to include procedures governing the filing of a motion for en banc reconsideration.)

But what happens if an ordinary motion for rehearing is filed without being coupled with a motion for en banc reconsideration? Under these circumstances, when is a motion for en banc reconsideration permitted? Under prior law one possibility was that no motion for en banc reconsideration could be filed after the court's decision of an ordinary motion for rehearing because of the prerequisites for filing a further motion for rehearing provided in Appellate Rule 49.5. While this analysis probably did not preclude en banc reconsideration if a majority of the en banc court ordered it with or without motion, the right to en banc reconsideration following a tardy motion was at least somewhat more problematic. But in *Yzaquirre v. Gonzalez*, 989 S.W.2d 111, 113 (Tex. App.--San Antonio 1999, pet denied) the San Antonio Court interpreted what has now become the next to the last sentence of Appellate Rule 49.7 to authorize a motion for en banc reconsideration at any time within the period of plenary power so that [l]itigants may therefore wait until the panel declines to revise its opinion and judgment before moving for en banc review. Unfortunately, the en banc court's opinion in *Yzaquirre* does not attempt to reconcile Rule 49.5 with Rule 49.7.

As finally promulgated, Appellate Rule 49.7's when permitted restriction is not very clear, but it most likely refers to the prerequisites set forth in Appellate Rule 49.5. Under this analysis, unless the next to the last sentence of Rule 49.7 trumps the additional when permitted language, counsel must/should combine a motion for en banc reconsideration with an ordinary motion for rehearing or file a motion for en banc reconsideration without filing an ordinary motion for rehearing, within the initial 15 day period. Otherwise, the motion for en banc consideration will be untimely and will not extend the time for filing a petition for review.

Of course, it is possible that the when permitted restriction has nothing to do with the requirements of Appellate Rule 49.5. For example, the language could simply be regarded as an oblique reference to the requirements for en banc consideration prescribed in Appellate Rule 41.2(c).

Companion amendments are proposed for Appellate Rule 19.1(b) which had implied that a motion for en banc reconsideration is a type of motion for rehearing. See Tex. R. App. P. 19.1 (b) (court of appeals plenary power over its judgment expires 30 days after the court overrules all timely filed motions for rehearing or en banc reconsideration, and all timely filed motions to extend time to file such motion).

For a detailed discussion of these amendments see Ch. 150, *Appellate Proceedings in Court of Appeals* §§ 150.106, 150.108.

Timetable for Filing Petitions for Review in Texas Supreme Court. Under the 2008 amendments to Appellate Rule 53.7, the Texas Supreme Court may shorten the normal deadline for filing a petition for review with the Texas Supreme Court. Tex. R. App. P. 53.7(a). In addition under new Appellate Rule 53.7, the normal deadlines for filing a petition for review is 45 days following: (1) the date the court of appeals rendered judgment, if no motion for rehearing or en banc reconsideration is timely filed; or (2) the date of the court of appeals last ruling on all timely filed motions for rehearing or timely filed motions or en banc reconsideration. Tex. R. App. P. 53.7(a).

Although justices of the courts of appeals have the right to grant en banc reconsideration, with or without a motion while the court of appeals has plenary power as provided in Appellate Rule 19 [Tex. R. App. P. 49.7; see Tex. R. App. P. 19 amended effective 9/1/08], as a result of the 2008 amendments to Appellate Rule 53.7, the date for filing a petition for review runs from the date of the court of appeals last ruling on all timely filed motions for rehearing and all timely filed motions for en banc reconsideration Tex. R. App. P. 53.7(a). This means that if a further motion for rehearing or

en banc reconsideration is not permitted by Appellate Rule 49.7, the date for filing a petition for review should not be calculated from the date of the court of appeals ruling on the tardy motion.

For additional discussion of petition for review practice in the Texas Supreme Court, *see* Ch. 151, *Appellate Proceedings in Supreme Court* § 151.04.

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Professor Dorsaneo served as the Reporter to the Combined Committee appointed by the Texas Supreme Court, the Court of Criminal Appeals and the Texas Legislature to draft the Texas Rules of Appellate Procedure and for the last 20 years he has served as the Chairman of the Appellate Rules Subcommittee of the Advisory Committee to the Texas Supreme Court. He is Board certified by the Texas Board of Legal Specialization in Civil Appellate Law and maintains an active appellate practice. He is also a board member of the Appellate Judges' Education Institute, a member of the Institute's Education Committee and a member of the American Law Institute.

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Susan M. Brazas on Novell v. Migliaccio

2008 Emerging Issues 3082

Susan M. Brazas on Novell v. Migliaccio, 2008 WI 44, 749 N.W.2d 544 (2008).

By Susan Brazas

November 13, 2008

SUMMARY: In *Novell v. Migliaccio*, 2008 WI 44, 749 N.W.2d 544 (2008), the Wisconsin Supreme Court considered the question of whether reasonable reliance is an element of a cause of action for statutory misrepresentation in the sale of real estate under Wis. Stat. sec. 100.18. This Emerging Issues Analysis explores the Courts review of the statute as applied to a home sale where the buyer claimed misrepresentation as to water leaking in a basement.

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ARTICLE: Seller Beware: Reasonable Reliance Not Required

In the May 2008 court opinion of *Novell v. Migliaccio*, 2008 WI 44, 749 N.W.2d 544 (2008), the Wisconsin Supreme Court addressed the statutory cause of action for fraudulent misrepresentation under Wis. Stat. sec. 100.18. The Supreme Court affirmed the Appellate Courts reversal of summary judgment as to the one statutory count based on sec. 100.18, and affirmed the trial courts granting of summary judgment as to all remaining counts.

The key holding of the *Novell* Courts opinion is that reasonable reliance is not a required element for a cause of action for fraudulent misrepresentation under Wis. Stat. sec. 100.18. What made this result surprising in this case is that the buyer was informed by a home inspector, in advance of closing, that a check of the foundation of the home was advisable in order to determine whether water seepage was a problem. In fact, the home inspector voiced many concerns to the buyers about the marginal condition of the basement walls, including bowing and cracking. However, on the disclosure form, the sellers had answered no to all questions inquiring about knowledge of water leakage. They also told the home inspector that they had not painted cracks in the walls. Foundation experts later testified that it appeared that the home had been experiencing water leaking for at least three years prior to the sale, and that the cracks in the basement walls had been painted. It was also noted that the buyer and the sellers were friends, and that the buyer asserted that this fact, along with the sellers assurance that they had never had water in the basement and had not painted cracks in the walls, were factors that led the buyer not to seek further inspection by a foundation specialist.

Analysis of the Statutory Cause of Action. The Court's analysis focused on three factors: (1) the plain language of the statute, sec. 100.18; (2) the purpose of sec. 100.18; and (3) case law precedent. First, the *Novell* court found that neither reasonable nor reliance (nor a similar term) is found anywhere within the language of the statute and concluded that the statute itself did not include reasonable reliance as an element. Second, the Court noted that the purpose of the

statute was to prohibit and deter sellers from making false representations, and concluded that requiring a plaintiff/buyer to prove that he or she reasonably relied on the representation would not serve the purpose of the statute. Third, the Court cited to other cases interpreting sec. 100.18 that held that reasonable reliance was not a required element of a claim under that statute.

The most recent prior case addressing a section 100.18 action for a leaky basement was discussed at length in the *Novell* opinion. In *Malzewski v. Rapkin*, 2006 WI App 183, 296, Wis. 2d 98, 723 N.W.2d 156, a similar fact scenario existed, and the court held, as in *Novell*, that reasonable reliance is a required element for numerous other theories of recovery, but not for a false advertising claim under sect. 100.18. The later decision in *K&S Tool & Die Corp. v. Perfection Machinery Sales, Inc.*, 2007 WI 70, 301 Wis. 2d 109, 732 N.W.2d 792 confirmed this holding.

Practical Implications. Despite *Novell*, attorneys must be prepared to argue the reasonableness or unreasonableness of a buyers reliance on the sellers representations. Even though the *Novell* Courts key--and repeated--holding was that reasonable reliance is not a required element of a section 100.18 claim, still the Court found that a genuine issue of material fact existed as to the unreasonableness of the buyers reliance, so as to preclude summary judgment. As the Court framed it, the issue was whether the sellers representation that the basement did not leak was a material inducement causing the purchaser's loss. Thus, either party must be prepared to marshal and present evidence as to the reasonableness of the buyers reliance. Related facts, such as warnings or definitive findings of a home inspection, should be explored and pleaded.

Impact on Pleadings. This opinion illustrates the importance, in pleadings and in motion practice, of establishing the element of causation for a claim of fraudulent representation. Note that although some courts refer to section 100.18 claims as false advertising or fraudulent advertising claims, it is, in fact, untrue, deceptive, or misleading representations that are actionable; advertising need not be involved. *Bonn v. Haubrich*, 123 Wis. 2d 168, 366 N.W.2d 503 (Ct. App. 1985). Reasonable attorneys fees are awarded to the prevailing party. Wis. Stat. sec. 100.18(11)(b).

The *Novell* Court confirmed that unreasonable reliance could be a defense to a sec. 100.18 claim, and that unreasonable reliance could be considered as a factor weighing against causation. Nonetheless, the *Novell* Court stood firmly by the established case precedent that it is causation, and not reasonable reliance, that is the third requisite element of this statutory cause of action. In other words, all that need be established is reliance, rather than reasonable reliance, to satisfy this third element.

Impact on Briefing and Argument. It is critical to consider the ultimate holding of a case opinion, and not just selected footnotes or dicta, in citing to case law as support for ones position. This was the lesson to the defense counsel in *Novell*, whose reading of certain case precedent (from *Malzewski*) was described as actually supporting the position of the opposing party rather than the defense. Thus, careful consideration should be given to citing to case law that has, as its ultimate holding, a position contrary to the desired language contained elsewhere in the opinion. The attorney who draws the courts attention to such cases should present argument as to how and why the two views within the opinion can and should be reconciled. **For additional discussion of misrepresentation see:** Powell on Real Property Ch. 81, Contracts of Sale The Law of Vendor and Purchaser; Purchase and Sale of Real Property ch. 40 Caveat Emptor, Implied Warranties and Warranties for New Construction.

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Susan M. Brazas on Busch v. Mison

2008 Emerging Issues 3083

Susan M. Brazas on Busch v. Mison, 2008 Ill. App. LEXIS 909 (Sept. 15, 2008)

By Susan M. Brazas

November 13, 2008

SUMMARY: The 1st Dist. App. Ct. considered a challenge to the sufficiency of a single rejection of an arbitration award for two cases commenced in separate court divisions and under separate case numbers but consolidated for the purposes of discovery and trial. In *Busch v. Mison*, the First District explores the potential trap for the unwary, even where pains have been taken to timely file the rejection within the 30-day limit of Supreme Court Rule 93.

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ARTICLE: ILLINOIS FIRST DISTRICT HOLDS THAT A SINGLE REJECTION OF ARBITRATION AWARD IS SUFFICIENT TO REJECT THE AWARD AS TO BOTH CASES CONSOLIDATED FOR DISCOVERY AND FOR TRIAL.

In *Busch v. Mison*, 2008 Ill. App. LEXIS 909 (Sept. 15, 2008), the First District Appellate Court of Illinois addressed the applicability of Supreme Court Rule 93(a) to an arbitration award of two separate cases consolidated by the circuit court prior to the arbitration hearing for purposes of discovery and trial. In affirming the trial court in this interlocutory appeal under Illinois Supreme Court Rule 308, the First District answered affirmatively the certified question of whether the single rejection of the arbitration award served as a rejection of the award as to both cases which had been consolidated and presented at a single arbitration hearing.

This case arose from a two-car accident in which Busch was the driver, and Kushma his passenger, in one vehicle, and Mison was the driver of the other vehicle. Busch and Kuschma brought a personal injury action against Mison, alleging injuries due to his negligence in the automobile accident. Mison filed a separate personal injury lawsuit against Busch for his injuries sustained in the same accident. The circuit court consolidated the two suits, stating that consolidation was for purposes of discovery and trial. One arbitration hearing ensued, and one arbitration award was entered.

Within the 30-day time limit of Illinois Supreme Court Rule 93(a), Mison filed a rejection of the award. Several motions and response briefs were then filed, requesting the circuit court to rule on whether the rejection applied to both cases, or only to the one municipal-court-division case filed by Busch. The Cook County Circuit Court held that Rule 93(a) did not require separate notices of rejection of award, but certified a question of law on the issue pursuant to Illinois Supreme Court Rule 308.

The First District Court of Appeals held that a single notice of rejection that covers any part of the arbitration award is sufficient under Rule 93(a) when cases have been consolidated for purposes of discovery and trial. As part of its reasoning, the First District concluded that such a consolidation was intended to bring the entire case to a resolution, and was distinguishable from a consolidation merely for convenience. The Court also interpreted Supreme Court Rule 92(c) to mean that any rejection of any part of an arbitration award applies to the entire award.

Practical Implications. Counsel cannot assume that consolidation will be viewed by as having been done in order to bring the entire case to a single resolution unless the court order of consolidation specifically indicates that the cases are consolidated for the purposes of discovery *and* trial. Therefore, counsel will be well advised to take steps to have such language included in an order entered *prior to* the arbitration hearing. Caution is also required because it is uncertain whether the *Busch* ruling will be considered by the Supreme Court, or whether other courts will limit it to its facts.

Strategic Considerations. Among the factors to be considered in moving for, or objecting to, consolidation of cases is whether it will be strategically advantageous to one's client to have the separate cases heard together. If, for example, having both cases heard at once would likely result in one's own claim being defeated, separate proceedings should be undertaken. Likewise, consolidation should be avoided if the nature of the relief requested is so different in the two cases that inequities or inconsistent outcomes would likely result.

Counsel should consider carefully the strategic decision of whether to reject an arbitration award. Rule 93 contains no provision for the withdrawal of a notice of rejection and, therefore, it will not be allowed. *Stemple v. Pickerill*, 377 Ill. App. 3d 788 (2d Dist. 2007). This is because if one party files a notice of rejection, any other party wishing to reject the award may rely on that notice, and need not file its own notice of rejection. *Id.* Only upon a party's petition (and not on the court's own motion) to bar a party from rejecting the arbitration award under Supreme Court Rule 91(b) may the court exercise its discretion to so bar a party. *Walker v. Lewis*, 352 Ill. App. 3d 952, 961 (1st Dist. 2004).

Take Caution When Filing Notice of Rejection of Arbitration Award. The *Busch* opinion -- especially the special concurrence -- suggests that the language chosen by the attorney drafting the rejection of the arbitration award is critical. This language should be clear and should specify exactly the parts of the arbitration award that are being rejected. Quoting from the award of the arbitrators will be the safest course. If a party wishes to reject the *entire* award, the rejection should state that explicitly.

Among the arguments on appeal advanced by *Busch* was that *Mison's* rejection should be limited to only the municipal court division case, because *Mison* listed only that case number in the caption of his notice of rejection. To avoid this possible basis for limitation on the notice of rejection of award, and to err on the side of caution, counsel should include any and all case numbers -- and the language consolidated with -- in the caption of the notice of rejection of award.

Above all, counsel should exercise great care to calendar the due date for filing a rejection of the arbitration award. By the express terms of Rule 93(a), the a rejection of the award may be filed only within 30 days after the filing of an award with the clerk of the court, and upon payment to the clerk of the court the sum of \$200 for awards of \$30,000 or less or \$500 for awards greater than \$30,000. The Rule contains no provision for discretion or for extensions of time beyond the 30 days.

Counsel should also err on the side of caution as to the fee paid, if the awards taken together may be viewed as exceeding \$30,000. Payment of the lesser fee could be construed as meeting the requirements for rejecting only one aspect of the award or, worse yet, could be construed as a failure timely to file. Counsel cannot rely upon the assurance of a deputy court clerk as to the correct amount of the fee, as the mandatory fee provisions within Rule 93(a) will be strictly construed. *Liebovich Steel & Aluminum Co. v. Advance Iron Works, Inc.*, 353 Ill. App. 3d 311, 314 (2d Dist. 2004). Further, the requisite fee must be paid within the 30-day period, or the notice of rejection will be stricken. *Killoren v. Racich*, 260 Ill. App. 3d 197, 198, 632 N.E.2d 621 (1994). Thus, counsel should allow plenty of time and

give ample consideration to all details of the notice of rejection.

For a discussion of arbitration see: Illinois Civil Procedure Ch. 11 MANDATORY ARBITRATIONS, SETTLEMENTS, DISMISSALS, AND DEFAULTS. *See generally* Illinois Civil Procedure LexisNexis Forms.

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Susan M. Brazas on Rogers v. Tyson Foods, Inc.

2008 Emerging Issues 3084

Susan M. Brazas on Rogers v. Tyson Foods, Inc., 2008 Ill. App. LEXIS 915 (Aug. 11, 2008).

By Susan Brazas

November 13, 2008

SUMMARY: Knowing when and how to position a case for possible interlocutory appeal is an important strategic consideration. The Fifth District addressed the issue of the appellate courts jurisdiction to review the denial of a motion for summary judgment based on the federal preemption doctrine in *Rogers v. Tyson Foods*. Susan Brazas explores this decision and suggests some alternative strategies for obtaining prompt interlocutory appellate review.

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ARTICLE: Fifth District Finds It Lacks Jurisdiction to Review Denial of Motion for Summary Judgment Asserting Federal Preemption

In *Rogers v. Tyson Foods*, 2008 Ill. App. LEXIS 915 (Aug. 11, 2008),

the Fifth District Appellate Court addressed its jurisdiction to consider the trial courts denial of a motion for summary judgment which asserted the federal preemption doctrine. The short opinion in *Rogers* concludes with the abrupt holding that the Appellate Court is without jurisdiction to consider the federal preemption argument which the defendant had raised in its motion for summary judgment in the trial court because that motion had been denied and the denial was not a final judgment subject to interlocutory appeal as of right. A final judgment or decision is generally a prerequisite to appellate jurisdiction. *Arangold Corp. v. Zehnder*, 187 Ill. 2d 341, 359 (1999).

Practical Implications. Although the *Rogers* court did not mention it, there is an exception to the general rule against granting interlocutory appeals of right for the denial of summary judgment motions: where the parties filed cross-motions for summary judgment, and one motion was granted and the other denied. *Arangold Corp. v. Zehnder*, 187 Ill. 2d 341, 359 (1999). However, the opposing motions for summary judgment must be as to the same claim or issue for this principle of review to apply. *Id.* In such a situation, the resulting order is final and appealable because it entirely disposes of the litigation. However, the test for a judgment being appealable is that the particular judgment appealed from, *if affirmed*, would leave only the execution of the judgment. *Flores v. Dugan*, 91 Ill. 2d 108, 112 435 N.E.2d 480 (1982). In contrast, in the *Rogers* case, if the denial of the defendants motion for summary judgment were *affirmed*, the litigation would proceed.

The other factor that identifies an appealable order is the magic language, under Supreme Court Rule 304, that it as

a final and appealable order. See *Berry v. Chade Fashions, Inc.*, 890 N.E.2d 1239, 1243 (1st Dist. 2008). In the event that counsel is not clear on whether an order will be viewed as appealable, this or similar language should be included in the order at the circuit court. This explicit language can be helpful because it is established law that a judgment that fails to dispose of all claims is not final and is subject to revision before entry of a final judgment that does adjudicate all the claims and liabilities of the parties. *Towns v. Yellow Cab Co.*, 73 Ill. 2d 113, 120, 382 N.E.2d 1217, 1220 (1978).

Standards for Pleading. The attorney considering strategy for dispositive motions should consider the limitations of a motion for summary judgment in the event that it is denied. Once the case is properly postured, a motion to dismiss or motion for judgment on the pleadings may offer a more advantageous resolution of key issues such as preemption. The dilemma of the defendant in *Rogers* is understandable; its position was that the case should not be before the state court at all, but the appellate court found itself without jurisdiction to hear that argument. A large number of federal cases address preemption and summary judgment and counsel would be advised to glean persuasive authority from those sources.

Implications for Argument and Briefing. Counsel can also stress the overarching principles of equity and fairness in arguing for the appellate court to exercise jurisdiction over an interlocutory appeal. For example, a basic tenet of preemption is that federal law does not preempt state law unless Congress intended that it should. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608 (1992). Counsel should peruse not only the explicit language of the federal statute, but also the statute's structure and purpose, and examine whether the state law is in actual conflict with federal law. *Garcia v. Volvo Europa Truck, N.V.*, 1996 U.S. Dist. LEXIS 9587, 6-7 (N.D. Ill. June 20, 1996).

Strategic Considerations. The *Rogers* court identified the following distinguishing aspects of cases in which preemption arguments were found to be within the appellate courts' jurisdiction: (1) where a motion to stay proceedings was granted or denied and (2) where a motion for preliminary injunction was granted or denied. The *Rogers* court thus hinted at the existence of two windows of opportunity for litigants to bring themselves within the appellate courts' jurisdiction: via a motion to stay or a motion for preliminary injunction. Thus, attorneys can consider availing themselves of either of these mechanisms as a way to have an important issue such as preemption -- which provides a complete affirmative defense -- considered early in the case. The advantage of these two approaches over a motion for summary judgment is that whether the motion is granted or denied is irrelevant: in either event, the appellate court has jurisdiction because motions of these two types fit squarely within the bases for jurisdiction set forth within Rule 307(a).

For further discussion of appeals from grants or denials of motions, see:

Illinois Civil Procedure Ch. 15, Appellate Review; Illinois Litigation Forms and Checklists C109.02, Appealing Non-Final Order.

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Dual Partnership Citizenship: Vairo on Swiger v. Allegheny Energy, Inc.

2008 Emerging Issues 3052

Dual Partnership Citizenship: Vairo on Swiger v. Allegheny Energy, Inc.

By Georgene Vairo

October 21, 2008

SUMMARY: When one party to a suit is a partnership with a partner who has dual U.S./foreign citizenship and is permanently living abroad, can there ever be diversity jurisdiction? In *Swiger v. Allegheny Energy, Inc.*, the Third Circuit Court of Appeals addresses this question. This Emerging Issues Analysis, by Moores Federal Practice Editorial Board member Georgene Vairo, explores the difficult jurisdictional issues raised in the case.

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ARTICLE: Georgene Vairo on *Swiger v. Allegheny Energy, Inc.*

Swiger v. Allegheny Energy, Inc., 540 F.3d 179, 2008 U.S. App. LEXIS 18139 (3d Cir. Aug. 25, 2008), involves an issue that is becoming increasingly important in our globalized world: how dual citizenship affects diversity jurisdiction. Although at first glance *Swiger* seems simply to affirm the general rule that the presence of a stateless citizen destroys complete diversity, it is an important case because it deals with the citizenship of a dual U.S./foreign citizen as well. The Third Circuit held that there is no diversity jurisdiction if one of the parties is a partnership with a partner who is a dual United States and United Kingdom citizen permanently living abroad.

Facts and Procedural Background. A citizen of West Virginia sued several entities in federal court on several state-law claims, including abuse of process, wrongful use of civil proceedings, invasion of privacy, and wrongful discharge. One of the defendants, a law firm, was a partnership, and one of the members of that partnership was a dual U.S. and United Kingdom citizen domiciled in the United Kingdom.

The law firm, joined by the other defendants, moved to dismiss the complaint on the ground that complete diversity between the parties was lacking. At the time of the filing of the lawsuit, one of the law firms partners was a dual United States and United Kingdom citizen domiciled in the United Kingdom. The district court dismissed the case for lack of jurisdiction, concluding that the citizenship of all of the members of an unincorporated entity such as a general or limited partnership count when determining whether diversity jurisdiction exists, and that a United States citizen who is not domiciled in one of the United States cannot invoke diversity jurisdiction. The district court dismissed the case for lack of jurisdiction [*Swiger v. Allegheny Energy, Inc.*, 2007 U.S. Dist. LEXIS 8610, at *2S*3 (E.D. Pa. Feb. 7, 2007)], and the Third Circuit affirmed.

Legal Basics. The diversity statute provides for jurisdiction over actions between: (1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state . . . as plaintiff and citizens of a State or of different States." [28 U.S.C. § 1332(a)]. A natural person is deemed to be a citizen of the state where she is domiciled. [See *Gilbert v. David*, 235 U.S. 561, 569, 35 S. Ct. 164, 59 L. Ed. 360 (1915).] Congress has expressly provided that the citizenship of a corporation is both (1) of the state or states in which it is incorporated and (2) of the state in which it has its principal place of business. [See 28 U.S.C. § 1332(c)(1).]

Quoting **Moore's Federal Practice** [15 *Moore's Federal Practice* § 102.57[1] (3d ed. 2006) (a partnership is not a 'citizen' of any state within the meaning of the statutes regulating jurisdiction)], and *Carden v. Arkoma Assoc.*, 494 U.S. 185, 187 S.Ct. 1192, 110 S. Ct. 1015, 108 L. Ed. 2d 157 (1990) (holding that a limited partnership is not a citizen under the jurisdictional statute), the Third Circuit stated that a partnership and other unincorporated associations, unlike individuals or corporations, would not be considered a citizen" as that term is used in the diversity statute.

Because a partnership is not a citizen for diversity purposes, the citizenship of all of the partners determines the citizenship of a partnership. [See *Carden v. Arkoma Assoc.*, 494 U.S. 185, 187 S.Ct. 1192, 110 S. Ct. 1015, 108 L. Ed. 2d 157 (1990)]. Thus, to satisfy the complete diversity requirement, all of the partners must be diverse from all of the parties on the opposing side [*Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 84 n.1, 126 S. Ct. 606, 163 L. Ed. 2d 415 (2006)].

Partner Domiciled Abroad Is Not Citizen of State. The Third Circuit noted the special problem presented by partnerships that have American partners living abroad. It stated the axiom that in order to be a citizen of a State within the meaning of the diversity statute, a natural person must be both a citizen of the United States and be a domiciliary of a state. [See *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 828, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1988).] An American citizen domiciled abroad, although a citizen of the United States, cannot simultaneously be domiciled in a state. Such a person is considered stateless" for purposes of diversity jurisdiction, and therefore, American citizens living abroad cannot be sued (or sue) in federal court based on diversity jurisdiction.

Stateless" Partner Destroys Diversity Jurisdiction. Citing **Moore's** again, the Third Circuit agreed with its sister circuits that the principles outlined above preclude diversity jurisdiction over a suit in which a partner of a partnership that is a party is a U.S. citizen domiciled abroad [see 15 *Moore's Federal Practice* § 102.37[16] (If a member of a partnership is a United States citizen permanently living abroad, there can be no diversity of jurisdiction because the member is neither a citizen of a state nor a citizen of a foreign country)]; *Herrick Co. v. SCS Communs., Inc.*, 251 F.3d 315, 322 (2d Cir. 2001); *accord ISI Int'l, Inc. v. Borden Ladner Gervais LLP*, 316 F.3d 731, 733 (7th Cir. 2003); *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 69 (2d Cir. 1990)].

Citizenship of Other Partners Does Not Preserve Diversity. The Third Circuit rejected the plaintiffs argument that the court should focus on the citizenship of the partners who *are* citizens of states, ignoring the statelessness" of the partner living abroad. The plaintiff reasoned that the partnership should be considered a citizen of all the states of which one of its partners is a citizen, rendering the partnership not stateless." However, the Third Circuit found this argument to be in conflict with the Supreme Courts explicit holding that for purposes of diversity jurisdiction, a partnerships citizenship is determined by reference to *all* partners, and *all* partners must be diverse from *all* parties on the opposing side" [see *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 84 n. 1, 126 S. Ct. 606, 163 L. Ed. 2d 415 (2006)]. Because the law firm had a stateless partner, not all partners of the partnership were diverse from all parties on the opposing side. According to the Third Circuit, the district court had correctly held that it lacked diversity jurisdiction over the action.

Comment. It is true that an individual can be domiciled in only one state or country at a time, as opposed to having one or more residences. However, the Third Circuit pushed the envelope a bit. Relying on *Newman-Green*, the Third Circuit stated that United States citizens domiciled abroad are neither citizens of a State,' see 28 U.S.C. § 1332(a)(1), nor citizens or subjects of a foreign state, see 28 U.S.C. § 1332(a)(2). Unlike this case, *Newman-Green* did not involve a dual United States/Foreign state party. Curiously, the plaintiff seemed to accept the district courts characterization of the partner as a stateless" citizen. The plaintiff argued that the district court erred in holding that it lacked diversity

jurisdiction on the theory that a single partner who is not a citizen of a state would not render the entire partnership stateless for diversity purposes. However, the plaintiff assume[d]" that the partner was in fact stateless.

Whether a federal district court has diversity jurisdiction over a lawsuit involving a partnership that has among its partners an American citizen domiciled in a foreign state was an issue of first impression for the Third Circuit. The plaintiffs assumption, however, made the Third Circuits job easy. All courts that have addressed the issue of whether a federal district court has diversity jurisdiction over a lawsuit involving a partnership that has among its partners an American citizen domiciled in a foreign state have held that such an entity does not qualify for diversity jurisdiction. However, the plaintiff did make the argument that the partners dual citizenship in the United Kingdom created alienage jurisdiction. The Third Circuit next turned to that argument.

No Alienage Jurisdiction for Dual Citizens. The Third Circuit also rejected the plaintiffs argument that the foreign citizenship of the stateless" partner should be considered for purposes of establishing diversity. If the foreign citizenship were considered, there would be diversity, because the plaintiff was a citizen of West Virginia and the partner was a citizen of the United Kingdom [see 28 U.S.C. § 1332(a)(2)]. However, while this case was pending on appeal, the Third Circuit held in another case that for purposes of diversity jurisdiction, only the American nationality of a dual national is recognized for diversity purposes. [*Frett-Smith v. Vanterpool*, 511 F.3d 396, 400 (3d Cir. 2008)]. Thus, the plaintiff could not rely on alienage jurisdiction either.

Comment. The issue of dual citizenship was also a case of first impression for the Third Circuit. As in the stateless citizen issue, the Third Circuit agreed with the growing trend in its sister circuits that have been holding that for a dual national citizen, only the American nationality is relevant for purposes of diversity jurisdiction. These courts argue that diversity jurisdiction may be properly invoked only when a dual citizen's domicile, and thus his citizenship, is in a state diverse from that of adverse parties. [See *Coury v. Prot*, 85 F.3d 244, 250 (5th Cir. 1996) (citing *Action S.A. v. Marc Rich & Co.*, 951 F.2d 504 (2d Cir. 1991); *Sadat v. Mertes*, 615 F.2d 1176 (7th Cir. 1980); *Mutuelles Unies v. Kroll & Linstrom*, 957 F.2d 707 (9th Cir. 1992); *Las Vistas Villas, S.A. v. Petersen*, 778 F. Supp. 1202 (D.C. Fla. 1991), *aff'd*, 13 F.3d 409 (11th Cir. 1994).] The only way that an American citizen, domiciled abroad, can sue under § 1332 is under § 1332(a)(1), and only if that national is a citizen, i.e., domiciled, in one of the 50 U.S. states. This emerging view is based on the rationale that a dual citizen should not be allowed to invoke alienage jurisdiction under § 1332(a)(2) because that would give him an advantage not enjoyed by native-born American citizens. [T]he major purpose of alienage jurisdiction is to promote international relations by assuring other countries that litigation involving their nationals will be treated at the national level, and alienage jurisdiction is intended to allow foreign subjects to avoid real or perceived bias in the state courts--a justification that should not be available to the dual citizen who is an American." [*Coury v. Prot*, 85 F.3d 244, 250 (5th Cir. 1996) (quoting from 1 Moore's Federal Practice (2d ed.) § 0.75[4]).]

Concurrence: Stateless" Partners Should Be Treated as Jurisdictional Zeroes." Circuit Judge McKee concurred. He agreed that the authority on which the majority relied strongly suggests the majority's analysis, but he argued that the case law does not necessarily compel the result reached by the court. Applying the *Carden* rule concerning the citizenship of partnerships and the stateless" citizen doctrine together resulted in a ruling that was inconsistent with both reality and common sense. It would be more logical, he pointed out, to treat a stateless" partner in this situation as a jurisdictional zero" rather than, in essence, as a citizen of the plaintiffs state. The purposes of diversity jurisdiction would be fully served as long as none of the partners was a citizen of the plaintiffs home state.

Judge McKee pointed out that as business ventures and legal relationships become more global, courts will be faced with stateless" partners more often. He expressed hope that Congress will clarify the meaning of Section 1332(a), making it clear whether diversity jurisdiction extends to these circumstances. Otherwise, he warned, persons suing large partnerships will increasingly be barred from bringing their claims in federal court.

Comment. Both the majority and the concurring judge are correct to look at the purpose of the diversity statute. It is likely that the well-known bias against the assertion of diversity jurisdiction supports the majority view. However, just as Congress decided to expand diversity jurisdiction in the Class Action Fairness Act [see 28 U.S.C. § 1332(d)],

Congress ought to take up Judge McKee's suggestion to consider amending § 1332 to clarify how dual citizens and partnerships with stateless citizens ought to be treated. Indeed it is time for Congress to take up the Supreme Court's hint in *Carden* to amend the statute (as it did in the Class Action Fairness Act which treats unincorporated associations as corporations) to conform with modern business realities.

Moreover, Judge McKee is likely correct that the majority stretched two somewhat dissimilar lines of Supreme Court precedent, i.e., the stateless citizen line and the unincorporated association line, to reach an illogical conclusion. Despite its apparent relevance to this jurisdictional dispute, for example, Judge McKee noted that *Carden* does not definitively answer the specific question here. In *Carden*, an Arizona limited partnership brought a diversity action against two Louisiana citizens. The partnership asserted that complete diversity was satisfied because none of its *general* partners shared the same citizenship as any adverse party. The citizenship of its *limited* partners, it argued, was irrelevant to the presence of diversity jurisdiction. The Court rejected that position and held that complete diversity was lacking because one of the limited partners was, like the defendants, a citizen of Louisiana, thus precluding complete diversity. Similarly, in *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 124 S. Ct. 1920, 158 L. Ed. 2d 866 (2004), because aliens were on both sides of the case, the requisite diversity was therefore lacking. Neither case directly addressed the specific jurisdictional question before the Third Circuit: whether diversity jurisdiction exists when no party on either side share a common citizenship. In other words, why is complete diversity lacking when the plaintiff is a citizen of one state and no defendant is a citizen of that state.

References. 15 *Moore's Federal Practice* (3d Ed.) §§ 102.37[16], 102.57[1], 102.70.

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Can a State Remove Under CAFA?: Vairo on LA ex rel. Caldwell v. Allstate Ins. Co

2008 Emerging Issues 3053

Can a State Remove Under CAFA?: Vairo on Louisiana ex rel. Caldwell v. Allstate Ins. Co

By Georgene Vairo

October 21, 2008

SUMMARY: If a state sues as *parens patriae* on behalf of its citizens, rather than as the representative of a class, may the defendant remove under the Class Action Fairness Act? In *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, the Fifth Circuit Court of Appeals addresses this question. This Emerging Issues Analysis evaluates the disparate approaches taken in the majority and dissenting opinions.

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ARTICLE: *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 2008 U.S. App. LEXIS 15275 (5th Cir. July 18, 2008), picks up where another recent Fifth Circuit case left off. In *Louisiana v. AAA Ins. (In re Katrina Canal Litig. Breaches)*, 524 F.3d 700, 2008 U.S. App. LEXIS 7933 (5th Cir. Apr. 11, 2008), the Fifth Circuit dealt with an issue of first impression under the Class Action Fairness Act (CAFA): may a defendant remove under CAFA if the state is the named plaintiff in a class action case? The court held that the State of Louisiana was not entitled to remand of a class action suit, because the state had joined a class of citizen plaintiffs not entitled to any immunity that might otherwise protect the state from removal. In *Allstate*, the second case, the Fifth Circuit decided another issue of first impression: if a state sues as *parens patriae* on behalf of its citizens, rather than as the representative of a class, may the defendant remove under CAFA? The Fifth Circuit held that the case was properly removed under CAFA.

Facts and Procedural Background of Katrina Litigation: In the wake of Hurricane Katrina, Louisiana enacted the Road Home Program. In exchange for a partial assignment of the homeowners' claims against their insurers, the State of Louisiana advanced money to Louisiana homeowners to reconstruct. As the partial assignee of these claims, Louisiana sued over 200 insurance companies for breach of contract in Louisiana state court, adding a class of Louisiana citizens who had applied for funds from the program as plaintiffs. The defendants removed the case to federal court on the ground of diversity under the Class Action Fairness Act (CAFA) [see 28 U.S.C. §§ 1332(d)(2) (CAFA diversity requirements), 1453(b) (removal under CAFA)].

Louisiana argued that CAFA did not apply, and that even if it did apply by its terms, it could not abrogate sovereign immunity from federal process. Alternatively, it argued that Congress did not clearly abrogate sovereign immunity from federal process in CAFA. The district court denied Louisiana's motion to remand, and the Fifth Circuit affirmed. Although the Fifth Circuit agreed with Louisiana that a state was not a citizen for diversity purposes, even under CAFA, Louisiana sought relief not only for itself, but also for the class of citizens joined as plaintiffs. This class of citizens

satisfied the minimal diversity rules of CAFA, which require only that any member of a class of plaintiffs is a citizen of a State different from any defendant [see 28 U.S.C. § 1332(d)(2)].

The Fifth Circuit was sympathetic to Louisiana's argument that a state should not be subject to CAFA jurisdiction. However, it noted that Congress had considered and rejected an amendment that would have exempted class actions filed by an attorney general from removal under CAFA. Moreover, even CAFA's use of the term "citizen" did not bar its application because CAFA refers to the citizenship of any class member and any defendant. Accordingly, in expanding federal jurisdiction over certain class actions filed in state court, the Fifth Circuit eliminated the rule that citizenship of the named representative is controlling.

Finally, the court agreed that a state is not a citizen under the diversity statutes, including CAFA, but that because Louisiana sought relief for both the State and the citizens, both the State and the citizens were likely real parties in interest. Because CAFA only requires minimal diversity, CAFA supplies federal jurisdiction and a path to removal unless state sovereignty turns away its exercise.

In our Expert Commentary on the *Katrina* case, we noted as a practice pointer that state attorneys general wanting to stay out of federal court ought not join a class of state citizens. See Vairo, Georgene, *In re Katrina Canal Litigation Breaches*, LexisNexis Expert Commentary, 2008 *Emerging Issues* 2362. The line of Supreme Court precedent suggesting that a state is not a person or a citizen would likely be controlling. Before CAFA was enacted, the question whether a state plaintiff suing defendants over whom it has regulatory authority in state court under its own state laws may be removed to federal court on diversity grounds would not arise. The rule that a state is not a person for diversity purposes and the requirement of complete diversity always precluded the removal of a state's action on the ground of diversity. CAFA, with its minimal diversity requirements, however, pushes the question forward," because diversity jurisdiction may be based on minimal diversity, i.e., the citizenship of plaintiffs other than the state. So, what happens if the state sues without joining a class? That is the issue in the *Allstate* case.

Allstate Facts and Procedural Background. The State of Louisiana, through its attorney general, filed a *parens patriae* action against the Allstate Insurance Company, and a number of other insurers and their agents in state court alleging violations of Louisiana's antitrust laws. Specifically, Louisiana alleged a scheme to thwart policyholder indemnity. Allegedly, in violation of their fiduciary duties, the insurer defendants and others continuously manipulated Louisiana commerce by rigging the value of policyholder claims and raising the premiums held in trust by their companies for the benefit of policy holders to cover their losses. Louisiana alleged that the defendant insurance companies (and possibly others) worked together to undervalue and underpay policyholders' claims, particularly in the wake of Hurricanes Katrina and Rita.

Defendants removed the action to federal court arguing that the *parens patriae* action was a class action or mass action under CAFA. Louisiana moved to remand the action, but the district judge denied the motion. The district court was primarily concerned about who the real parties in interest were in this case. In noting that it was his responsibility to look to the substance of the complaint--to pierce the pleadings--and to determine the real nature of the claim asserted, he explained: [I]t's the Court's responsibility to not just merely rely on who a plaintiff chose to sue, or, in this case, how the plaintiff chose to plead, but I have to look at the specific substance of . . . the complaint . . ." Judge Zainey concluded that, while the State was a nominal party, the real parties in interest were the citizen policyholders. Ultimately, he denied Louisiana's motion to remand the case back to state court, concluding that the lawsuit was properly removed under CAFA.

Louisiana petitioned the Fifth Circuit for permission to appeal the interlocutory order under CAFA. The petition was granted and a divided Fifth Circuit panel affirmed.

Relevant CAFA Provisions: Definition of Class Actions and Mass Actions. CAFA permits removal of class actions and mass actions involving parties with minimal diversity [see 28 U.S.C. §§ 1332(d)(2), (11), 1453]. For CAFA purposes, "class action" is defined as any civil action filed under *rule 23 of the Federal Rules of Civil Procedure* or

similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action [28 U.S.C. § 1332(d)(1)(B)]. A mass action is any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdiction amount requirement under [28 U.S.C. § 1332(a)]" [see 28 U.S.C. § 1332(d)(11)(B)(i)].

The Fifth Circuit majority then foreshadowed its decision. It looked to the legislative history of CAFA and stated that Congress intended that the term class action" should be construed broadly to prevent jurisdictional gamesmanship." It quoted from a Senate Report that stated that CAFAs application should not be confined solely to lawsuits that are labeled class actions' by the named plaintiff or the state rulemaking authority. Generally speaking, lawsuits that resemble a purported class action should be considered class actions for the purpose of applying these provisions." [See S. Rep. No. 109-14, at 35 (2005).]

Like the *Katrina* court, the majority also noted that Congress had considered but rejected an amendment that would have exempted class actions filed by state attorneys general from removal under CAFA. Here, the majority quoted Senator Hatch's statement: At worst, [the amendment] will create a loophole that some enterprising plaintiffs' lawyers will surely manipulate in order to keep their lucrative class action lawsuits in State court. . . . If this legislation enables State attorneys general to keep all class actions in State court, it will not take long for plaintiffs' lawyers to figure out that all they need to do to avoid the impact of [CAFA] is to persuade a State attorney general to simply lend the name of his or her office to a private class action." [See 151 Cong. Rec. S1157, 1163S1164 (daily ed. Feb. 9, 2005) (statement of Sen. Hatch).]

Louisiana Authorized to Bring *Parens Patriae* Antitrust Actions But Are They Class or Mass Actions?

Louisiana argued that because it had filed the action as a *parens patriae* action instead of a class action (as it had in the *Katrina* case) that CAFA did not supply federal jurisdiction. The Fifth Circuit agreed that a state has standing to bring a *parens patriae* action to assert an interest relating to sovereignty or a quasi-sovereign interest, such as the States interest in the physical and economic health and well-being of its citizens. Specifically, under Louisiana law, the Louisiana Attorney General has statutory and constitutional authority to bring *parens patriae* antitrust actions [see La. Rev. Stat. §§ 51.128, 51.138; see also La. Rev. Stat. § 13.5036]. However, the court did not decide whether this *parens patriae* authority allows the State to sue for treble damages in a representative capacity under state law. Rather, like the district court, it focused on a narrow issue: whether the real parties in interest were the individual policyholders or the State as the guide to whether the states *parens patriae* action should be considered a class action or mass action for CAFA purposes.

Comment. In taking this tack, the Fifth Circuit majority ignores the general rule that jurisdiction depends on a review of the well-pleaded complaint. The states complaint did not contain the words class action" or mass action." Nonetheless, the majority turned to the well-established" rule that in determining whether there is jurisdiction, federal courts look to the substance of the action and not only at the labels used by the parties. The first case on which the majority relied was *Grassi v. Ciba-Geigy, Ltd.*, 894 F.2d 181, 185 (5th Cir. 1990), in which the Fifth Circuit had stated: [J]urisdictional rules may not be used to perpetrate a fraud or ill-practice upon the court by either improperly creating or destroying diversity jurisdiction. Were that to occur, we would not elevate form over substance but would accomplish whatever piercing and adjustments considered necessary to protect the court's jurisdiction." However, that case involved an assignment of interest to create federal jurisdiction, and Congress has specifically banned the use of collusive assignments to create jurisdiction [see 28 U.S.C. § 1359].

The second case the majority relied on was *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 185S186, 27 S. Ct. 184, 51 L. Ed. 430 (1907), in which the Supreme Court stated: Federal courts should not sanction devices intended to prevent a removal to Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction."). Of

course, this standard invites a begging of the question. A defendant does not have the right to remove unless there is federal jurisdiction. And, the *Wecker* court dealt with the well-established fraudulent joinder" doctrine pursuant to which claims made against a local defendant to prevent removal will be disregarded if the plaintiff has no colorable claim against that defendant. Indeed, defendants may pierce the pleadings to show that the . . . claim has been fraudulently pleaded to prevent removal." [See *Burchett v. Cargill, Inc.*, 48 F.3d 173, 175 (5th Cir. 1995) (internal quotation marks and citation omitted).] Here, in essence, the defendants argued that the state fraudulently joined itself because it was not the real party in interest. Curiously, before the district court, at least according to the Fifth Circuit, Louisiana failed to object to the district court engaging in that sort of a piercing analysis.

Policyholders Are Real Parties in Interest With Respect to Treble Damages. The Fifth Circuit framed the real party in interest question as whether Louisiana's action is a *parens patriae* action or whether, as the district court found, the citizen policyholders are the real parties in interest." Nonetheless, the court began by examining the *parens patriae* case law. The purpose of this discussion was to make the point that in the context of such actions, the state is a real party in interest when an action concerns a type of injury that the state has addressed or would be likely to address to further the well-being of its citizens.

The Fifth Circuit determined that the policyholders were the real parties in interest, at least with respect to the claim for treble damages. The court explained that a party is a real party in interest when it is directly and personally concerned in the outcome of the litigation to the extent that his or her participation in the litigation will ensure a genuine adversary issue between the parties. The state does not have such an interest when it sues for the particular benefit of a limited number of citizens and does not assert a direct interest of its own. The court concluded that the only parties with the direct interest in the treble damages sought by the Attorney General were the individual policyholders, who were the ones who suffered damages.

Type of Relief Matters. The court acknowledged that if Louisiana were seeking only injunctive relief, it would have a more compelling argument that it is the real party in interest. In *In re Katrina Canal Litigation Breaches* (referred to by the court as *Road Home*), in which another panel of the Fifth Circuit refused to remand another case brought by the Louisiana Attorney General against insurance companies in connection with damage caused by Hurricanes Katrina and Rita, the panel left open the possibility that various claims could be severed so that the claims that were removable under CAFA (the claims of the class of Louisiana citizens) would remain in federal court, while Louisianas claims could be remanded to state court [see *In re Katrina Canal Litigation Breaches*, 524 F.3d 700, 711S712 (2008), discussed at 2008 *Emerging Issues* 2362.]. The Fifth Circuit again raised that possibility with respect to the claims for injunctive relief in this case, although during oral argument the State had insisted it was not interested in having the injunctive relief claims severed from the damage claims.

Suit Is Mass Action" Subject to CAFA Removal. Having determined that the policyholders were the real parties in interest, the Fifth Circuit agreed with the defendants that the action was properly removed under CAFA because the requirements of a mass action were met: the suit was a civil action in which monetary claims of 100 or more persons were proposed to be tried jointly on the ground that they involved common questions of law or fact, the aggregate amount in controversy was at least \$5 million, the parties were minimally diverse, and the suit was brought in a representative capacity on behalf of those who allegedly suffered harm [see 28 U.S.C. § 1332(d)(11)(B)(i)].

Comment. Of course, given how the state structured the case as a *parens patriae* action none of the policy holders were parties to the suit. Should not the court have simply dismissed the case? If the state, the only plaintiff named on the complaint, was not a real party in interest, then there were no proper plaintiffs before the court, and there was no attempt to join any new plaintiffs. Yet, the Fifth Circuit found that the claims of 100 or more persons were proposed to be tried jointly. The court did not address whether the suit could properly proceed as a class action following further proceedings on remand. Nor did it determine the manner by which the individual policyholders were to be added to the case, leaving this matter to the district judges capable hands."

There is no question that the Fifth Circuits approach vindicates Congressional intent to interpret CAFAs expanded

jurisdictional provisions broadly. But, it seems inappropriate to hijack a case with no plaintiffs. If the case had been dismissed, the state had the option of refilling series of cases, each with fewer than 100 plaintiffs, to get the ball rolling towards a resolution of its claims against the defendants.

Louisiana Waived Eleventh Amendment Immunity. Finally, the Fifth Circuit held that Louisiana had waived any Eleventh Amendment immunity by bringing a suit in which individual policyholders were the real parties in interest. In so holding, the court again relied on *Katrina*, in which the other panel held that the State had waived immunity by joining a class of private citizens [see *In re Katrina Canal Litigation Breaches*, 524 F.3d 700, 711 (2008)]. The court concluded that it was bound by this circuit precedent. However, it should be noted that in *Katrina*, the Louisiana Attorney General had explicitly added a class of Louisiana citizens to his suit against the insurance companies [see *In re Katrina Canal Litigation Breaches*, 524 F.3d 700, 703 (2008)]. The Attorney General had not added such citizen plaintiffs in this case, though the Fifth Circuit proclaimed them the real parties in interest.

Dissent: Suit Not Removable Under CAFA. In a dissenting opinion, Judge Southwick disagreed with the majority's approach. He argued that in determining whether the case was removable under CAFA, the court should have limited its consideration to what the case is, not what it must be if all the relief requested is to be part of the litigation. In other words, because the case as then structured did not satisfy the definition of a class action or a mass action, it was not subject to removal under CAFA. Although he noted that perhaps the case ought to be structured as a class action or mass action, it was not. Accordingly, the *parens patriae* case should have been remanded to state court, where answers to the following questions could be obtained: (1) does the Louisiana Attorney General have authority to bring the treble damage claims under the Louisiana Monopolies Act? This is important, because if it did, it would be more likely that the court would have to consider the state a real party in interest. (2) If so, must the attorney general use a class or mass action to do so? And (3) if so, does the Attorney General wish to amend the suit or to dismiss the treble damage claims, which then under *Katrina* would be removable under CAFA?

Judge Southwick also argued that even if the state were merely a nominal party, such a conclusion could not make this suit a mass action. Instead, Judge Southwick would find that the Attorney General had filed a defective pleading under Louisiana law. In his view, the majority was the wrong court making a premature finding.

Comment. Judge Southwick's approach is preferable. It may well be true that the case was of a kind Congress intended to be removable under CAFA, especially because as the majority pointed out the state was represented by several plaintiffs law firms. And, it may well have turned out to be true had the case been remanded that the state attorney general would have been required under Louisiana state law to name a class of policy holders of over 100 plaintiffs in order to obtain treble damages. But, to do less violence to principles of federalism, it would have been preferable to have those issues decided by the state court, rather than not resolved at all.

Judge Southwick also reminds us that doubts about removal ought to be resolved in favor of remand. Moreover, he correctly observes that Louisiana cannot be forced to litigate in the posture of a plaintiff in a mass action or, as a class representative, so that the court can find that there is federal jurisdiction: Deciding that a removed case should be a class or mass action does not create or confirm anything. It only states our opinion that the parties after procedural work in state court should make this a removable action."

Additionally, as the majority seems to understand, the fact that Congress did not provide a state attorney general suits exemption under CAFA may have been because some members believed that such immunity existed automatically.

It may well be worthwhile for the state to consider petitioning for en banc review or for certiorari.

References. 5 *Moore's Federal Practice* (3d Ed.) §§ 23.63[2][e], 23.63A[6]; 15 *Moore's Federal Practice* (3d Ed.) §§ 102.107[3], 107.14[2][g][v]; 17A *Moore's Federal Practice* (3d Ed.) § 123.41[2].

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Higginbotham on Revisions to Rule 26: Expert Trial Witness Discovery

2008 Emerging Issues 2771

The Honorable Patrick E. Higginbotham on Revisions to Rule 26: Expert Trial Witness Discovery

By Hon. Patrick E. Higginbotham

September 28, 2008

SUMMARY: On August 8, 2008, revisions to Rule 26 of the Federal Rules of Civil Procedure were published for public comment. The revisions would make significant changes in the rules governing disclosure and discovery of expert witness information. The Hon. Patrick E. Higginbotham, U.S. Circuit Judge, Fifth Circuit Court of Appeals, and author of the Rule 26 coverage in Moores Federal Practice, offers an introduction to these important proposals.

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ARTICLE: Hon. Patrick E. Higginbotham on Revisions to Rule 26: Expert Trial Witness Discovery

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I. Introduction

The large experiment with pretrial discovery and notice pleading launched in 1938 with adoption of the Federal Rules of Civil Procedure has continued over the past 70 years. It is a history of rulemaking responsive to the experience of judges and lawyers working with sea changes in federal litigation.

These years have seen the growth of the public law model with citizens seeking judicial policing of federal and state executive and legislative functions, the enlisting by Congress of private suits to enforce its legislative norms such as regulation of securities markets, the environment, antitrust, patents, ERISA, and anti-discrimination laws -- to start a long list. The substantive questions asked of judges and juries reach deep into complex issues of science, mathematics, economics, medicine, engineering, and electronics -- to start another long list.

Lawyers have turned to experts in these fields to teach them and then to teach judges and juries -- consulting experts and testifying experts. The costly mining of these technologies with the attending necessary schooling of lawyers has spawned persistent disputes over proprietary rights -- of attorney-client privilege and attorney work

product. And the paper trails these efforts leave, in turn with the large changes in their retention brought by computer technology, have created an industry of document retention and production. Envisioned at the outset as an enterprise of counsel, discovery has become a free-standing business selling support services to case managers. And discovery's place in the time line and its role in the development of a case have changed as the Rule 56 summary judgment has increasingly become the main event. Over this course have come responsive changes in the rules of Federal Rules of Civil Procedure and the Federal Rules of Evidence.

The rule changes now published for comment and the rules with which they are entwined are best understood against the backdrop of these tidal changes. This history makes plain that new rules for discovery and amendments to old rules are based on experience in practice and their effectiveness upon the Committees understanding of that experience. In short the comment period is vital. My task is to introduce the changes in Rule 26 now published for comment.

One introductory matter remains: a setting that needs a brief reminder of relevant rule changes over the past 30 years, a gentle introduction to the reality that the dynamic character of civil litigation in the United States and the resistance of discovery to discipline, particularly by rules of civil procedure, teach that rule making for the arena of discovery is best undertaken with low expectations. That we try and try again is testament to the importance of the enterprise, not new found formulations

II. Historical Overview

A. The 1970 Amendments

Before the 1970 amendments, the rules of discovery were relatively dispersed. With the growing concerns over the increasing cost of litigation and a sense that discovery was a major contributor to that cost, if not the culprit, the Rules Committee moved much of discovery regulation to Rule 26. The idea was to establish Rule 26 as a rule governing discovery in general." n1 Rule 26(b)(3) addressed production of trial preparation materials n2 and good cause" was deleted as a requirement for production of documents under Rule 34. n3 Rule 26(b)(4) was added creating different tracks for those who will testify at trial and those experts who will not. n4 Discovery from the non-testifying expert implicated attorney work product and the rule allowed discovery only on a showing of exceptional circumstances under which it would be impractical for the party seeking discovery to obtain facts or opinions on the subject by other means. The provisions of Rule 30(b) governing protective orders n5 were transferred to Rule 26(a) to give it application to discovery generally." n6 Finally, Rule 26(e) turned to duty of supplementation, providing that a party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony." n7

B. The 1980, 1983 And 1987 Amendments

In 1980, new subdivision 26(f) added the requirement of a discovery conference. n8

Three years later, the Committee made changes in 26(a) and 26(b), adding new language in 26(b)(1) addressing frequency or extent of use of the discovery methods. In addition, the Committee added a new subdivision 26(g), requiring the signing and certification of discovery requests, responses, and objections, with sanctions if the certification is violated. n9 An amendment to Rule 26 in 1987 made technical non-substantive changes. n10

C. The 1993 Amendments

Six years later, the Rules Committee chose rule-directed over party-initiated discovery for matters attending expert witnesses. Rule 26(a)(1) required initial disclosure by a party without waiting for a discovery request. Rule 26(a)(2)(A) required disclosure of the identity of any person who may be used at trial to present evidence under *Rules 702, 703, or 705 of the Federal Rules of Evidence*.¹¹ For any witness retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony," Rule 26(a)(2)(B) required the Rule 26(a)(2)(A) disclosure to be accompanied by a written report prepared and signed by the witness, including a complete statement of all opinions to be expressed and the basis and reasons therefor" and the data, or other information considered by the witness in forming the opinions. n11 As we will see, the changes now published for comment target this language in Rule 26(a)(2)(B).

Since 1970, parties could use interrogatories to discover the substance of facts and opinions to be expressed by expert witnesses and at least a summary of the grounds for each opinion. Lawyers found the device far less useful than simply taking the deposition of witnesses who would offer expert testimony at trial, skipping the use of interrogatories. This practice was usually pursued by agreement and often by court order. The Committee listened, and by rule, validated practice making clear that A party may depose any person who has been identified as an expert whose opinions may be presented at trial." n12 The 1993 amendments in turn substituted a report for experts covered by (a)(2)(B) but was silent regarding other experts. Further accenting the utility of reporting requirements and the inefficiency of written interrogatories, the Committee made the report of the anticipated testimony of the expert a condition to the taking of the deposition. It provided that If a report is required under subdivision (a)(2)(b) the deposition shall not be conducted until after the report is provided. n13

A grasp of the full narrative of the Committees struggle with discovery and Rule 26 is worth the effort. This limited and incomplete recounting is limited to the setting of a backdrop to the proposed treatment of Expert Trial Witness Discovery and Disclosure" to which I now turn.

The Rules Committee considered for the fourth time at its April 7-8, 2008 meeting recommendations of a sub-committee for changes in Rule 26 governing discovery and disclosure of expert witnesses. The Advisory Committee in turn made three related proposals to the Standing Committee which has now published them for comment. The first relates to party disclosure.

III. Party Disclosure: A New Obligation to File a Report

Under the present rules, a party must disclose the identity of any witness it may use at trial to present evidence under *Federal Rule of Evidence 702, 703, or 705*. n14 A witness retained or specially employed to provide expert testimony in the case or one whose duties as the partys employee regularly involve giving expert testimony" must provide an expert witness report under

Rule 26(a)(2)(B). n15

The Committee learned that many courts were requiring reports of witnesses offering expert testimony but who were outside the reach of Rule 26(a)(2)(B). While these reports were often helpful, their burden fell heavily upon treating physicians over whom a party had little control and employees who did not regularly offer expert testimony. Balancing the benefits and burdens of this practice, the Advisory Committee proposes a new but lighter disclosure obligation than is placed on witnesses covered by the present rule.

Under the new 26(a)(2)(C), a party must disclose the subject matter of the expected testimony and a summary of

the facts and opinions of the expected testimony. The proposal responds to the problem of surprise by validating the trend to require reports contrary to the rule, persuaded that trial judges and counsel by their practices recognized the usefulness of this disclosure, albeit a studiously brief one. It also expects that this report, short-form, will facilitate the taking of the witness deposition. And a focus on the latter purpose may be essential to its success, requiring enough information for opposing counsel to make a fair judgment of the necessity of a deposition, but no more. This report for experts must not be confused with the reports now required under Rule 26(a)(2)(B). This new summary report is just that. Saying more than is required is likely only to promote more discovery.

IV. New Proposals Regulate Draft Reports and Attorney-Client Communications

It is helpful to view this set of proposals mindful of the overarching concerns and objectives of the Advisory Committee. The Advisory Committee's report to the Standing Committee makes plain that the proposals accept the utility of pretrial exposure of expert witnesses who will testify at trial. While the traditional view, even consensus, is that doing so promotes settlements and efficiency at trial, core objectives of the 1938 Rules, these proposals arrive in a legal culture the Committee could not have foreseen in 1938.

As experts have become centerpieces of litigation, the pressures for learning all that is possible about them have increased. There is more here than simply an increase in the use of experts in civil cases. n16 This central role of experts is attended by a change in their relationship to the lawyers retaining them. As the Advisory Committee explains, the expert is now seen as a part of the party's camp and seldom as an independent professional offering detached objective opinions of science. In short, experts are today often advocates of a cause of the retaining party. This relationship shapes the exchanges between the lawyer and the lawyer's expert as the expert studies" the case. The expert becomes, in varying degrees, a consultant to the case, pushing aside lawyer theories that cannot be sustained. As the case is shaped in preparation, the produced drafts and detritus of the efforts offer rich material for an opposing party. These pressures challenge rulemaking. And the proposed rules are pristine examples of this phenomenon. The present rules allow discovery of facts, data, or other information considered by the expert. n17 The other information" language has in practice invited efforts to compel production of the exchanges between lawyer and expert. The substitution of reports for interrogatories led to efforts to compel disclosure of drafts of reports.

Lawyers and judges have advised the Committee that in practice lawyers have responded to the risk of being ordered to disclose communications with the testifying expert by hiring parallel experts who will not testify but will consult. It is suggested that the rule in practice has foundered with changing roles of experts and perversely produced inefficiency and unnecessary costs. The American Bar Association, acting on recommendations of the Litigation Sections Federal Practice Task Force, has urged changes in state and federal rules of discovery in response to inefficiencies and costs attending discovery relating to expert witnesses. It points to New Jersey, which by rule limits discovery of draft reports and attorney-client communications. Its rule limits discovery of communication between attorney and witness to facts and data. n18 The Advisory Committee reports that a wide range of lawyers in New Jersey were unanimous in their praise for the rule as reducing discovery problems.

The proposal is to delete the words or other information" from facts or data or other information." The reach of discovery is further narrowed by protecting as work product drafts of any report or disclosure required by 26(a)(2). By the addition of (C) to Rule 26(b)(4), work product protection is extended to communications in any form between an expert and retaining counsel, with three exceptions. Discovery is allowed in the ordinary course for:

- . Communications relating to compensation for the expert's study or testimony;
- . Communications identifying facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

. Communications identifying assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.

In addition to these three categories, allowing discovery of draft reports or attorney-expert witness communications may be had on a showing of substantial need for the discovery to prepare the case and an inability, without undue hardship, to obtain the substantial equivalent by other means. n19

The comment period will likely produce differing views regarding both the justifications for any narrowing of discovery of reports by expert witnesses and communications with the retaining lawyer as well as whether the proposals will work as intended. On the latter score data" seems clear enough. Facts" and assumptions" furnished by the attorney to the expert witness and relied upon by the expert are a bit more elusive but should prove workable as has been the case in New Jersey. Compensation" is clear enough but note that discovery is allowed for communications relating to compensation for the experts study or testimony. Study" may create difficulty as a statement for services rendered may, by detailing the course of study, disclose more than you wish of your work product.

A careful lawyer will pause at the practical question of just what can be provided to an expert witness that would not be data, facts considered by him, or assumptions that the expert relied upon. First, any facts or data provided are virtually by definition, considered. As for assumptions, reliance upon an assertion that they were not relied upon is not without risk of disclosure, either in a deposition or in cross-examination at trial. If the question is, did your counsel provide any assumptions, likely a proper question, you are left with a response, that undermines and lingers, such as none that I relied upon," followed by the question of why did you decline to rely upon them?"

Communication with an expert by counsel that is not within one of the exceptions (call it x") is yet not free of difficulty for counsel, apart from the uncertainty at the margins of the exceptions. For example, a cross examining lawyer may inquire at trial of x" when x" is relied upon because it is a basis of his opinion. Will the lawyer be prohibited from inquiry about its source? The argument will be that the judge or jury is entitled to know the source of this basis for the expert's opinion, that he should be allowed to ask where the x" came from. Because an objection to this question at trial comes at a cost, it may be wise to file an in limine motion to define the limits of cross examination and the absence of the good cause exception to work product protection. The larger point here is that the operation of the discovery rules and admissibility at trial may not be of a piece.

Counsel must also craft communications discoverable under any of the three exceptions with an eye upon the precise language defining their scope -- such as relates to" or considered by" to identify" facts or data." Produced material should be carefully reviewed for commentary and stray marginal notes that may be interleaved in the material. If produced information is being generated for the expert, counsel should take care that it, as well as any transmittal letters conform to the exceptions. Redaction is a poor substitute for careful attention in preparation.

V. Conclusions and General Observations

While discovery is the handmaiden of notice pleading and was seen as facilitating settlements by allowing the parties to evaluate the strength of their case, that calculation looked to the likely outcome of a trial. The trial is no longer seen as the main event. Rather, that is now the summary judgment. Witness the extensive proposals for Rule 56, companions to these efforts.

Many point to the cost of litigation as the killing force of trials and see uncontrollable discovery as the culprit -- achieving settlements not as

struck for by the 1938 Rules but by pricing out trials and many litigants, their evaluation of the likelihood of ultimate success aside. With this decline of trials, the trial courts increasingly function in a manner more akin to an administrative than a judicial body. n20 These larger changes are the elephant

in the living room as the Advisory Committee continues its long struggle with the discovery process. Practicing lawyers are wise to remain tuned to these large debates over the very role of courts and juries as they present their disputes including discovery issues to federal judges judges who are concerned about dark courtrooms and loss of a craft in which they were trained.

Relatedly, there is a large question precedent to the entire approach of the Rules Committee that will be asked again in the comment period. The changing role of expert witnesses in litigation has been briefly described above. I will not repeat it here to make the point that there is a well considered argument that limiting discovery from experts, with its trailing and somewhat uncertain limiting of trial evidence of the preparation of the expert for trial, moves in the wrong direction; that the proposed rule amendments accept that the expert witness today is an advocate for the party who hires him; that he is part of the lawyer team. The comment period affords an opportunity for further exploration of whether such a state of affairs is a public good to be salvaged.

There is a tension between the shielding of the expert witness from discovery and presenting the witness to judge or jury at trial as a disinterested student of science. The *Daubert* decision n21 and its progeny have insisted that expert opinion be grounded in science in the sense that the witnesss opinion is validated by his adherence to scientific method, a response to the perception that expert testimony is a carrier of junk science; that experts are increasingly less disinterested in their methods and increasingly just advocates for a party, spinning under oath. As the argument goes, this is either a good state of affairs or an undesirable one that we lack the will or ability to alter and hence accept -- the employ of testifying advocates. The proposed changes in disclosure respond in part to the circumstance that well-financed parties can avoid disclosure by hiring consulting experts to teach them and shape their litigation theories and hiring a second set to testify at trial. This is seen as undesirable because it increases the cost of litigation and disadvantages poorer litigants; as well as fostering discovery disputes generated by the techniques now being deployed for avoiding discovery. It is fair to ask whether complete disclosure is preferable to enabling an expert to consult and testify free from disclosure of the consulting path.

Supported by talented staff, some of our very best lawyers, law professors and judges work hard on the Rules Committees, drawing on rich experience and continuous study. But as good as they are, and to these eyes they are splendid, to succeed they must have the benefit of the experience of a broad range of practicing lawyers and members of the academy. With this brief introduction and commentary, I urge you accept the invitation of the Rules Committee and share your views with it.

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n1 See *Fed. R. Civ. P.* 26, Committee Note of 1970; 6 *Moore's Federal Practice*, § 26App.05[2] (Matthew Bender 3d ed.) (1970 Amendment to Rule 26).

n2 See 6 *Moore's Federal Practice*, § 26App.05 (Matthew Bender 3d ed.) (1970 Amendment to Rule 26).

n3 *See 7 Moore's Federal Practice*, § 34App.03 (Matthew Bender 3d ed.) (1970 Amendment to Rule 34).

n4 *See 6 Moore's Federal Practice*, § 26App.05 (Matthew Bender 3d ed.) (1970 Amendment to Rule 26).

n5 *See 7 Moore's Federal Practice*, § 30App.03 (Matthew Bender 3d ed.) (1970 Amendment to Rule 30).

n6 *See Fed. R. Civ. P. 26*, Committee Note of 1970; *6 Moore's Federal Practice*, § 26App.05[2] (Matthew Bender 3d ed.) (1970 Amendment to Rule 26).

n7 *See 6 Moore's Federal Practice*, § 26App.05 (Matthew Bender 3d ed.) (1970 Amendment to Rule 26).

n8 *See 6 Moore's Federal Practice*, § 26App.06 (Matthew Bender 3d ed.) (1980 Amendment to Rule 26).

n9 *See 6 Moore's Federal Practice*, § 26App.07 (Matthew Bender 3d ed.) (1983 Amendment to Rule 26).

n10 *See 6 Moore's Federal Practice*, § 26App.08 (Matthew Bender 3d ed.) (1987 Amendment to Rule 26).

n11 *See 6 Moore's Federal Practice*, § 26App.09 (Matthew Bender 3d ed.) (1993 Amendment to Rule 26).

n12 *See 6 Moore's Federal Practice*, § 26App.09 (Matthew Bender 3d ed.) (1993 Amendment to Rule 26).

n13 *See 6 Moore's Federal Practice*, § 26App.09 (Matthew Bender 3d ed.) (1993 Amendment to Rule 26).

[14]Fed. R. Civ. P. 26(a)(2)(A).

[15]Fed. R. Civ. P. 26(a)(2)(B).

n16 And criminal cases as well, although the concerns there, while informing the dimension of the tasks on the civil side, are distinct difficulties.

[17]Fed. R. Civ. P. 26(a)(2)(B)(ii).

n18 N.J. Court Rules, R. 4:10-2(d) (trial preparation; experts).

n19 *See Fed. R. Civ. P. 26(b)(3)(A)* (protection for trial preparation materials).

n20 Patrick E. Higginbotham, So Why do We Call Them Trial Courts? *55 S.M.U. L. Rev.* 1405 (2002); Judith Resnik, Trial as Error, Jurisdiction as Injury: Transforming The Meaning of Article III, *113 Harv. L. Rev.* 924 (2000); William G. Young, An Open Letter to U.S. District Court Judges, *The Federal Lawyer*, 30, 31 (July 2003).

n21 *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

RELATED LINKS: For more information, see Moore's Federal Practice:

- 6-26 Moore's Federal Practice -- Civil § 26.23;
- 6-26 Moore's Federal Practice -- Civil § 26.70;
- 6-26 Moore's Federal Practice -- Civil § 26.80

ABOUT THE AUTHOR(S):

Patrick E. Higginbotham, the author of Chapters 26, 27, and 28 in *Moore's Federal Practice*, has served as a United States Circuit Judge for the Fifth Circuit Court of Appeals since 1982. He assumed senior status in 2006, but maintains a full workload on the court.



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Hon. Michael M. Baylson on Revisions to Rule 56

2008 Emerging Issues 2772

Hon. Michael M. Baylson on Revisions to Rule 56: Improving Procedures for Counsel and Facilitating Decisions by Judges

By Hon. Michael M. Baylson

September 28, 2008

SUMMARY: On August 8, 2008, revisions to Rule 56 of the Federal Rules of Civil Procedure were published for public comment. The proposed revisions would make significant procedural changes in summary judgment practice. The Honorable Michael M. Baylson, U.S. District Judge, Eastern District of Pennsylvania, and member of the Civil Rules Advisory Committee, offers an introduction to these important proposals.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: **Hon. Michael M. Baylson on Revisions to Rule 56: Improving Procedures for Counsel and Facilitating Decisions by Judges**

Cite as: **Hon. Michael M. Baylson, *Revisions to Rule 56: Improving Procedures for Counsel and Facilitating Decisions by Judges*, LexisNexis Expert Commentary, (Insert date you accessed the document online)**

I. Background -- What Is Wrong With the Present Rule 56?

On August 8, 2008, revisions to *Rule 56, Federal Rules of Civil Procedure*, were published for public comment. The Advisory Committee on Civil Rules, part of the U.S. Judicial Conferences Committee on Rules of Practice and Procedure, has been working on this project for approximately three years. The revisions being published follow many drafts, and have been vetted before numerous judges, practitioners and law professors.

Both the full Advisory Committee and its Rule 56 Subcommittee have unanimously recommended that the revisions be published for comment because they represent a decided improvement in clarifying procedures for counsel and facilitating the work of judges in deciding motions for summary judgment under Rule 56.

In many districts summary judgment motions are filed in virtually every civil case, yet several provisions in the current rule are outmoded in the context of current litigation practice:

. **Timing of plaintiff's motion.** There is no good reason to preclude a plaintiff from filing a motion for summary judgment at any time after filing the complaint; n1

. **Distinguishing between filing by claiming party or defending party.** There is no good reason to distinguish between the filing of a motion by a claiming party or by a defending party; n2

. **Hearing on motion.** The rule assumes that the court will have a hearing, and allows the opposing party to serve affidavits at any time before the hearing day. n3 However, many judges do not have hearings on summary judgment motions, but instead set dates by which such dispositive motions must be filed; supporting affidavits almost always must be filed along with the motion and supporting briefs, or with a response. n4

. **Varying local practice from district to district.** Most district courts have their own local rules on summary judgment procedures and there is a profusion of individual district judge practice rules. Mastering these varying rules is a heavy burden on counsel in a specific case, and an expense for clients. Many lawyers have presented anecdotal evidence to the Advisory Committee that the varying rules of different districts, and judges within the same district, increase the cost of litigation. A profusion of local rules reflects widespread dissatisfaction with the national rule.

. **No explicit provision for partial summary judgment.** The rule does not explicitly provide for what is commonly referred to as partial summary judgment, even though that is the outcome in many cases.

. **Lack of clarity.** Because of the lack of clear direction to counsel about procedures for responding to a motion for summary judgment, some lawyers find themselves in procedural limbo, and may err in what is required, to the prejudice of their clients. Clerks offices and judges chambers receive many telephone requests to ascertain how a particular filing issue should be handled. Some courts encourage motions to strike pleadings that were improperly filed on a pending summary judgment motion.

II. Proposed Revisions Are Procedural, Not Substantive

The revisions to Rule 56 are not intended to change the substantive law of summary judgment:

. The changes are exclusively procedural.

. There is no intent to favor movants or nonmovants, plaintiffs or defendants.

. No changes are being made in the substantive standard for summary judgment. The courts will continue to be guided by the Supreme Court 1986 trilogy, n5 and each circuits existing and developing law on summary judgment.

. There is no change in the summary judgment burden.

III. Objectives of the Proposed Revisions

The Committee believes that the rule improves and clarifies procedures, particularly the adoption of the point/counterpoint procedure discussed below. Many lawyers and judges have endorsed the revisions, believing that the increased specificity and clarity will facilitate judicial decision-making, which will be valuable to counsel and the parties by enabling courts to decide summary judgment motions more efficiently and, presumably, more promptly.

IV. Summary of the Provisions of the Proposed Rule

Subdivision (a) -- Motion for Summary Judgment or Partial Summary Judgment

The party moving for summary judgment may do so on all or part of a claim or defense, and the court should grant summary judgment if there is no genuine dispute as to any material fact and a party is entitled to judgment as a matter of law.

The use of the verb *should* has been the subject of great discussion within and outside the Advisory Committee. It is important to note that in the 2007 revision, as part of the style revision to all of the Federal Rules, the word *shall* was changed to *should*.

As the Comment notes: n6

It is established that although there is no discretion to enter summary judgment when there is a genuine issue as to any material fact, there is discretion to deny summary judgment when it appears that there is no genuine issue as to any material fact. Should in amended Rule 56(c) recognizes that courts will seldom exercise the discretion to deny summary judgment when there is no genuine issue as to any material fact. [Citations omitted].

Some lawyers have asserted that *shall* had a mandatory connotation, which is lost by using a more discretionary verb, such as *should*. The Advisory Committee's decision to propose the word *should* followed extensive legal research that many courts have approved the denial of a motion for summary judgment for various reasons even though there are no genuine disputes as to any material fact.

Several specific reasons support *should*:

- . Use of the verb *must* would introduce a mandatory concept to the rule which is not supported by the case law, and would result in the revision impeding on substantive summary judgment standards, which the Committee has consistently and consciously avoided.

- . Some judges decline to grant summary judgment where there are no disputed facts, but a close legal issue, and the judge believes that the court can make a more definitive ruling on the legal issue by requiring that the parties adhere to the burdens of proof appropriate in a trial context.

- . Some motions for summary judgment contain such voluminous exhibits, declarations and supporting briefs that a judge may find a trial is a more prompt and efficient context to bring the litigation to a close.

- . A judge may believe that a prompt trial is in the public interest, and deciding a motion for summary judgment would require substantial delays in the trial, even though there may not be any disputed facts.

- . Some cases which involve a high degree of public interest may warrant a trial, even though the facts are not in dispute.

56(a) adds another sentence which reflects the views of virtually all circuits, that [t]he court should state on the record the reasons for granting or denying the motion. The Committee heard from many counsel that although a statement of reasons usually accompanies the grant of a motion for summary judgment, denials are too often simply one line orders -- leaving counsel and the parties in the dark as to, e.g., whether the motion was legally unfounded or the court concluded that there were disputes on material facts. Once again, the verb *should* expresses an expected and a preferred mode of judicial action. The context of the ruling is left to the courts discretion, whether as a written order or as part of the transcript of a hearing or argument. The extent of the reasons is also left to the courts discretion. Obviously, in a complex case there may be a great many disputed material facts, but only one of them would warrant the court to deny summary judgment. In such a case, there is no need for the court to detail every dispute. In other cases, however, the court may find great utility in a detailed finding of all material facts that are not in dispute.

Subdivision (b) -- Time for a Motion, Response, and Reply

56(b) sets the timing requirements. n7

It is important to note the time provisions of (b) may be modified by a local rule, as well as a court order in an individual case. After considering many alternatives, the Advisory Committee selected 30 days after the close of all discovery as the deadline for the filing of a summary judgment motion, in the absence of a local rule or a specific court order. A response may be filed 21 days after the motion is served, or the nonmovants responsive pleading is due, whichever is later. A reply by the movant must be filed within 14 days after the response is served, but only if the responding party has submitted additional facts, as provided in paragraph (c).

The rule separately provides for a reply brief to be filed in every case.

Subdivision (c) -- Procedures

Subparagraph (c) is the beating heart of Rule 56. Many local rules and individual judges practice orders have similar requirements. The requirements of (c) can be modified by the judge, but only on a case-by-case basis. The rule requires for the movant to file three separate documents:

. **Motion.** The movant files the motion itself, which identifies the claim or defense, or part thereof, on which summary judgment is sought.

. **Separate statement.** The movant files a separate statement, which concisely identifies in separately numbered paragraphs only those material facts that cannot be genuinely disputed and entitle the movant to summary judgment. These specific words were adopted to require counsel to list only those facts which are both undisputed and crucial for summary judgment. Although some lawyers had proposed specific numerical limits on the number of separately numbered paragraphs, the Committee believed that any maximum limitation should only be adopted by an individual judge presiding over a specific case. Many judges react unfavorably to endless statements of minor or non-material facts that many attorneys include for fear of leaving something out -- when the actual material facts which are not disputed, and most importantly, entitle the movant to summary judgment are usually few in number. Undoubtedly, the application of this paragraph in practice will require some discipline by counsel, and patience by judges, particularly for those who have not dealt with local rules or practice orders that have similar requirements.

. **Brief.** The movant files a brief stating the movants contentions under law or facts.

The responding party must file:

. **Response.** The responding party files a response, in correspondingly numbered paragraphs, which accepts or disputes, in whole or part, each fact in the movants statement.

. **Identification of any additional material facts.** The responding party may, in its response, concisely identify . . . additional material facts that preclude summary judgment.

. **Brief.** The responding party also files a brief stating its contentions on the law or facts.

If, and only if, the respondent has filed additional facts, then the movant must [note the mandatory imperative] file a reply to any additional facts stated by the nonmovant.

The response and the movants reply must be in the same form as the prior factual statements.

As noted above, the movant may file a reply brief in every case. Many judges look forward to a reply brief, particularly in cases with shifting burdens of proof, to determine what factor of law the movant can cite to support its position, after the responding party has filed its papers.

The rule also makes clear in (c)(3) that a movant may accept or dispute a fact, either entirely or for purposes of the motion only. The latter position may be taken by a party to present what it believes is the proper legal argument, but to reserve a different position for trial if the court rejects its argument as to the law or the facts.

Proposed Rule 56(c)(4)(A)(ii) allows the movant to simply state in its motion for summary judgment that after discovery, the opposing party has no admissible evidence to meet its burden. Under *Celotex Corp. v. Catrett*,ⁿ⁸ such a showing shifts the burden to require the opposing party (usually the plaintiff) to show it can meet its burden at trial. *Celotex* clearly allows dismissal of a case at the summary judgment phase where the plaintiff is unable to show admissible facts that satisfy its burden of proof:

In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.ⁿ⁹

Under *Celotex*, the moving party may meet its burden by showing the court that there is an absence of evidence to support the nonmoving party's case. Once the moving party has shown an absence of evidence, the burden shifts to the nonmoving party to designate specific facts showing that there is a genuine issue for trial.ⁿ¹⁰ The Court found no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim.ⁿ¹¹

In practice, there are few such bare bone motions for summary judgment because counsel for the defendant will usually present to the court at least a short narrative about the case, noting the plaintiff's burden of proof, what facts the plaintiff must show it can prove, and then making a statement that the plaintiff has no evidence, or insufficient evidence, to meet that burden.

Thus, although the proposed rule provides for numbered paragraphs of undisputed facts, there is no intent to change the rule in *Celotex* and preclude a movant from simply making a statement that the opposing party has no facts to prove its case.

Once again, the rule only provides for procedural steps and does not intrude on the substantive standard or make any attempt to change existing burdens under Supreme Court or circuit law.

Paragraph (c)(4)(A) continues the requirement that a statement that a fact can or cannot be genuinely disputed must be supported by specific citations to the record.

The proposal specifies the following:

- . Depositions.
- . Documents.
- . Electronically stored information.
- . Affidavits or declarations.ⁿ¹²
- . Stipulations.

. Admissions.

. Interrogatory answers or other materials.

However, as noted above, one party can make a showing that the materials cited (by the other party) do not establish the absence or presence of a genuine dispute and may also state that the party cannot produce admissible evidence to support the fact. A number of circuits have held that in advancing or disputing a factual position in a motion for summary judgment, a party must cite *admissible* evidence. n13

The proposed rule also makes clear that although the court need not consider materials other than those presented by counsel, it may find other materials in the record which establish a genuine dispute of fact or, if the court gives notice to the parties, it may grant summary judgment for reasons other than those presented by the movant.

The rule also makes clear, in its requirement that evidence relied upon be admissible, that a response or reply to a statement of fact may note that the other party has presented a fact that is not admissible in evidence.

The proposed rule also repeats the current language that an affidavit or declaration must be made on personal knowledge, set out facts that will be admissible in evidence, and show that the affiant is competent to testify on the matters stated, once again emphasizing that a party relying on a fact must, as part of its papers before the court, show that the party has the ability to have the fact admitted into evidence at trial.

The remaining five subdivisions of the rule are generally procedural clarifications of existing practices that are followed by most judges, and derive from provisions in the current rule, but have been made more specific to benefit both counsel who make summary judgment motions and judges who decide them.

Subdivision (d) -- When Facts Are Unavailable

56(d) deals with the situation that arises when facts are unavailable to the nonmovant, who shows by affidavit or declaration why it cannot present facts essential to justify its opposition. In such a case, the court may defer considering the motion, allow time to obtain affidavits or take discovery, or issue any other appropriate order. Although most judges follow these procedures, the rule now provides in black and white the need of the movant to bring this situation to the courts attention and gives the court discretion to deal with the situation in a fair manner.

Subdivision (e) -- Failure to Respond or Properly Respond

56(e) addresses the situation where a party either fails to respond or does not properly respond. As the Committees review has shown, virtually all judges who do not receive a timely response, or any response, to a summary judgment motion will usually give the nonmovant notice and a further chance to respond, particularly in *pro se* civil rights cases, where mail can be delayed, or the plaintiff (often a prisoner) does not understand the ramifications of not responding to a motion. In those cases, the court will send an appropriate directive to the plaintiff giving additional time within which to submit a response to the pending motion for summary judgment, and will advise the plaintiff that a failure to respond will likely result in the court granting the motion as unopposed.

Numerous decisions have held that if there is no response, or an inadequate response, the court may consider a fact statement by the movant as undisputed for purposes of the motion. n14 However, most circuits do not approve the granting of summary judgment only on the basis of a nonmovants failure to respond, but require the court to examine the moving papers to satisfy itself that the movant is entitled to summary judgment under the law. n15 The proposed rule does authorize the court to grant summary judgment if the motion and supporting materials, including the facts

considered undisputed, show that the movant is entitled to it. This language, allowing the court to consider undisputed facts along with the other materials in granting summary judgment, follows settled law.

Subdivision (f) -- Judgment Independent of the Motion

Subparagraph (f) makes clear, after giving notice and a reasonable time to respond, that a court may grant summary judgment for a nonmovant or may grant or deny the motion on grounds not raised by the parties, or may consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

Subdivision (g) -- Partial Grant of the Motion

Subparagraph (g) makes clear the courts power to grant partial summary judgment by either establishing a material fact or making a legal ruling justified by the motion and responses.

Subdivision (h) -- Affidavit or Declaration Submitted in Bad Faith

As to subparagraph (h), authorizing imposition of monetary sanctions against a party who submits an affidavit or declaration in bad faith or solely for delay, the proposed rule makes the sanctions discretionary rather than continuing the mandatory language in the current rule. Empirical research has shown that few motions have been filed nationwide, let alone granted, under the current summary judgment sanctions rule.

V. Providing Comments on Proposals for Rule 56

Individuals who have reviewed these materials and wish to make comments on the rule as it is published should feel free to do so. The Advisory Committee will also hold hearings on three separate occasions as follows:

November 17, 2008 in Washington, DC

January 14, 2009 in San Antonio, TX

February 2, 2009 in San Francisco, CA

The Committee welcomes comments on perceived inadequacies and any suggestions that would improve the intent of clarifying procedures but not changing substance.

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ⁿ¹ See Fed. R. Civ. P. 56(a)(1) (motion may be filed at any time after (1) 20 days have passed from the

commencement of the action; or (2) the opposing party serves a motion for summary judgment).

n2 *See, e.g., Fed. R. Civ. P. 56(a)* (governing motion by claiming party"); *Fed. R. Civ. P. 56(b)* (governing motion by defending party").

n3 *See Fed. R. Civ. P. 56(c)* (The motion must be served at least 10 days before the day set for the hearing. An opposing party may serve opposing affidavits before the hearing day. . . .").

n4 **Affidavits.** Although an affidavit filed the day before a court hearing may be successful in causing the court to deny summary judgment, failure to adhere to an earlier deadline and relying instead on the current provisions of Rule 56(c) is not usually successful.

3d Circuit See, e.g., Coastal States Gas Corp. v. Department of Energy, 644 F.2d 969, 980982 (3d Cir. 1981) (finding, in a Freedom of Information Act case, that the district court erred when it rejected the governments affidavit and index which had been filed the day before the hearing, and explaining Rule 56(c)).

5th Circuit See, e.g., Farina v. Mission Inv. Trust, 615 F.2d 1068, 1076 (5th Cir. 1980) ([A]bsent an affirmative showing by the non-moving party of excusable neglect according to Rule 6(b) a court does not abuse its discretion when it refuses to accept out-of-time affidavits.).

7th Circuit See, e.g., Pfeil v. Rogers, 757 F.2d 850, 857 (7th Cir. 1985) (holding that district courts refusal, on a summary judgment motion, to consider opposing affidavits filed after the court-imposed deadline was not an abuse of discretion).

9th Circuit See, e.g., Marshall v. Gates, 44 F.3d 722, 725 (9th Cir. 1995) ([Rule 56(c)] does not unconditionally require a district court to accept affidavits up to the date set for hearing on the motion for summary judgment. Rather, the rule allows district courts to adopt procedures pursuant to which the non-moving party may oppose a motion prior to a hearing date.); *Fowler v. Honeywell Intern. Inc.*, 2008 U.S. Dist. LEXIS 29726, at *7 (D. Ariz. Apr. 10, 2008) (striking an affidavit that was filed in compliance with Rule 56(c) but in violation of local rules).

n5 **Trilogy.** *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

n6 *See Report of the Civil Rules Advisory Committee* (May 9, 2008), p. 79, available at (last checked October 2, 2008).

n7 Part of this revision is likely to become effective as of December 1, 2009 as a result of previously published time computation revisions. The Judicial Conference approved these revisions in September 2008, and forwarded them to the Supreme Court.

[8]*Celotex Corp. v. Catrett*, 477 U.S. 317, 322323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

[9]*Celotex Corp. v. Catrett*, 477 U.S. 317, 322323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

[10]*Celotex Corp. v. Catrett*, 477 U.S. 317, 324325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (emphasis omitted).

[11]*Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (emphasis omitted).

n12 The proposed rule adds that declarations pursuant to 28 U.S.C. § 1746 may be filed in lieu of an affidavit.

n13 **Party must cite admissible evidence.**

3d Circuit Pamintuan v. Nanticoke Memorial Hosp., 192 F.3d 378, 387 n.13 (3d Cir. 1999) (affirming district court's grant of summary judgment, the Third Circuit noted that district court properly found plaintiff's evidence to be inadmissible); *Petruzzis IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc.*, 998 F.2d 1224, 1235 n.9 (3d Cir. 1993) (allowing hearsay statement to be considered on summary judgment because it was capable of being admissible at trial).

9th Circuit Beyene v. Coleman Sec. Services, Inc., 854 F.2d 1179, 1181 (9th Cir. 1988) (It is well settled that only admissible evidence may be considered by the trial court in ruling on a motion for summary judgment.").

n14 *See, e.g., Runnels v. Armstrong World Indus.*, 105 F. Supp. 2d 914, 918 (C.D. Ill. 2000) (because Plaintiff has submitted no facts or evidence to counter [defendant] Armstrong's version of events, Armstrong's facts are undisputed for purposes of this motion").

n15 *See, e.g., Vt. Teddy Bear Co. v. 1-800 BEARGRAM Co.*, 373 F.3d 241, 244 (2d Cir. 2004) ([T]he failure to oppose a motion for summary judgment alone does not justify the granting of summary judgment. Instead, the district court must still assess whether the moving party has fulfilled its burden . . .).

RELATED LINKS: For more information, see Moore's Federal Practice

■ 11-56 Moore's Federal Practice -- Civil § 56.01;

■ 11-56 Moore's Federal Practice -- Civil § 56.50

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Michael M. Baylson has served as a United States District Judge for the Eastern District of Pennsylvania since 2002. He is a member of the Advisory Committee on Civil Rules and serves as Chair of the Rule 56 Subcommittee. Acknowledgment is recognized to Judge Baylson's law clerks, Dana Bazelon, Clare Putnam and Katherine Stroker for their assistance in research.



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Jason M. Frank on Soukup v. Law Offices of Herbert Hafif

2008 Emerging Issues 2922

Jason M. Frank on Soukup v. Law Offices of Herbert Hafif (2006) 39 Cal. 4th 260

By Jason M. Frank and Nicholas J. Begakis

September 25, 2008

SUMMARY: A defendant in a SLAPPback lawsuit cannot invoke the anti-SLAPP statute if the defendant's underlying action is illegal as a matter of law.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Cite as: Frank, Jason M. *Jason M. Frank on Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal. 4th 260. LexisNexis Expert Commentary, (Date content was last viewed online).

Background. The California Legislature enacted the anti-SLAPP statute to prevent and deter meritless strategic lawsuits against public participation (aka SLAPP) that are brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances [*Code Civ. Proc.* § 425.16(a)]. The anti-SLAPP statute allows a defendant to file a special motion to strike the lawsuit as a SLAPP which, in turn, enables the trial court using a summary judgment like procedure to evaluate the merits of the lawsuit at an early stage of the litigation [*Code Civ. Proc.* § 425.16(b)(1)].

To prevail, the defendant must first make a threshold showing that the plaintiffs cause of action is one arising from the defendants exercise of constitutionally protected activity. If the defendant succeeds, the burden then shifts to the plaintiff to demonstrate a probability of prevailing on the claim. In making this determination, the trial court considers the pleadings and any evidence submitted by the parties through affidavits [*Code Civ. Proc.* § 425.16(b)(2)]. If the trial court determines that the claim lacks merit, the prevailing defendant is entitled to recover his or her attorneys fees and costs [*Code Civ. Proc.* § 425.16(c)].

The prevailing defendant can also bring a separate SLAPPback lawsuit for malicious prosecution or abuse of process to seek compensation for any resulting financial and emotional damages incurred beyond attorneys fees and costs. However, in a twist illustrating the old adage ***Whats good for the goose is good for the gander***, the SLAPPback defendant i.e., the party that had his or her underlying lawsuit dismissed as a SLAPP can bring his or her own special motion to strike the SLAPPback lawsuit as a SLAPP suit under the anti-SLAPP statute.

In 2005, the California Legislature enacted *Code Civ. Proc. § 425.18* which stack[s] the procedural deck in favor of the SLAPPback plaintiff confronted with a special motion to strike [39 Cal. 4th 260, 282]. First, Section 425.18 provides the SLAPPback plaintiff with a longer timeframe in which to conduct discovery that might yield evidence to resist the motion to strike, as well as the right to file an *ex parte* application for a continuance to seek further discovery [Code Civ. Proc. § 425.18(d), (e)]. Second, Section 425.18 exempts the plaintiff from fees and costs even if his or her SLAPPback lawsuit is stricken [Code Civ. Proc. § 425.18(c)]. Third, Section 425.18 limits an unsuccessful SLAPPback defendant to writ review (whereas ordinarily an order granting or denying a special motion to strike is subject to immediate appeal) [Code Civ. Proc. § 425.18(c)]. Fourth, and most critical to this analysis, a defendant in a SLAPPback lawsuit cannot file a special motion to strike if the defendants underlying claim which was dismissed as a SLAPP was illegal as a matter of law [Code Civ. Proc. § 425.18(h)].

The Burden Is On The SLAPPback Plaintiff To Specifically Establish That The Underlying Claim Was Illegal As A Matter Of Law. In *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal. 4th 260, 46 Cal. Rptr. 3d 638, 139 P.3d 30, the California Supreme Court interpreted the illegal as a matter of law exemption in Section 425.18(h). In a unanimous decision, the Court concluded that the fact that the SLAPPback defendants underlying claim was dismissed as a SLAPP **does not** mean that the claim was illegal as a matter of law [39 Cal. 4th 260, 283-284]. The Court reasoned that to hold otherwise would mean that a SLAPPback defendant could never file a special motion to strike because, by definition, the underlying claim in a SLAPPback lawsuit would always have been dismissed as a SLAPP suit [39 Cal. 4th 260, 283-284].

The *Soukup* Court also concluded that the burden of establishing that the underlying claim was illegal as a matter of law should be shouldered by the SLAPPback plaintiff [39 Cal. 4th 260, 286]. The Court reasoned that ordinarily a defendant filing a special motion to strike satisfies his or her initial burden simply by demonstrating that the challenged cause of action is one arising from protected activity [39 Cal. 4th 260, 286]. The Court, concluded that it thus, could not impose an additional requirement that the defendant also prove that the protected activity did not violate any laws [39 Cal. 4th 260, 286]. The Court found that placing this burden on the defendant also would be impractical and inefficient because it would require the defendant to identify and address every conceivable statute that might have had some bearing on the underlying action and then prove a negative that the underlying action did not violate any of these laws [39 Cal. 4th 260, 286].

Accordingly, once the SLAPPback defendant demonstrates that the SLAPPback lawsuit arises from protected activity, the SLAPPback plaintiff may counter by demonstrating that the underlying action was illegal as a matter of law because either: [1] the defendant concedes the illegality of the assertedly protected activity; or [2] the illegality is conclusively established by the evidence presented in connection with the motion to strike [39 Cal. 4th 260, 286-87]. The SLAPPback plaintiff must specifically identify the statute or statutes that the SLAPPback defendant is alleged to have violated [39 Cal. 4th 260, 287]. [T]he [SLAPPback] plaintiff **must** also show the specific manner in which the statute or statutes were violated with reference to their elements [39 Cal. 4th 260, 287]. The *Soukup* Court explicitly held that [a] generalized assertion that a particular statute was violated by the filing or maintenance of the underlying action without a particularized showing of the violation will be insufficient to demonstrate illegality as a matter of law [39 Cal. 4th 260, 287]. If the SLAPPback plaintiff cannot conclusively establish that the underlying action was illegal as a matter of law, then the SLAPPback plaintiff will need to demonstrate that there is a probability that the SLAPPback plaintiff will prevail on his or her claim for malicious prosecution or abuse of process (i.e., the same requirement any plaintiff would face opposing a special motion to strike once the defendant established that the plaintiffs claim concerns protected activity) [39 Cal. 4th 260, 291].

Litigation Significance

1. The SLAPPback Plaintiff Faces A Very High Burden To Establish The Illegal As A Matter of Law Exemption.

The *Soukup* decision places a very high burden on the SLAPPback plaintiff to establish the illegal as a matter of law exemption. In order to apply, either the SLAPPback defendant has to admit that the underlying action concerned illegal activity or the evidence will need to **conclusively** demonstrate illegality [39 Cal. 4th 260, 286-287]. Based on the authority cited in *Soukup*, if there is a genuine issue of material fact, the illegal as a matter of law exemption **will not** apply [39 Cal. 4th 260, 285-286].

For example, in *Soukup*, the California Supreme Court approvingly cited the legislative analysis of an earlier version of Section 425.18(h) which used the phrase indisputably illegal conduct instead of illegal as a matter of law [39 Cal. 4th 260, 285-286]. The *Soukup* Court quoted a passage from the legislative analysis stating that if there is a genuine issue of material fact that turns on the credibility of [a] witness or on proper inferences to be drawn from indisputable facts, then the matter is not indisputable [39 Cal. 4th 260, 285-286 (quoting Sen. Comm. on Judiciary, Analysis of Assem. Bill No. 1158 (2005-2006 Reg. Sess.))]. While the *Soukup* Court noted that the final version of Section 425.18 did not contain the indisputably illegal conduct language, the Court found that there is no indication in the legislative history that a different meaning was intended [39 Cal. 4th 260, 285-286].

The *Soukup* Court also relied heavily on the decision in *Paul for Council v. Hanyecz* (2001) 85 Cal. App. 4th 1356 (2001). In *Paul*, the plaintiff was a city council member seeking reelection. Following his defeat, he sued the defendants alleging that they interfered with his candidacy through illegal campaign contributions. The defendants filed a special motion to strike under the anti-SLAPP statute based on the fact that campaign contributions constitute political speech protected by the First Amendment. However, the defendants moving papers showed that they did, in fact, violate the Political Reform Act by laundering campaign contributions [85 Cal. App. 4th 1356, 1367]. The *Paul* court found that the defendants could not invoke the anti-SLAPP statute, because their underlying conduct was not a valid exercise of their constitutional rights [85 Cal. App. 4th 1356, 1367]. The *Paul* court, nevertheless, noted that had there been a factual dispute as to the legality of defendants actions, then we could not so easily have disposed of defendants motion [85 Cal. App. 4th 1356, 1367].

As the above authorities demonstrate, unless the SLAPPback plaintiff can conclusively prove that there are no disputed issues of material fact, the illegal as a matter of law exemption will not apply. In order to establish the illegal as a matter of law exemption, a SLAPPback plaintiff should specifically present evidence establishing each element of the alleged statutes or laws that were violated. If it appears that facts essential to establish the exemption may exist, but cannot then be presented, the SLAPPback plaintiff should take advantage of the greater discovery rights afforded under Section 425.18(e) which allows the SLAPPback plaintiff to file an *ex parte* application for a continuance to obtain necessary discovery. For an example of a plaintiff proving that the asserted protected conduct was illegal as a matter of law even though the defendant would not concede illegality, see the California Supreme Courts companion decision to *Soukup* in *Flatley v. Mauro* (2006) 39 Cal. 4th 299, 330-31 (holding that evidence submitted on special motion to strike conclusively established that attorneys communications constituted extortion, not protected settlement demands, and thus were illegal as a matter of law).

2. A SLAPPback Defendant Should Strongly Consider Filing A Special Motion To Strike.

If a SLAPPback defendant believes that the plaintiff will have a difficult time proving his or her case, then the SLAPPback defendant should strongly consider filing a special motion to strike under the anti-SLAPP statute. A SLAPPback defendant should be able to easily satisfy the threshold burden of establishing that a SLAPPback lawsuit arises from protected activity. The *Soukup* Court recognized that a SLAPPback lawsuit for malicious prosecution or abuse of process i.e., that the SLAPPback defendant committed a tort by filing the underlying lawsuit implicates the defendants First Amendment right of petition [39 Cal. 4th 260, 291]. As such, upon the filing of a special motion to strike, the burden will immediately shift to the SLAPPback plaintiff to establish: (1) that the SLAPPback defendants underlying claim was illegal as a matter of law or (2) that the SLAPPback plaintiffs lawsuit for malicious prosecution or abuse of process has merit. If the SLAPPback plaintiff cannot make this showing, the SLAPPback lawsuit will be dismissed. By filing a special motion to strike, the SLAPPback defendant can obtain a relatively quick determination of the merits of plaintiffs case.

RELATED LINKS: For further discussion of anti-SLAPP motions generally, see

- Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 13, Anti-SLAPP Motions;
- Forms of Pleading and Practice, Ch. 376, Motions to Strike: Anti-SLAPP

For further discussion of SLAPPback suits in particular, see

- Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 13, Anti-SLAPP Motions, § 13.22A et seq.;
- California Forms of Pleading and Practice, Ch. 376, Motions to Strike: Anti-SLAPP, § 376.17.

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Jason M. Frank on *Flatley v. Mauro*

2008 Emerging Issues 2923

Jason M. Frank on *Flatley v. Mauro* (2006) 39 Cal. 4th 299

By Jason M. Frank and Nicholas J. Begakis

September 25, 2008

SUMMARY: California Supreme Court decision adds an exception to the first step of the anti-SLAPP test by holding that if "either the defendant concedes, or the evidence conclusively establishes" that the alleged protected activity is illegal as a matter of law, the defendant is precluded from using the anti-SLAPP statute.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Cite as: Frank, Jason M. *Jason M. Frank on Flatley v. Mauro* (2006) 39 Cal. 4th 299. *LexisNexis Expert Commentary*, (Date content was last viewed online).

Background: The California Legislature enacted the anti-SLAPP statute to prevent and deter meritless strategic lawsuits against public participation (aka SLAPP) that are brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances [*Code Civ. Proc.* § 425.16(a)]. The anti-SLAPP statute allows a defendant to file a special motion to strike the lawsuit as a SLAPP. [*Code Civ. Proc.* § 425.16(b)]. If the defendant can demonstrate that the plaintiffs lawsuit concerns protected activity such as the defendants exercise of his or her constitutional rights then the burden shifts to the plaintiff to demonstrate (through pleadings and affidavits) a probability of prevailing in the lawsuit. In short, the anti-SLAPP statute provides a relatively quick and efficient means for defendants to resolve meritless lawsuits early in the litigation.

In *Flatley v. Mauro* (2006) 39 Cal. 4th 299, 46 Cal. Rptr. 3d 606; 139 P.3d 2 the California Supreme Court held that a defendant will not be permitted to employ the anti-SLAPP statute if the asserted protected activity is illegal as a matter of law [39 Cal. 4th 299, 305] In *Flatley*, the plaintiff -- renowned dance star Michael Flatley -- sued attorney D. Dean Mauro for civil extortion, intentional infliction of emotional distress and wrongful interference with economic advantage. Flatleys claims arose from a letter and subsequent phone calls from Mauro demanding payment to Mauros client who claimed she was raped by Flatley. Mauro unsuccessfully moved to strike Flatleys complaint under the anti-SLAPP statute arguing that the demand letter was a prelitigation settlement offer and therefore Flatleys lawsuit was challenging the attorneys exercise of his constitutionally protected rights of petition and free speech. The California Supreme Court upheld the trial courts denial of the motion to strike, finding that Mauros letter constituted criminal extortion and was therefore unprotected by constitutional guarantees of petition and free speech.

Test: Traditionally, an anti-SLAPP motion proceeds in two parts. First, the defendant must make a prima facie showing that the plaintiff's causes of action arise from acts the defendant took in furtherance of his or her constitutional rights [39 Cal. 4th 299, 314]. Second, if the defendant shows that the lawsuit arises from constitutionally protected activity, the burden shifts to the plaintiff to make a prima facie showing of facts which, if proven, would support a judgment in the plaintiff's favor [39 Cal. 4th 299, 314].

The *Flatley* Court added an exception to the first step of this test holding that if either the defendant concedes, or the evidence conclusively establishes that the alleged protected activity is illegal as a matter of law, the defendant is precluded from using the anti-SLAPP statute [39 Cal. 4th 299, 320]. The Court emphasized that in reaching this conclusion, the question of whether the defendant's underlying conduct was illegal as a matter of law is preliminary, and unrelated to the second prong question of whether the plaintiff has demonstrated a probability of prevailing [39 Cal. 4th 299, 320]. The Court further emphasized that the showing required to establish conduct illegal as a matter of law either through defendant's concession or by uncontroverted and conclusive evidence is not the same showing as the plaintiff's second prong showing of probability of prevailing [39 Cal. 4th 299, 320].

Litigation Significance: As noted in a concurring opinion, the illegal as a matter of law exception created by the *Flatley* Court may prove difficult to implement in practice without blurring the distinction between the first and second prong tests for anti-SLAPP motions [39 Cal. 4th 299, 335]. The standard for determining whether the exception applies is virtually indistinguishable from the standard plaintiffs must satisfy under the second prong when proving the merits of their case [39 Cal. 4th 299, 335].

For example, the *Flatley* decision does not clearly address which party has the burden of raising and proving that the illegal as a matter of law exception applies [39 Cal. 4th 299, 320]. However, from a practical standpoint, it is clear that the plaintiff will need to do both. The Court in fact recognizes the holding in *Navellier v. Sletten* (2002) 29 Cal. 4th 82, where the California Supreme Court held that the anti-SLAPP statute does not require defendants to prove that their asserted protected activity was valid as a matter of law [39 Cal. 4th 299, 319-320]. Consequently, in order for a plaintiff to conclusively establish that the illegal as a matter of law exception applies, the plaintiff likely will need to establish the merits of his or her case because the illegality will be inextricably linked with the basis for the claim.

The facts in *Flatley* provide a perfect illustration. The defendant was being sued for engaging in extortion. The defendant claimed that it was protected activity. The plaintiff ultimately had to conclusively establish that the defendant's so-called prelitigation settlement efforts were extortion through supporting declarations [39 Cal. 4th 299, 332-333]. It is hard to see how this is any different than the traditional two-step test for anti-SLAPP motions. While there may be unique situations where the illegality of the conduct is not inextricably linked with the merits of the case, in most situations the plaintiff will ultimately have the burden of proving that the alleged protected conduct is illegal and that the evidence establishes a probability that the plaintiff will prevail on the merits. As such, the *Flatley* decision still makes it relatively easy for a defendant to shift the burden of proof to the plaintiff, even if the asserted protected activity is illegal as a matter of law.

RELATED LINKS: For further discussion of anti-SLAPP motions generally, see

- Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 13, Anti-SLAPP Motions;
- California Forms of Pleading and Practice, Ch. 376, Motions to Strike: Anti-SLAPP

For further discussion of the Litigation Privilege as it pertains to anti-SLAPP motions, see

- Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 13, Anti-SLAPP Motions § 13.18;
- California Forms of Pleading and Practice, Ch. 376, Motions to Strike: Anti-SLAPP, § 376.15

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Katherine C. Huibonhoa on Alan v. American Honda Motor Co., Inc.

2008 Emerging Issues 2921

Katherine C. Huibonhoa on Alan v. American Honda Motor Co., Inc., (2007) 40 Cal. 4th 894

By Katherine C. Huibonhoa

September 24, 2008

SUMMARY: California Supreme Court literally construes trigger for 60-day appeal clock under California Rule of Court 8.104(a)(1), reversing appellate court decision dismissing appeal as untimely

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Cite as: Huibonhoa, Katherine C. *Katherine Huibonhoa on Alan v. American Honda Motor Co., Inc.*, (2007) 40 Cal. 4th 894. *LexisNexis Expert Commentary*, (Date content was last viewed online).

Introduction: California Rule of Court 8.104(a) sets forth the time in which a party must appeal from a judgment or appealable order. Rule 8.104(a) states that unless otherwise provided by statute or by Rule 8.108 (governing extensions of time for appeal), a party must file a notice of appeal on or before the earliest of [Cal. Rule of Ct., Rule 8.104(a) (emphasis added)]:

(1) 60 days after the superior court clerk mails the party filing the notice of appeal a document entitled Notice of Entry of judgment or a file-stamped copy of the judgment, showing the date either was mailed;

(2) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled Notice of Entry of judgment or a file-stamped copy of the judgment, accompanied by proof of service; or

(3) 180 days after entry of judgment.

In *Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal. 4th 894, 55 Cal. Rptr. 3d 534, 152 P.3d 1109, the Court focused on subsection (a) regarding what type of documentation from the superior court clerk constitutes proper notice of a judgment or appealable order. The Court read Rule 8.104(a)(1) literally to require either a document entitled Notice of Entry of judgment or a court file-stamped copy of the judgment, and also held that Rule 8.104(a)(1) requires a single, self-sufficient document that satisfies all of the stated conditions.

Background: In *Alan*, the plaintiff Keith Alan alleged that defendant American Honda Motor Co., Inc. failed to inform customers fully about costly replacements associated with timing belts in its vehicles and sued for unfair competition and false advertising. Following some discovery, Alan moved to certify a nationwide class, and the superior court denied the motion.

On January 2, 2003, the superior court clerk mailed to the parties a single envelope with two documents: (i) a document entitled STATEMENT OF DECISION RE: ALANS MOTION FOR CLASS CERTIFICATION (Statement of Decision), a file-stamped document that set forth the courts reasons for denying the motion and stated that Plaintiffs motion was denied; and (ii) a minute order entitled RULING ON SUBMITTED MATTER/MOTION FOR CLASS CERTIFICATION (Minute Order) that referenced the Statement of Decision and stated that both the Statement of Decision and the Minute Order were mailed on January 2, 2003. Subsequently, on January 21, 2003, Defendant filed and served on Plaintiff a document entitled NOTICE OF ENTRY OF ORDER AND STATEMENT OF DECISION DENYING CLASS CERTIFICATION (Notice of Entry) that attached copies of the Statement of Decision and Minute Order sent by the superior court clerk on January 2.

Plaintiff Alan thereafter filed his appeal on March 6, 2003 -- 63 days after the superior court clerk mailed the Statement of Decision and Minute Order, and 44 days after Honda served the Notice of Entry. While both parties agreed that the January 21 Notice of Entry satisfied Rule 8.104(a)(2), Defendant Honda contended that the earlier January 2 Statement of Decision and Minute Order together satisfied Rule 8.104(a)(1) and commenced the 60-day appeal clock. Defendant Honda thus moved to dismiss the March 6, 2003 appeal as untimely under Rule 8.104(a)(1).

Plaintiff Alan opposed. He argued, among other things, that the service of the Minute Order triggered the 60-day clock and that the appeal was filed timely. Alans position was that neither the Statement of Decision nor the Minute Order satisfied Rule 8.104(a)(1), that Rule 8.104(a)(2) governed the timeliness of the appeal, and that he timely filed the notice of appeal under Rule 8.104(a)(2) (*i.e.*, within 60 days of service of the January 21 Notice of Entry).

The appellate court granted Defendants motion to dismiss, holding that the Statement of Decision and Minute Order could be read together to satisfy the rule. The appellate court also rejected Plaintiff Alans argument that Rule 8.104(a)(1) required a single document that satisfied its conditions.

Result: The California Supreme Court reversed on two alternate grounds. First, the Court found that there was no document entitled Notice of Entry among the documents the superior court clerk mailed on January 2, as required by the literal language of Rule 8.104(a)(1). The Court then moved to the second half of subsection (a) and questioned whether there was a file-stamped copy of the judgment mailed by the clerk. The Court answered in the negative, holding that the Minute Order (rather than the file-stamped Statement of Decision) was the appealable order in the case. Since the superior court clerks January 2 mailing did not satisfy either condition set forth in Rule 8.104(a)(1), the Court concluded that the notice of appeal was filed timely under Rule 8.104(a)(2).

Second, the *Alan* Court went a step further and offered an alternate basis for its conclusion. The Court utilized principles of statutory construction, including the well-established policy of resolving ambiguities in rules limiting the right to appeal -- such as Rule 8.104(a)(1) -- in favor of the right to appeal, as long as that can be accomplished without violence to the applicable rules. The Court concluded that interpreting Rule 8.104(a)(1) as requiring a single, self-sufficient document did not do violence to the rule and was consistent with the plain language of the rule. For this reason as well, the Court concluded, the Statement of Decision and Minute Order could not be taken together to satisfy Rule 8.104(a)(1).

The Significance of the Case:

- **The Rule means what it says.** *Alan* makes clear that language in Rule 8.104(a)(1) -- and presumably the same language in Rule 8.104(a)(2) -- requires: (1) a single, self-sufficient document, (2) that is precisely entitled Notice of Entry of judgment or that is a court file-stamped copy of the judgment, and (3) that shows the date of mailing by the clerk (or, for Rule 8.104(a)(2), that attaches a proof of service).

- **Limitations on the right to appeal.** The *Alan* Court utilized principles of statutory construction to construe Rule

8.104(a)(1) literally and in favor of the appeal. It relied on the rule that jurisdictional limits, such as time limits for filing an appeal, are to be construed strictly and literally. The Court also underscored that where there is doubt, statutory ambiguities in rules that limit the right to appeal should be resolved in favor of the right to appeal, as long as that can be done without doing violence to the applicable rules.

Practice Tips:

■ **Follow the Rules literal requirements.** Parties seeking to appeal (or to commence the appeal clock) should follow Rule 8.104(a) precisely. Where the superior court clerk is to notify the parties of the entry of judgment, parties should review carefully what is received from the clerk and determine whether it consists of: (1) a single, self-sufficient document, (2) that is precisely entitled Notice of Entry of judgment or that is a court file-stamped copy of the judgment, and (3) that shows the date of mailing by the clerk. If it does not strictly meet these requirements, Rule 8.104(a)(1) has not been triggered and the 60-day appeal clock has not yet started. To trigger the 60-day clock, either party (whichever party would like to get the clock started) should call upon Rule 8.104(a)(2) by serving on the other party: (1) a single, self-sufficient document, (2) that is precisely entitled Notice of Entry of judgment or that is a court file-stamped copy of the judgment, and (3) that includes a proof of service.

■ **Parties can use Rule 8.104 strategically.** The *Alan* decision clarifies what precise documentation is required to trigger the appeal clock under Rule 8.104(a). In the case at bar, the Courts decision favored the appellant. But *Alan* would not seem to favor appellant or appellee. While *Alan* prevents appellees from relying on a questionable document (or documents) to commence the appeal clock and then argue that the 60 days have run, it makes clear what documentation will (and will not) trigger the clock. A party who would like to commence the appeal clock soon can and should act under Rule 8.104(a)(2), assuming the appropriate documentation is available from the court. Similarly, where a clerk has not mailed the correct documentation, parties should act accordingly, moving quickly (or slowly) under Rule 8.104(a)(2) to begin the 60-day appeal clock. In any event, *Alan* did not address and does not modify Rule 8.104(a)(3), which states that the appeal clock expires 180 days after entry of judgment.

RELATED LINKS: For further discussion of time requirements for filing a notice of appeal, see

- California Forms of Pleading and Practice, Ch. 42, Notice of Appeal, § 42.13;
- California Forms of Pleading and Practice, Ch. 42, Notice of Appeal, § 42.50

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Electronic Discovery, Evidence and Claims in New York

2008 Emerging Issues 2938

Bisceglie on Electronic Discovery, Evidence and Claims in New York

By Kyle C. Bisceglie

September 24, 2008

SUMMARY: This emerging issue commentary summarizes the legal developments in New York related to electronically stored information ("ESI") or "electronic discovery", as it is called in New York state courts. This commentary emphasizes New York state law in this emerging area, referencing federal precedent only as necessary to guide state practice, and treats ESI evidentiary issues and new substantive claims that merit the practitioners attention.

PDF LINK: Enhanced Emerging Issues Commentary (\$)

ARTICLE: New York generally has been a forward-looking jurisdiction in dealing with electronic discovery. New York courts held ESI discoverable as early as 1979. *See Ball v. State*, 101 Misc. 2d 554, 421 N.Y.S.2d 328 (Ct. Cl. 1979) (finding that computer information, including printouts and tapes containing raw data, is discoverable). New Yorks early adoption of a meet and confer requirement for electronic evidence in its Commercial Division rules, development of evidentiary standards for authentication, and amendment to the CPLR to preserve privileged communications over email provide additional evidence that electronic discovery has been part of practice in New York since long before the December 2006 amendments to the Federal Rules of Civil Procedure governing discoverability of ESI. *See* 2006 Amendments and Advisory Committee Notes to *Fed. R. Civ. P.* 16(b), 26(a)(b) and (f), 33(d), 34(a), 37(e) and 45(a)(b)(d) and (e).

However, like most states, New Yorks rules of civil procedure do not expressly address electronic discovery: the CPLR contains no specific provisions governing the *discovery* of electronic documents. *Lipco Elec. Corp. v. ASG Consulting Corp.*, 4 Misc. 3d 1019A (N.Y. Supr. Ct. 2004). Instead, courts and practitioners rely on the general pre-trial disclosure provisions of Article 31 of the CPLR, specifically CPLR 3120, for disclosure of electronic records, and often look to the Federal Rules of Civil Procedure and federal case law for guidance. *Delta Financial Corp. v. Morrison*, 13 Misc.3d 604, 819 N.Y.S.2d 908, 911 (N.Y. Supr. Ct. 2006).

This commentary addresses the following areas that are important for the New York practitioner to evaluate when considering electronic discovery: (I) preservation and litigation holds; (II) court ordered preservation; (III) the meet and confer; (IV) the allocation of costs between the parties and cost shifting; (V) spoliation of electronic discovery; (VI) use of E.S.I. as evidence; (VII) the impact of electronic data on substantive claims available under New York law; (VIII) preservation of the attorney-client privilege; and (IX) third party discovery. The meet and confer requirement has been addressed briefly, and this commentary does not address at length technical issues of ESI including format of exchanges

(e.g., TIFF, PDF, native, PST, etc.), document management systems (Concordance, Summation, Ringtail, etc.) and presentation of evidence at trial.

I. Preservation

New York state courts impose a duty on the part of the party in possession and control of evidence to see that it is preserved. *Amaris v. Sharp Electronics Corp.*, 304 A.D.2d 457, 758 N.Y.S.2d 637 (1st Dept. 2003). The obligation to preserve evidence arises only when a party should have known that the evidence may be relevant in future litigation. *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998). This duty often predates the filing of the suit. In *Zubulake IV*, the court found the duty arose before any written complaint was made because the evidence indicated that the employees of defendant who worked with the plaintiff recognized the possibility she might sue. *Zubulake v. UBS Warburg et al.*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) (*Zubulake IV*).

Zubulake IV articulated a Summary of Preservation Obligations that is observed in all New York courts:

A party or anticipated party must retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches, and any relevant documents created thereafter

The scope of a party's preservation obligation can be described as follows: Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a litigation hold to ensure the preservation of relevant documents. As a general rule, that litigation hold does not apply to inaccessible backup tapes (e.g., those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedules set forth in the company's policy. On the other hand, if backup tapes are accessible (i.e., actively used for information retrieval), then such tapes *would* likely be subject to the litigation hold.

However, it does make sense to create one exception to this general rule. If a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of key players to existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available. This exception applies to *all* backup tapes.

Zubulake IV, 220 F.R.D. at 218 (*emphasis original*).

The duty to preserve applies not only to the party but also to the party's outside and inside counsel. *Zubulake v. UBS Warburg LLC, et al.*, 229 F.R.D. 422, 435 (S.D.N.Y. 2004) (*Zubulake V*). The requirements of this duty are fairly commonly understood and much has been written about them; only a brief summary is due here. Counsel must become familiar with a client's document retention policy and data retention architecture by speaking with key players in the litigation, and information technology personnel who can explain system-wide backup procedures. *Id.* at 432. Counsel also can preserve data based on broadly drawn system-wide keyword searches and preserve those documents for anticipated discovery demands. It is not sufficient to simply issue the legal hold; counsel must take *some reasonable steps* to ensure compliance. *Id.* And there are certain steps counsel should take to continue the litigation hold and preservation during the pendency of the action, *id.* at 433, which steps include periodically reissuing the litigation hold, speaking to key players (again) about the hold and obtaining custody of backup tapes, if necessary. *Id.* at 433-34.

As a practical matter, counsel applying these rules learns quickly that while these rules are not intended to be difficult or onerous, it is the role of outside counsel to make sure in-house counsel and business persons appreciate the danger in failure to comply. Unless the client has had the misfortune of a prior bad experience, some persistence may be required. Additionally, plaintiff's counsel may include in a demand letter notice to preserve certain types of evidence, and the more specific the instruction as to the individuals involved and the type of evidence they have, the harder it will be to argue later that the duty to preserve did not arise. It is more common to see such a preservation request in suits brought by individual plaintiffs than in suits brought by an institution, perhaps because in the former there is a lower likelihood that onerous demands will be turned around on counsel.

II. Court Ordered Preservation

New York State approaches preservation requirements differently than federal courts. Rule 26(f), the only preservation rule in the Federal Rules of Civil Procedure, requires counsel to discuss any issues relating to preserving discoverable information. Substantive law, the best known of which may be the Private Securities Litigation Reform Act of 1995, 15 U.S.C. 78u-4 (the PSLRA), also may impact preservation of evidence under federal law. Under PSLRA, a defendant shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure. 15 U.S.C. 78u-4(b)(3)(C)(i). All of these requirements matter little in New York state court, the federal protections are not directly binding [on New York courts]. It is true that the federal court could, and probably would, enforce the PSLRA, but New York courts cannot independently enforce a breach of PSLRA. *Weiller v. New York Life Ins. Co.*, 6 Misc. 3d 1038A, 800 N.Y.S.2d 359, (N.Y. Supr. Ct. 2005). The Advisory Committee points out two important assumptions about federal preservation: (1) The operation of computers involves both the automatic creation and automatic deletion or overwriting of certain information. Failure to address preservation issues early in the litigation increases uncertainty and raises a risk of disputes, and (2) [t]he requirement that the parties discuss preservation does not imply that courts should routinely enter preservation orders.

A. Preservation and Disclosure Prior to Commencing Litigation

Under New York law, preservation orders are divided into those orders issued before and those issued after commencing litigation. Unlike federal law, New York expressly provides for pre-litigation preservation and discovery. CPLR 3102(c) governs and provides a mechanism to compel disclosure of electronic records: [b]efore an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order. The court may appoint a referee to take testimony. However, simply because relief is available does not mean that it is freely granted: the prospective plaintiff must demonstrate, by affidavits and evidentiary facts, the existence of a prima facie cause of action. *Barash v. Waldorf Astoria*, 2003 N.Y. Misc. LEXIS 245 (N.Y. Supr. Ct. 2003). See, e.g., *Quad/Graphics, Inc. v. Southern Adirondack Library System*, 174 Misc. 2d 291, 29294, 664 N.Y.S.2d 225, 22628 (N.Y. Supr. Ct. 1997) (denying pre-litigation disclosure of library computer records to petitioner corporation that sought the data to determine which of its employees were utilizing company computers to access the Internet via the library).

It is important to note that practitioners seeking discovery before commencement of litigation must purchase and use a separate index number for each and every amendment made. This includes seeking pre-action discovery from additional parties or to establish additional substantive claims. Failure to do so can have significant consequences. In *Harris v. Niagara Falls Board of Education*, 6 N.Y.3d 155, 157, 811 N.Y.S.2d 299, 300 (2006), plaintiff commenced a special proceeding to obtain permission to serve a late notice of claim, pay a filing fee and obtain an index number. The application was successful, but plaintiff was compelled to bring a second proceeding seeking permission to serve a late notice of claim on additional entities. After receiving permission and serving the notices of claim, plaintiff commenced the action by filing a summons and complaint with the county clerk that used the same index number for the papers in the two special proceedings and the initial action. The defendants waited until after the statute of limitations had expired before seeking dismissal without an adjudication of the merits. *Id.* at 158. The Appellate Division then dismissed the complaint and the Court of Appeals affirmed. *Id.* at 150.

B. Preservation and Disclosure After Commencing Litigation

The Commercial Division rules require parties to discuss implementation of a data preservation plan, and practitioners may seek preservation orders for electronic information after commencing litigation under the CPLR. Specifically, CPLR 3103(a) governs post commencement orders and states: The court may ... make a protective order ... regulating the use of any discovery device. Such order shall be designed to prevent unreasonable annoyance, expense, ... or other prejudice to any person.

Weiller v. New York Life Ins. Co., 6 Misc. 3d 1038A, 800 N.Y.S.2d 359 (N.Y. Supr. Ct. 2005), provides a telling example of how the rules work in New York state practice. In *Weiller*, the defendant insurance corporations allegedly engaged in an elaborate scheme to drastically limit its liability to policyholders by denying meritorious claims based on economic factors having nothing to do with insureds actual qualifications under the policies. *Id.* at *1. The plaintiffs sought what was in substance, a motion for a preliminary injunction, in that it sought to restrain the defendants from discarding [a]ll databases, electronic material, tape media, electronic media, hard drives, computer disks and documents, asserted to be of possible probative value. *Id.* at *6. Even though a federal court had previously issued an almost identical order, the court issued such a preservation order with respect to all material requested by the plaintiffs and without any cost shifting (although it noted that it might address it later). *See also School of Visual Arts v. Kuprewicz*, 3 Misc. 3d 278, 771 N.Y.S.2d 804, 813 n.8 (N.Y. Supr. Ct. 2003) (In a previous oral ruling, the Court enjoined [defendant] from destroying or erasing any files from her home computer and directed [her] to give the computer to her lawyer so as to preserve potential evidence).

III. Meet and Confer

The meet and confer requirement is perhaps the one significant area of ESI where New York state court and other federal jurisdictions offer clearer guidance than New York federal court. While *Fed. R. Civ. P. 26(f)* was amended to require counsel to discuss preservation as part of his or her discovery plan, none of the Southern, Eastern or Northern Districts prescribes any rules governing the meet and confer. This is in contrast to federal courts in Kansas, Maryland and Delaware, each of which provide local rules governing ESI generally and the meet and confer specifically. *See* Guidelines for Discovery of Electronically Stored Information for the U.S. District Court for the District of Kansas, Default Standards for Discovery of Electronic Documents (E-Discovery) for the District of Delaware and District of Maryland's Suggested Protocol for Discovery of Electronically Stored Information. It is not uncommon for litigants in the Southern District to look to these guidelines as a starting point in preparation for the meet and confer.

Effective January 17, 2006, the Commercial Division of the Supreme Court amended Part 202 of the Uniform Civil Rules of the Supreme and County Courts by adding Section 202.70 to include a meet and confer requirement. This Section contains Rule 8(b), which governs practice in the Commercial Division statewide. Rule 8(b) provides:

Prior to the preliminary conference, counsel shall confer with regard to anticipated electronic discovery issues. Such issues shall be addressed with the court at the preliminary conference and shall include but not be limited to (i) implementation of a data preservation plan; (ii) identification of relevant data; (iii) the scope, extent and form of production; (iv) anticipated cost of data recovery and proposed initial allocation of such cost; (v) disclosure of the programs and manner in which the data is maintained; (vi) identification of computer system(s) utilized; (vii) identification of the individual(s) responsible for data preservation; (viii) confidentiality and privilege issues; and (ix) designation of experts.

To date, no published opinion of the Commercial Division interprets this rule. Additionally, practice experience suggests that this rule although adopted well before the better-known ESI amendments to the Federal Rules of Civil Procedure has not been as actively managed as the federal meet and confer requirement. This may be due in part to the heavy volume of cases and lack of magistrates in the Commercial Division. Nevertheless, pro-active counsel have had a new weapon to wield in the appropriate cases. *See Berman, Outside Counsel E-Discovery in New York, N.Y.L.J.*, June 25, 2005, at 4, col. 4 (noting that the rule will make cost allocation a primary strategic consideration).

IV. Cost Shifting and Allocation for Both Parties

Once discovery is pending, practitioners must next consider who bears the cost. There are significant differences between New York and federal courts as relates to the cost of discovery of ESI. While the Supreme Court has instructed that in federal courts the presumption is that the responding party must bear the expense of complying with discovery requests, *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358, 98 S. Ct. 2380, 2393 (1978), *Fed. R. Civ. P. 26(b)(2)(B)* modifies this presumption as to electronically stored information by requiring: [a] party need not provide

discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. Examples of accessible data include data on PCs, servers and local drives, and inaccessible data may include backup tapes, erased, fragmented or damaged tapes. Thus, in federal court the practitioner must employ the seven-factor test articulated in *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) (*Zubulake III*) as to inaccessible data, to determine if the cost of discovery should be shifted to the requesting party: (1) The extent to which the discovery request is specifically tailored to discover relevant information; (2) the availability of such information from other sources; (3) the total cost of production, compared to the amount in controversy; (4) the total cost of production, compared to the resources available to each party; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues at stake in the litigation; and (7) the relative benefits to the parties of obtaining the information. *Id.* at 322. New York federal courts still maintain the presumption that the responding party pays, the cost shifting analysis must be neutral and close calls should be resolved in favor of the presumption. *Id.* at 320.

It is unclear whether the New York state courts will employ this cost shifting analysis. In New York, although courts have often looked to federal cases for guidance on the issues of electronic discovery, *In re Maura*, 17 Misc.3d 237, 842 N.Y.S.2d 851 (N.Y. Supr. Ct. 2007), the presumption is that each party should shoulder the initial burden of financing his own suit, and based upon such a principle, it is the party seeking discovery of documents who should pay the cost of their [reproduction]. *Rosado v Mercedes-Benz of N. Am.*, 103 A.D.2d 395, 398, 480 N.Y.S.2d 124 (2d Dept 1984). This is nearly a diametrically opposite starting point from federal rules and derives from CPLR 3120, which provides for Notice of Discovery and Inspection. CPLR 3120 requires a party to produce and permit the party seeking discovery, or someone acting on his or her behalf, to inspect, copy, test or photograph any designated documents or any things which are in the possession, custody or control of the party or person served. In other words, the producing party has no obligation to produce any documents but simply must make them available for inspection. This approach to discovery has its obvious limitations in the electronic era, but certainly explains why New York's starting point is fundamentally different from the federal standard.

Courts have interpreted this and similar CPLR provisions (*e.g.*, CPLR 3114 imposing translation cost on examining party) as making cost shifting not an issue in New York, as the party seeking discovery should incur the costs incurred in the production of discovery material. *Lipco Elec. Corp. v. ASG Consulting Corp.*, 4 Misc.3d 1019(A), 798 N.Y.S.2d 345, *9 (N.Y. Supr. Ct. 2004); *In re Maura*, 17 Misc.3d 237, 842 N.Y.S.2d 851, 859 (2007); *Etzion v. Etzion*, 7 Misc.3d 940, 796 N.Y.S.2d 844 (N.Y. Supr. Ct. 2005). There has been some recognition that electronic discovery presents additional issues not present in traditional discovery. The *Lipco* court observed that [r]etrieving computer based records or data is not the equivalent of getting the file from a file cabinet or archives. *But see Etzion*, 7 Misc.3d 940, 796 N.Y.S.2d at 846 (Courts have held that the contents of a computer are analogous to the contents of a filing cabinet.). Nevertheless, New York state case law is evolving to meet the new demands of electronic discovery. In a later decision in *Delta Financial Corp. v. Morrison*, 13 Misc.3d 604, 819 N.Y.S.2d 908 (N.Y. Supr. Ct. 2006), the court found that it was not bound by the *Zubulake* decision but still expressly followed its cost shifting analysis. After the *Delta Financial* decision, the Commercial Division amended its Rules of Practice in 2006 to require counsel to confer with each other regarding anticipated electronic discovery issues, including (i) the scope, extent and form of production and (ii) the anticipated cost of data recovery and proposed initial allocation of such cost, thus opening the door for a cost shifting analysis.

Reflecting the New York presumption that the party seeking electronic discovery should incur the cost, several cases have allocated some of the costs associated with electronic discovery to the responding party or reserved the right to reallocate costs at a later date. One such case is *Etzion*, 7 Misc.3d 940, 796 N.Y.S.2d 844. In *Etzion*, a matrimonial action, plaintiff sought production of computerized business records and hard drives belonging to defendant. Finding the information relevant, the court allowed the hard drive of the defendant to be cloned because the husband had deleted and altered information on the computer. The court also found that the party seeking production shall bear the cost of the production of the business records she seeks, subject to any possible reallocation of costs at trial. *Id.* at 847.

New York courts have not required the party seeking discovery to bear the cost of discovery if the cost is

inordinately low. In *Waltzer v. Tradescape & Co., L.L.C.*, 31 A.D.3d 302, 819 N.Y.S.2d 38 (1st Dept 2006), the court first noted that as a general rule, under the CPLR, the party seeking discovery should bear the cost incurred in the production of discovery material, but then did not require the seeking party to pay because the information sought was already on CD and the cost of copying and giving them to plaintiff would have been inconsequential. *Id.* at 40. Of note to the practitioner, the court also required the defendant to bear the cost of examining them to see if they should not be produced due to privilege or on relevancy grounds. *Id.*

New York state courts, also, may defer the decision on costs as secondary to moving forward with production. In *Weiller*, defendants claimed they had incurred more than \$1 million in preserving computer hard drives under a federal order. *Weiller*, 6 Misc. 3d 1038(A) at *6. The court stated that it is not insensitive to the cost entailed in electronic discovery, and would, at the appropriate juncture, entertain an application by defendants to obligate plaintiff, the requesting party, to absorb all or a part of the cost of the e-discovery it seeks, or will seek, herein. *Id.* Note the state courts de-emphasis on the allocation of costs: the court will not constrain the production of possibly relevant evidence on account of the later need to allocate the cost. *Id.*

Of course, parties are free to reach an agreement as to allocation. See *Samid v. Catholic Diocese of Brooklyn*, 5 A.D.3d 463, 773 N.Y.S.2d 116 (2d Dept 2004) (plaintiff agreed that all costs related to the recovery of defendants' hard drive data would be borne solely by plaintiff to ascertain whether relevant, deleted emails could be recovered).

An additional issue addressed by the courts related to cost shifting is who must pay if a client seeks work product that is stored electronically. In *Matter of Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn*, 294 A.D.2d 190, 743 N.Y.S.2d 72 (1st Dept 2002), plaintiff asked defendant firm to produce work product it had created as plaintiffs lawyers. The defendant law firm initially refused to produce the documents claiming it would be too costly because the documents were on data tapes, but the court found that barring a substantial showing by the Proskauer firm of good cause to refuse client access, petitioners should be entitled to inspect and copy work product materials, for the creation of which they paid during the course of the firms representation. *Id.* at 191. However, the court found that because it was work product, the assemblage and delivery of documents to a client is properly chargeable to the client. *Id.* at 191-92.

V. Spoliation of Electronic Information

Under New York law, spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776 (2d Cir.1990).

The determination of an appropriate sanction, if any, for spoliation is confined to the sound discretion of the court and is assessed on a case-by-case basis. *Zubulake IV*, 220 F.R.D. at 217. In one of the best known federal cases, the court ordered re-depositions, attorneys fees and an adverse jury instruction. *Zubulake v. UBS Warburg LLC, et al.*, 229 F.R.D. 422, 435 (S.D.N.Y. 2004)(*Zubulake V*). Perhaps tellingly, before ordering the adverse instruction, the *Zubulake* court issued four time-consuming decisions involving tedious and difficult fact finding that great[ly] burden[ed] the courts resources. The court noted in postscript that since the case began much has changed pointing to a flood of recent opinions, guidance from professional groups, the American Bar Association and the Sedona Conference and proposed revisions to the Federal Rules of Civil Procedure. Now the Federal Rules of Civil Procedure have been amended, and it is doubtful that federal courts in New York (and elsewhere) are going to be as patient as the *Zubulake* court was.

Federal courts in New York have not hesitated to impose sanctions in appropriate circumstances both before and after *Zubulake IV*. See *De Espana v. American Bureau of Shipping*, No. 03 Civ. 3573 (S.D.N.Y. June 6, 2007) (court imposed costs for spoliation but did not allow an adverse inference because plaintiff could show only that defendant was negligent and could not establish the relevance of the spoliated evidence); *In re NTL, Inc. Sec. Litig.*, No. 02 Civ. 3013, 7377 (S.D.N.Y. Jan. 30, 2007) (court imposed adverse jury inference and costs for defendants gross negligence in allowing ESI to be destroyed); *Metropolitan Opera Assn, Inc. v. Local 100 Hotel Employees and Restaurant Employees*

Inter. Union, 212 F.R.D. 178 (S.D.N.Y. 2003) (court entered judgment as to liability finding defendants utter failure to preserve ESI and related behavior aggressively willful.)

New York state courts have addressed allegations of spoliation and ordered severe sanctions in a number of cases. The movant must demonstrate that the party alleged to have spoliated the evidence was on notice of a potential lawsuit. *Travelers Indemnity Co. v. C.C. Controlled Combustion Co., Inc.*, 2003 N.Y. Misc. LEXIS 1477 (N.Y. City Civ. Ct. 2003). CPLR 3126 provides that the court may make such orders with regard to the failure or refusal as are just for willful failure to disclose relevant information. *Sage Realty Corps., et al. v. Proskauer Rose LLP, et al.*, 713 N.Y.S.2d 155, 159 (1st Dept 2000) (citations omitted) (involving destroying tapes of critical business conversations). Spoliation sanctions are appropriate under New York law for both intentional and negligent spoliation. *Travelers Indemnity Co.*, 2003 N.Y. Misc. LEXIS 1477, at *3. Penalties for a refusal to comply with disclosure requests are explicitly provided for in CPLR 3126. That section allows for such sanctions as the following: (a) having the matter resolved against the party who destroyed or failed to preserve the significant evidence [CPLR 3126(1)]; (b) prohibiting the disobedient party from supporting or opposing claims based on such spoliated evidence [CPLR 3126(2)]; or (c) striking the pleadings of the disobedient party [CPLR 3126(3)]. New York state courts have broad discretion to impose sanctions under CPLR 3126 when a party intentionally, contumaciously or in bad faith fails to comply with a discovery order or destroys evidence prior to an adversary's inspection. *Sage Realty Corps.*, 713 N.Y.S.2d at 160. The party seeking disclosure bears the burden of showing willfulness; the non-disclosing party must demonstrate an excuse. *Id.* at 160-61 (citations omitted). In upholding dismissal of the complaint, the *Sage Realty Corporation* court recognized the very destruction of the evidence diminishes the ability of the deprived party to prove relevance directly. *Id.* at 160.

Based on the CPLR and these standards, state courts have ordered the most severe remedy available for spoliation of electronic data dismissal of the complaint. *See, e.g., Long Island Diagnostic Imaging, P.C. v. Stony Brook Diagnostic Associates*, 286 A.D.2d 320, 728 N.Y.S.2d 781 (2d Dept 2001) ([s]triking of a party's pleading is a proper sanction for a party who spoliates evidence by purging a computer database despite several court orders directing the defendant to produce the evidence.); *Ingoglia v. Barnes & Noble College Booksellers, Inc.*, 48 A.D.3d 636, 852 N.Y.S.2d 337 (2d Dept 2008) (reversing the trial court on abuse of discretion and dismissing complaint when plaintiff installed a software program designed to permanently remove data from the computer's hard drive and numerous files, images, and folders, as well as some history of the plaintiff's internet usage, had been deleted between the date the defendant demanded inspection of the plaintiff's computer and the date of the inspection); *see also Sage Realty Corps.*, 713 N.Y.S.2d 155 (involving tape recordings). Alternatively, at least one state court has awarded attorneys fees where there was insufficient evidence that the lost emails were relevant. *Hunts Point Realty Corp. v. Pacifico*, 16 Misc.3d 1122(A), 847 N.Y.S.2d 902 (Table) (Sup. Ct., Nassau County July 24, 2007).

VI. Use of ESI as Evidence

Litigators have and, apparently, will continue to expend a tremendous amount of time, effort and clients money in obtaining ESI through discovery. Likewise, jurists, commentators and third-party legal support service providers have written extensively on electronic discovery. There is limited guidance on how to use ESI as evidence in motion practice or at trial once it has been obtained.

The evidentiary issues presented by ESI are essentially the same evidentiary issues presented by traditional documentary evidence. With respect to ESI, trial lawyers most commonly encounter four evidentiary hurdles: (1) is the ESI relevant; (2) is it authentic; (3) if the ESI is offered for the truth of the matter asserted, is it hearsay, and if so, is it covered by an applicable exception; and (4) is the form of the ESI that is being offered as evidence an original or a duplicate of the original writing?

New York does not have written evidence rules but depends on a hodgepodge of court rules, CPLR, statutes and case law. This has significant implications for the practitioner including greater importance of case law interpretation, less uniformity and substantially more trial court discretion. In federal court, the jury determines questions of relevance and authentication under *Fed. R. Evid. 104(b)*, and the court determines questions of hearsay under *Fed. R. Evid. 104(a)*

. In New York state courts, the court determines relevance, authentication, hearsay and best evidence.

While many New York federal and state cases address discoverability of ESI, only a handful of cases involve ESI evidence. Most of the New York cases address the use of computer records in cases involving credit card disputes or accounts stated although there are a few cases involving admissibility of instant messages, emails, websites and chat room content. These cases provide limited instruction and vary in the amount of required foundation.

As a result, to date, the best guidance for practitioners seeking to admit ESI into evidence in a motion, hearing or trial in New York is their own fingerspitzengefühl to establish a foundation, as well as reliable evidence treatises including Edward J. Imwinkelried, *Evidentiary Foundations* (LexisNexis 6th Ed. 2005) and Jack B. Weinstein & Margaret A. Berger, *Weinsteins Federal Evidence* (Joseph M. Laughlin ed., Matthew Bender 2d ed. 1997). In terms of case law guidance, *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007) provides a summary of best evidentiary practices and a survey of state and federal decisions nationwide on all significant and recurring issues associated with foundation for ESI in each of its different flavors: email; internet website postings; text messages and chat room content; computer stored records and data; computer animation and computer simulations; and digital photographs. Significantly, *Lorraine* does not cite to any authority in New York nor has the decision been cited in New York. However, it is a good starting place for practitioners preparing to submit ESI evidence to a court because it provides guidance as to best practices. As the *Lorraine* court wisely observed in the context of authentication, but applicable to all evidentiary foundations:

[T]here is wide disparity between the most lenient [and demanding] position[s] courts have taken in accepting records Lawyers can expect to encounter judges in both camps, and in the absence of controlling precedent in the court where an action is pending setting forth the foundational requirements for computer records, there is uncertainty about which approach will be required. Further, although it may be better to be lucky than good, as the saying goes, counsel would be wise not to test their luck unnecessarily. If it is critical to the success of your case to admit into evidence computer stored records, it would be prudent to plan to authenticate the record by the most rigorous standard that may be applied. If less is required, then luck was with you.

Lorraine, 241 F.R.D. at 558-59.

New York case law suggests that this observation about lenient and demanding camps is no less true here. Certainly, New York courts are far more amenable to admitting electronic evidence than the Southern District of Texas which, in ruling on the authenticity of a print-out of a posting on the U.S. Coast Guards website, noted the following:

While some look to the Internet as an innovative vehicle for communication, the Court continues to warily and wearily view it largely as one large catalyst for rumor, innuendo, and misinformation There is no way Plaintiff can overcome the presumption that the information he discovered on the Internet is inherently untrustworthy. Anyone can put anything on the Internet. No web-site is monitored for accuracy and *nothing* contained therein is under oath or even subject to independent verification absent underlying documentation. Moreover, the Court holds no illusions that hackers can adulterate the content on *any* web-site from *any* location at *any* time. For these reasons, any evidence procured off the Internet is adequate for almost nothing, even under the most liberal interpretation of the hearsay exception rules found in *Fed. R. Evid. 807*. Instead of relying on the voodoo information taken from the Internet, Plaintiff must hunt for hard copy back-up documentation in admissible form from the United States Coast Guard or discover alternative information verifying what Plaintiff alleges.

St. Clair v. Johnnys Oyster and Shrimp, Inc., 76 F. Supp. 2d 773 (S.D. Tex. 1999).

In that spirit, this commentary outlines the issue as it pertains to ESI, and notes any New York or other helpful precedent. It is beyond the scope of this commentary to provide a treatise-like dissertation on New York evidence.

A. Relevance

There have been few, if any, cases in New York dealing with the relevance of ESI possibly because the threshold is fairly easy to establish. Under New York law all relevant evidence is admissible unless its admission violates some exclusionary rule and has any tendency in reason to prove the existence of a material fact, i.e., it makes determination of the action more probable or less probable than it would be without the evidence. *People v. Scarola*, 71 N.Y.2d 769 (1988); see *Hoya Saxa, Inc. v. Gowan*, 149 Misc. 2d 191, 192, 571 N.Y.S.2d 179, 180 (1st Dept 1991) (Multiple Dwelling Law § 328(3) provides that printed computerized violation files of a department shall be relevant evidence for the enforcement of State housing standard laws.) This is largely consistent with *Fed. R. Evid. 401* which provides: Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. While it is not difficult to establish that ESI is relevant, the practitioner should attempt to articulate multiple grounds of relevance carefully identifying each potential basis for admissibility rather than putting all his or her eggs in a single evidentiary basket. *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534, 541 (D. Md. 2007). The more relevant purposes the practitioner can establish, the greater latitude he or she will have in laying other foundations (like hearsay, authentication, etc.) or establishing a permissible use.

B. Authentication of E.S.I. in New York

Authentication issues in New York are complicated by the fact that every type of record seems to have its own authenticating provision or statute. For example, here are some of the various authenticating provisions found in the CPLR: CPLR 2105 (Certification by attorney); CPLR 4518 (business records exception); CPLR 4520 (Certificate or Affidavit of public officer); CPLR 4532 (self-authentication of newspapers and periodicals of general circulation); CPLR 4536 (proof of writing by comparison of handwriting); CPLR 4538 (Acknowledged, proved or certified writing; conveyance of real property without the state); CPLR 4540 (Authentication of official record of court or government office of the US); CPLR 4541: (proof of proceedings before a justice of the peace); CPLR 4542 (Proof of Foreign Records and Documents); CPLR 4543 (Proof of facts or writing by methods other than those authorized in this article). Statutes providing for authentication include: Business Corporation Law § 107 (corporate seal is prima facie evidence of authentication); Domestic Relations Law § 14-a (town and city clerks can authenticate marriage certificates) and the Uniform Commercial Code.

In New York, the court determines if there is clear and convincing evidence that the document is authentic. The jury's role is to determine if the evidence is genuine. As a result, New York state courts are invested with greater decision-making power than federal courts which, under *Fed. R. Evid. 104(b)*, are permitted to enter the evidence only if a reasonable jury could rationally conclude based on a preponderance of evidence that it is authentic.

One New York court permitted authentication of instant messages through circumstantial evidence, which included a close friend and cousin testifying to the defendant's screen name and sending a message to that screen name. *People v. Pierre*, 838 N.Y.S.2d 546, 548-49 (1st Dept 2007). The court also noted there was no evidence that anyone had a motive, or opportunity, to impersonate defendant by using his screen name.

As to emails, two New York cases demonstrate that emails can be admitted circumstantially and by sworn statements. In one case, the court admitted a series of email exchanges based on the content of the exchanges, in particular the detail about meetings and about progress on construction sites and the fact that they were produced by a third party in response to a subpoena. *U.S. Information Systems, Inc. et al., v. International Brotherhood of Electrical Workers Local Union Number 3, AFL-CIO, et al.*, 2006 U.S. Dist. LEXIS 52870 (S.D.N.Y. August 1, 2006); see also *Monte v. Ernst & Young LLP*, 330 F. Supp.2d 350, 359 (S.D.N.Y. 2004) (admitting email messages based on sworn statements attesting to their authenticity and overruling an objection that the emails are suspect on the basis of having been preserved for so long). The *Lorraine* decision, *supra*, states that the most common ways to authenticate include person with personal knowledge, expert testimony or comparison with authenticated exemplar, distinctive characteristics, including circumstantial evidence, self-authenticated trade inscriptions (*viz.*, the auto signature) and certified copies of business records. All of these should be viable means of authentication in New York.

One New York court ruled inadmissible print-outs of websites obtained from the Wayback Machine service maintained by the Internet Archive Company, which service allows a user to obtain an archived website as it appeared at a particular period in time. *Robert Novak d/b/a Petswarehouse.com, v. Tucows, Inc., Opensrs and Nitin Networks, Inc.*, 2007 U.S. Dist. LEXIS 21269 (E.D.N.Y. 2007). The Eastern District found insufficient plaintiffs declaration lacked sufficient personal knowledge to set forth with any certainty that the documents obtained via third-party websites are, in fact, what he proclaims them to be. *Id.* At *5. The court suggested that plaintiff should have provided testimony or sworn statements from an employee of the companies hosting the sites from which plaintiff printed the pages. The court excluded the documents for absence of authentication and as hearsay. The court suggested that testimony from employees of Internet Archive might be insufficient. Rather, because the webpages came from third-parties who donate the data to the Internet Archive, only testimony from employees of the companies that originally hosted the sites would be sufficient. *But see Telewizja Polska USA, v. Echostar Satellite Corp.*, 2004 U.S. Dist. LEXIS 20845 (N.D.Ill. October 15, 2004)(affidavit from representatives of Internet Archive Company sufficient where opposing party did not present any evidence that Internet Archive is unreliable or biased).

Lorraine, supra, identifies the following ways to authenticate internet websites: witness with personal knowledge, expert testimony, distinctive characteristics, public records, system or process capable of producing reliable result and official publication. Nearly all of these should be viable methods in New York.

C. Hearsay

Another common issue raised by ESI is hearsay. When ESI is offered into evidence, it is often a statement, made by a declarant out of court offered for the truth of the matter asserted. In 2000, New York enacted New York State Technology Law § 306, which states: In any legal proceeding where the provisions of the civil practice law and rules are applicable, an electronic record or electronic signature may be admitted into evidence pursuant to the provisions of article forty-five of the civil practice law and rules including, but not limited to section four thousand five hundred thirty-nine of such law and rules. This still requires that the proponent articulate why the evidence is not hearsay or find an applicable exception. The most commonly used exceptions are the business and public records exceptions and, particularly for emails, excited utterances, state of mind and present state of mind.

1. Business Records (CPLR 4518)

There has been a long-line of cases providing guidance on the admission of print-outs of computer data usually in the area of account stated or claims involving credit card statements. Beginning in 1974 with *Ed Guth Realty, Inc. v. Gingold*, 34 N.Y.2d 440, 451, 358 N.Y.S.2d 367, 374 (1974), the business records exception has been used to admit computer documents. In *Gingold*, the City of Syracuse attempted to avoid changes to real estate tax assessments by arguing that the computer printouts of the supporting statistical evidence could not come in under the business entry rule (CPLR 4518). *Id.* at 451. The court rejected this argument, holding that: [e]ssentially, the business entry exception to the hearsay rule is based on the concept of routineness. The routineness of the entry in the usual course of business tends to guarantee truthfulness because of the absence of motivation to falsify. Certainly, compiling and feeding data into a computer in the context we have before us would seem to be as routine a function as could be imagined and should be included under CPLR 4518. *Id.* See also *Federal Exp. Corp. v. Federal Jeans, Inc.*, 14 A.D.3d 424, 788 N.Y.S.2d 113 (1st Dept 2005) (holding that computer-generated invoices and billing records of amounts due were admissible as business records in an account stated action, since plaintiff established that information contained therein was entered into computer in regular course of business); *Education Resources Institute, Inc., v. John S. Piazza*, 794 N.Y.S.2d 65 (2d Dept 2005) (opining that computer printouts are admissible as business records if data stored in normal course of business as shown by affidavit from an individual with personal knowledge as to the care and maintenance of the computer system); *Citibank (S.D.) N.A. v. Jones*, 272 A.D.2d 815, 708 N.Y.S.2d 517 (3d Dep't 2000) (summary judgment appropriate where plaintiff submitted an affidavit from manager familiar with creation and maintenance of computer records); *Wayne County Dept. of Social Services ex rel. Van Dusen v. Petty*, 273 A.D.2d 943, 709 N.Y.S.2d 791 (4th Dep't 2000) (certified computerized records kept in the ordinary course of business are admissible as evidence); *Schneider Fuel Oil, Inc. v. DeGennaro*, 238 A.D.2d 495, 656 N.Y.S.2d 668 (2d Dep't 1997) (In an action for

goods sold and delivered and account stated, the court held that computer records of the plaintiff-creditor demonstrating that the defendant received and retained accounts without objection and made partial payments sufficient evidence to support summary judgment in favor of the plaintiff.); *Matter of Thomma*, 232 AD2d 422, 648 NYS2d 453 (2d Dept 1996) (Computer printouts are admissible as business records if the data was stored in the normal course of business.).

In 2002, CPLR 4518(a), which governs admission of any writing or recording kept in the regular course of business, was amended to specify that electronic records are to be treated the same as any other business record. The 2002 Amendment added:

An electronic record, as defined in section three hundred two of the state technology law, used or stored as such a memorandum or record, shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record. The court may consider the method or manner by which the electronic record was stored, maintained or retrieved in determining whether the exhibit is a true and accurate representation of such electronic record.

2. Public Records (CPLR 4520)

Another common way of admitting E.S.I. over a hearsay objection is CPLR 4520, which states: Where a public officer is required or authorized, by special provision of law, to make a certificate or an affidavit to a fact ascertained, or an act performed, by him in the course of his official duty, and to file or deposit it in a public office of the state, the certificate or affidavit so filed or deposited is prima facie evidence of the facts stated. One example of using this public records exception to admit ESI is *People v. Baker*, 183 Misc.2d 650, 705 N.Y.S.2d 846 (Oneida Co. Ct. 2000). In *Baker*, the defendant objected to the admission of a computer printout of a Department of Motor Vehicles abstract of his driving record. The court disagreed, finding that a computer generated abstract is properly authenticated by simultaneous affixation of seal and certifying signature of Department of Motor Vehicle Records and the insertion of the individual's driving information on the abstract. *Id.* at 654. The court reasoned that [t]echnological advances have permitted simultaneous reprinting of information and transmitting of same that overcome the objections occasioned by improper authentication. In many ways, the present procedure serves to overcome the possibility of human error that might result from improper comparison prior to separate affixation of the seal and signature. *Id.* at 655. Further, the court noted that it has been advised that access to the computer generation of the information is strictly limited. Accuracy, which is the intent of the authentication rules, is satisfied by the simultaneous printing process. *Id.*

D. Original Documents and Reproductions

With the widespread use of E.S.I. by almost every business and governmental agency, New York courts relaxed the Best Evidence Rule considerably, and allow computer printouts of electronic business records to be admitted if the underlying business records were kept in the regular course of business. *In re Thomma*, 232 A.D.2d 422, 648 N.Y.S.2d 453 (2d Dept 1996). The traditional rationale held that printouts of the data are summaries of the records. *See Ed Guth Realty v. Gingold*, *supra*, 34 N.Y.2d at 451.

To determine how to admit E.S.I., the practitioner must first determine if the information was originally in electronic form (such as documents stored in a database or word processing system) or if it was derived from an optically scanned image that was originally in document form. If the information was originally in electronic form, the document may be admissible as a business record under CPLR 4518 and the practitioner need not be concerned about the Best Evidence Rule. If it was not originally in electronic form and is an optically scanned image, the practitioner should proceed under CPLR 4539(b).

CPLR 4539(b) was added in 1996 to extend the statutes coverage to electronic data imaging, that is scanning original documents into electronic copies. CPLR 4539(b) allows [a] reproduction created by any process which stores an image of any writing, entry, print or representation and which does not permit additions, deletions, or changes without leaving a record of such additions, deletions, or changes . . . [to be] admissible in evidence as the original. This broadly worded statute seemingly allows practitioners to admit electronic copies of documents that are not business

records, such as deposition testimony or other exhibits.

Of note to the practitioner, N.Y. State Technology Law § 306 references CPLR 4539. Section 306 authorizes the admission of electronic records pursuant to CPLR Article 45, including, but not limited to CPLR 4539. The implication of this cross-reference is that tangible forms of information stored in computer databases, such as documentary printouts, qualify as copies or reproductions within the meaning of CPLR 4539(a). Though section 306 speaks only of the admissibility of the electronic record itself, the definition of electronic record requires that such record be capable of being accurately reproduced in forms perceptible by human sensory capabilities. State Technology Law § 302(2). Thus, there should be no need for the proponent to produce, as an exhibit, the hard drive or other electronic medium in which the electronic record is stored. Also, CPLR 4539(a) seems to preclude printouts of non-business records. As noted above, courts have treated printouts as summaries of voluminous records. See *Ed Guth Realty, Inc. v. Gingold*, *supra*.

VII. Substantive Claims

New York has revisited and given new meaning to centuries-old substantive claims because of the widespread use and importance of electronically stored information. In particular, the torts of conversion of property and trespass to chattel have been applied in ways that the original prosecutors of such claims would never have imagined. Both are examples of the growing trend of adapting existing law to meet the needs of the electronic age.

A. Conversion of Intangible Property or Electronic Data

The tort of conversion in New York requires the unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owners rights. *Vigilant Ins. Co. of America v. Housing Authority of City of El Paso, Tex.*, 87 N.Y.2d 36, 44, 637 N.Y.S.2d 342 (1995). New York law permits conversion of intangible property, which creates a property right that may or may not be represented by something tangible, but that itself has no intrinsic value apart from the right it represents. *United States v. Bellomo*, 263 F. Supp. 2d 561, 573 (E.D.N.Y. 2003). Traditionally, electronic data was not considered intangible property. That changed with *Thyroff v. Nationwide Mutual Insurance Company*, 8 N.Y.3d 283 (2007).

In *Thyroff*, the plaintiff was an insurance agent who leased his computer equipment as an independent contractor. Upon termination of the agreement, defendant confiscated its equipment, along with all of the information the plaintiff had stored on his computer, including personal correspondence and email, customer information, and personal documents and data. *Thyroff v. Nationwide Mutual Insurance Company*, 460 F.3d at 403 (2d Cir. 2006). The plaintiff sued, claiming the taking of his electronic data constituted conversion. The Court of Appeals permitted plaintiffs claim to proceed, and, thereby, expanded the scope of conversion, finding it cannot be seriously disputed that societys reliance on computers and electronic data is substantial, if not essential. *Thyroff*, 8 N.Y.3d at 291. On this basis, *Thyroff* accorded the supposedly intangible electronic information the same treatment as a paper document kept in a file cabinet. *Id.* at 292. See also *Astroworks, Inc. v. Astroexhibit, Inc.*, 257 F. Supp. 2d 609 (S.D.N.Y. 2003), *Shmueli v. Corcoran Group*, 9 Misc. 3d 589 (N.Y. Supr. Ct. 2005), and a Ninth Circuit decision, *Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003). Subsequent decisions suggest that the ability to copy electronic data will limit the use of this tort because it requires actual exclusion of the owner. See *A & G Research, Inc. v. GC Metrics, Inc.*, 2008 NY Slip Op 51016U (N.Y. Sup. Ct. May 21, 2008) (stating copied computer data does not exclude the proper owner); *Leser v. Karenkooper.com*, 2008 NY Slip Op 50135U (N.Y. Sup. Ct. 2008) (stating the use of an image from a webpage does not exclude the proper owner). See generally Bisceglie, Kyle C., Kyle C. Bisceglie on *Thyroff v. Nationwide Insurance Company*. *LexisNexis Expert Commentary* (July 2008), 2008 *Emerging Issues* 2495.

B. Trespass to Chattel

Trespass to chattel, an old and rarely-used common law tort action, requires interference with a person's property. *Sporn v. MCA Records, Inc.*, 58 N.Y.2d 482, 487, 448 N.E.2d 1324 (1983). While the trespasser, to be liable, need not intend or expect the damaging consequences of his intrusion, he must intend the act which amounts to or produces the

unlawful invasion, and the intrusion must at least be the immediate or inevitable consequence of what he willfully does, or which he does so negligently as to amount to willfulness. *Phillips v. Sun Oil Co.*, 307 N.Y. 328, 121 N.E.2d 249, 250-51 (1954). Though this violation was originally intended to protect physical property, beginning with *School of Visual Arts v. Kuprewicz*, 3 Misc. 3d 278, N.Y.S.2d 804 (N.Y. Supr. Ct. 2003), the tort was extended to electronic information.

In *School of Visual Arts*, a former employee posted false job postings on the internet, causing unsolicited job applications and pornographic emails to be sent to the director of human resources of her former employer. *Id.* at 807. These actions caused large volumes of unsolicited job applications and pornographic emails to be sent to plaintiff by way of their computer system without their consent. *Id.* at 808. The plaintiff argued that the unsolicited material depleted hard disk space, drained processing power, and adversely affected other system resources. The court agreed, ruling that the complaint stated a valid cause of action for trespass to chattels. *Id.* See also *Davidoff v. Davidoff*, 12 Misc.3d 1162A, *10, 819 N.Y.S.2d 209 (N.Y. Supr. Ct. 2006) (Defendants alleged tortious conduct, that is, sending to plaintiffs Website unsolicited content, and causing a depletion or deletion of information therein, thereby adversely affecting the effectiveness of his website, constitutes a claim for trespass to chattel.) (complaint dismissed on other grounds). And, as a result, a tort originally designed to address a partys misappropriation of the use of anothers horse or cow is now a means to combat spam.

VIII. Attorney-Client Privilege

Another important electronic discovery issue faced by practitioners involves preserving the attorney-client and work-product privileges. This issue typically arises in two contexts: document production and email communications.

There has been significant discussion of the document production at the federal level. Litigants may inadvertently produce documents or, in the interest of efficiency, the parties may agree to produce documents in advance of a privilege review with the understanding that the producing party can either claw back the documents or the examining party sneaked-a-peak subject to subsequent privilege review. The concern is that production or such agreements could lead to waiver. The 2006 amendments to *Fed. R. Civ. P. 16* attempt to give some protection against inadvertent disclosure by stating that a scheduling order can include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production. However, there is still concern whether such agreements would be binding outside of that particular litigation and, as a result, would result in subject matter wavier. A proposed amendment to *Fed. R. Evid. 502* would make the court-ordered agreement enforceable in all courts, state and federal, in order to avoid subject matter waiver. See S. 2450 passed by the U.S. Senate on February 27, 2008.

In New York state, CPLR 4503(a) states that a privilege exists for confidential communications made between attorney and client in the course of professional employment, and CPLR 3101(b) vests privileged matter with absolute immunity. *Spectrum Sys. Intl Corp. v. Chemical Bank*, 575 N.Y.S.2d 809, 814, N.E.2d 1055, 1060 (1991). The party asserting the privilege must demonstrate that there was: (1) a communication between client and counsel, which (2) was intended to be and was in fact kept confidential, and (3) made for the purpose of obtaining or providing legal advice. *United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996). With electronic communications, the main issue is whether the communication was intended to and is in fact confidential.

New York ensures that emails do not lose their privileged character simply because the email travels through multiple servers and ISPs. CPLR 4548 provides: no communication under this article shall lose its privileged character for the sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication.

The leading New York case on attorney-client privilege and electronic documents is *Scott v. Beth Israel Medical Center Inc.*, 847 N.Y.S.2d 436 (Sup. Ct. 2007). In *Scott*, the court denied the motion of a hospital administrator for a protective order that would have required his employer, Beth Israel Medical Center, to return email correspondence between Dr. Scott and his attorneys that were sent through Beth Israels email system and presumably found on Beth

Israel's server during discovery. The *Beth Israel* Court reasoned that sending the emails through the hospital's system with knowledge of the hospital's restrictive email policy destroyed any reasonable expectation of confidentiality and, thereby, waived the attorney-client privilege. See generally Bisceglie, Kyle C., Kyle C. Bisceglie on Privilege Issues in E-discovery under New York Law in *Scott v. Beth Israel Medical Center Inc. LexisNexis Expert Commentary* (August 2008), 2008 *Emerging Issues* 2112.

One argument made by the administrator was that CPLR 4548 protected the confidentiality of his communications. The court rejected this argument, noting that CPLR 4548 simply acknowledges the widespread use of email and that use of email by itself will not abrogate the privileged nature of a communication. However, CPLR 4548 does not absolve an attorney of his or her responsibilities to assess the risk of communicating by email with a client. The holder of the privilege and his or her attorney must protect the confidential communication if they expect it to remain privileged.

IX. Non-party Disclosure

Discovery rules apply equally to subpoenas. As the Advisory Committee Notes for the 2006 Amendments explain: Rule 45 is amended to conform the provisions for subpoenas to changes in other discovery rules, largely related to discovery of electronically stored information. However, *Fed. R. Civ. P. 45* requires issuing counsel to take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. *Fed. R. Civ. P. 45(c)(1)*. Any compliance order must protect the responding party from significant expense resulting from compliance. *Fed. R. Civ. P. 45(c)(2)(B)*. Under the burden-shifting framework of *Fed. R. Civ. P. 45(d)(1)(D)*, the initial burden is on the responding party to show the ESI is not reasonably accessible. *Auto Club Family Insur. Co. v. Ahner*, 2007 U.S. Dist. LEXIS 63809, *8-9 (E.D.La. Aug. 29, 2007). The burden then shifts to issuing counsel to show good cause.

While the subpoena provision of the CPLR has not been amended to explicitly address electronic discovery, there is no reason to believe electronic evidence cannot be subpoenaed.

While New York does not recognize a tort for negligent third-party spoliation, see *Ortega v. City of New York*, 9 N.Y.3d 69, 2007 N.Y. LEXIS 2715 (2007), contempt is available under NY CLS Jud § 773 and *Fed. R. Civ. Proc. R. 45*, respectively. See generally Bisceglie, Kyle C., Kyle C. Bisceglie on *Ortega v. City of New York. LexisNexis Expert Commentary* (March 2008), 2008 *Emerging Issues* 2858.

CROSS-REFERENCES: Federal Judicial Center, *Managing Discovery of Electronic Information: A Pocket Guide for Judges*, Federal Judicial Center, 2007; The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age; Paul R. Rice, *Electronic Evidence: Law and Practice* (ABA Publishing 2005); Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?*, 41 B.C. L. Rev. 327, 335-41 (2000)

Additional Federal Cases Interpreting December 2006 Amendments to Fed. R. Civ. P. on ESI: Rule 26(b)(2)(B) and (C): *W.E. Aubuchon Co., Inc. v. BeneFirst, LLC*, 245 F.R.D. 38 (D. Mass. 2007) (construing Rule 26(b)(2)(B) in light of *Zubulakes* distinction between accessible and inaccessible formats); *Veeco Instruments, Inc. Securities Litigation*, 2007 U.S. Dist. LEXIS 23926 (S.D.N.Y. April 2, 2007) (finding good cause under Rule 26(b)(2)(C) to restore backup tapes); *Best Buy Stores, LP v. Developers Diversified Realty Corp.*, 247 F.R.D. 567 (D. Minn. 2007) (finding no duty to preserve and no requirement to produce a now inaccessible searchable database under Rule 26(b)(2)(C) and (D)); *National Union Fire Insurance Co. v. Clearwater Insurance Co.*, 2007 U.S. Dist. LEXIS 52770 (S.D.N.Y. July 21, 2007) (denying order to restore backup tapes given inadequate showing); *Columbia Pictures Industries v. Bunnell*, 2007 U.S. Dist. LEXIS 46364 (C.D. Cal. May 29, 2007) (ordering production of data from the RAM memory on party's website); *Peskoff v. Farber*, 240 F.R.D. 26 (D.D.C. 2007) (imaged hard drives accessible and produced at the expense of producing party); *Disability Rights Council of Greater Washington v. Washington Metropolitan Area Transit Authority*, 242 F.R.D. 139 (D.D.C. 2007) (ordering production of inaccessible backup tapes under Rule 26(b)(2)(B) because responding party failure to issue a litigation hold); *Woodburn Construction Co. v. Enron Pacific, LLC*, Civ. No. C07-1620 (W.D. Wash. April 30, 2007) (denying motion to compel where parties had

agreed to discovery protocol for ESI and requesting party sought formats at variance with protocol); *Hubbard v. Potter*, 247 F.R.D. 27 (D.D.C. 2008) (ordering further discovery but largely rejecting argument based on a party's unsupported assumptions about the volume of responsive documents that should have been produced); *Peskoff v. Faber*, 244 F.R.D. 54 (D.D.C. 2007) (ordering further discovery where witness testified to frequent use of email); *KnifeSource, LLC v. Wachovia Bank, N.A.*, 2007 U.S. Dist. LEXIS 58829 (D.S.C. August 10, 2007) (motion to compel under Rule 26(b)(2)(B) granted because data sought was non-physical but accessible); *Seattle v. Professional Basketball Club, LLC*, Civ. No. C07-1620MJP (W.D.Wash. February 25, 2008) (a bald assertion that discovery will be burdensome is insufficient in light of Rule 26(b)(2)(B)); *Petcou v. C.H. Robinson Worldwide, Inc.*, 2008 U.S. Dist. LEXIS 13723 (N.D.Ga. February 25, 2008) (motion to compel denied given ESI was inaccessible); *U&I Corp. v. Advanced Medical Design, Inc.*, 2008 U.S. Dist. LEXIS 27931 (M.D.Fla. March 26, 2008) (involving parties' discovery obligations, meet and confer, IT conference, burden shifting, and potential sanctions); *Asset Funding Group, LLC v. Adams & Reese, LLP*, 2008 U.S. Dist. LEXIS 30348 (E.D.La. April 4, 2008) (ordering a responding party to hire IT consultant and certify methods used to perform satisfactory search of various ESI data sources); *Mikron Industries, Inc. v. Hurd Windows & Doors, Inc.*, 2008 U.S. Dist. LEXIS 27455 (W.D.Wash. April 21, 2007) (protective order denied because responding party did not meet and confer properly, and did not support its allegation of burdensomeness).

Rule 26(b)(5)(B): *Muro v. Target Corp.*, 243 F.R.D. 301 (N.D.Ill. 2007) (finding that, to preserve privilege, a party must describe each privileged string entry of emails on the privilege log rather than describing the entire string email as only one entry); *Garcia v. Berkshire Life Ins. Co. of America*, 2007 U.S. Dist. LEXIS 86639 (D.Colo. November 13, 2007) (technical incompetence is no defense for failure to produce ESI where the producing party had been put on notice of its obligations).

Rule 26(f)(4): *eBay Seller Antitrust Litigation*, 2007 U.S. Dist. LEXIS 75498 (N.D. Cal. October 2, 2007) (Court ordered responding party to produce IT witness to testify about responding party's ESI preservation and collection based on Advisory Committee Note to Rule 26(f).); *RLI Insurance Co. v. Indian River School District*, 2007 U.S. Dist. LEXIS 78419 (D. Del. October 23, 2007) (motion to compel denied as discovery was not made in initial meet and confer).

Rule 34(a) and (b): *Calyon v. Mizuho Secur. USA Inc.* 2007 U.S. Dist. LEXIS 36961 (S.D.N.Y. May 18, 2007) (rejecting party's request to inspect and image hard drives under Rule 34 for inadequate showing); *Scotts Company LLC v. Liberty Mutual Insur. Co.*, 2007 U.S. Dist. LEXIS 43005 (S.D. Ohio June 12, 2007) (same); *Ferron v. Search, LLC*, 2008 U.S. Dist. LEXIS 34599 (S.D. Ohio April 28, 2008) (permitting imaging of party's hard drive given qualifying reason(s) including failure to preserve and produce); *PSEG Power New York, Inc. v. Alberici Constructors, Inc.*, 2007 U.S. Dist. LEXIS 66767 (N.D.N.Y. September 7, 2007) (responding party ordered to pay for reproduction of thousands of emails originally produced without attachments); *DOnofrio v. SFX Sports Group, Inc.*, 247 F.R.D. 43 (D.D.C. 2008) (interpreting if necessary language of Rule 34(a) to shield responding party from converting inaccessible data); *Autotech Technologies Ltd. Partnership v. Automationdirect.com, Inc.*, 248 F.R.D. 556 (N.D. Ill. 2008) (motion to compel reproduction of metadata denied because it was not in original request); *Michigan First Credit Union v. Cumis Insur. Society, Inc.*, 2007 U.S. Dist. LEXIS 84842 (E.D. Mich. Nov. 16, 2007) (citing *Williams v. Sprint*, 230 F.R.D. 640 (D. Kan. 2005) for the proposition that there is a general presumption against production of metadata); *3M Co. v. Kanbar*, 2007 U.S. Dist. LEXIS 45232 (N.D. Cal. June 14, 2007) (applying the requirement of Rule 34 to producing ESI in ordinary course of business or labeled to correspond to each request and finding that the responding party produce in a searchable format); *Palgut v. City of Colorado Springs*, 2007 U.S. Dist. LEXIS 91719 (D. Colo. December 3, 2007) (denying motion to compel restoration where responding party lacked hardware to access inaccessible data).

Rule 37(f): *Cache la Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 623 (D. Colo. 2007) (addressing when duty to preserve arises in context of letter containing equivocal statement of discontent); *Doe v. Norwalk Community College*, 248 F.R.D. 372 (D. Conn. 2007) (rejecting good faith protection of Rule 37(f) because party did not have a routine system in place and ordering sanctions including adverse inference and costs for spoliation); *Seroquel Products Liability Litig.*, 244 F.R.D. 650 (M.D. Fla. 2007) (imposing sanctions for multiple discovery shortcomings in response); *Qualcomm Inc. v. Broadcom Corp.*, 2008 U.S. Dist. LEXIS 911 (S.D.Cal. 2008) (sanction of attorneys fees and costs in the amount of \$8,568,633.24 for withholding tens of thousands of emails); *The Southern New England Tel.*

Co., v. Global Naps, Inc., 2008 U.S. Dist. LEXIS 47986 (D. Conn. June 23, 2008) (deliberate destruction of computer files using Window Washer and other discovery violations results in \$5.2 million default judgment against defendant); *Keithley v. The Home Store.com, Inc.*, 2008 U.S. Dist. LEXIS 61741 (D. N. Cal. August 12, 2008) (Court ordered adverse inference and \$320,000 in costs because responding party did not satisfy their duty to preserve ESI including source code.)

Rule 45: *United States v. Three Bank Accounts*, 2008 U.S. Dist. LEXIS 29992 (D. S. Dak. April 2, 2008) (denying motion to quash given bare-bones allegation of burden; the Court enforced a subpoena that resulted in the identification of 250,000 electronic documents and would require three employees working full-time for four weeks with the proviso that the parties work in good faith to reduce its scope); *Guy Chemical Co., Inc. v. Romaco AG*, 243 F.R.D. 310 (N.D. Ind. 2007) (issuing counsel ordered to pay costs for production as non-party status is significant factor in finding undue burden).

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Hedges on an Innovative Response to Burdensome Pretrial Preservation Obligations

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Hedges on an Innovative Response to Burdensome Pretrial Preservation Obligations

By Ronald J. Hedges

September 11, 2008

SUMMARY: In a recent case, one party faced with the burden of determining and clarifying its pretrial preservation obligations sought judicial intervention, requesting a declaratory judgment to help define its obligations. Ronald J. Hedges, counsel at the New York office of Nixon Peabody LLP and former U.S. Magistrate Judge, analyzes this innovative approach and discusses how a party can deal with burdensome pretrial preservation requirements.

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ARTICLE: Hedges on an Innovative Response to Burdensome Pretrial Preservation Obligations

INTRODUCTION

The burdens imposed by pretrial preservation obligations can be very costly, and often leave litigants in the awkward position of either preserving a substantial amount of electronically stored information and/or paper documents at their own expense, or determining for themselves which of their documents may be relevant to potential litigation. Little guidance exists for making that determination outside of the general requirement that parties exercise good faith and reasonableness to identify and preserve relevant information. n1 While this requirement may seem simple to satisfy, the risk that a court will disagree with a party's unilateral exercise of good faith and reasonableness, and the resulting threat of sanctions, encourages litigants to consider any means possible to clarify the scope of their preservation obligation. As *Texas v. City of Frisco* n2 demonstrates, pre-litigation means available to litigants to clarify their preservation obligation is limited.

CASE SUMMARY

On April 13, 2007, the Texas Department of Transportation (TxDOT) received a Notice Regarding Preservation of Electronic Data from counsel for the City of Frisco regarding potential litigation stemming from the conversion of SH 121 from a freeway to a tollway (the Project). n3 By that letter, the City of Frisco requested that TxDOT preserve documents and communications relating to the Project, as well all backup tapes or other storage media that may have contained that data. n4

Though TxDot attempted to comply with this broad preservation request, the burden and expense associated with

that preservation led TxDOT to request a meet and confer with City of Frisco, pursuant to *Rule 26(f) of the Federal Rules of Civil Procedure*. The meet and confer process is essential in establishing the scope of discovery, and provides an excellent opportunity for parties to resolve discovery disputes. However, TxDOT's request went unanswered.

Without any direction from the opposing party, and confronted with a broad request for preservation, TxDOT sought judicial intervention. TxDOT filed a Complaint and Request for Declaratory Relief and Protective Order on August 14, 2007. By that Complaint, TxDOT requested a declaratory judgment and the courts protection from a general litigation hold request. n5 As stated more specifically in the Complaint:

TxDOT seeks protection from the broad scope and undue burden of the litigation hold and requests a declaratory judgment releasing TxDOT from the City's requested litigation hold as it violates the Federal Rules of Civil Procedure discovery provisions and as the City would not be entitled to such overbroad and general discovery were a case filed under NEPA and the APA. n6

The City of Frisco responded to the declaratory judgment action with a motion to dismiss, arguing that TxDOT had failed to plead the required elements of a justiciable claim and, essentially, was requesting an advisory opinion regarding preservation.

HOLDING

The Court dismissed TxDOT's Complaint on the grounds that TxDOT's claim was not ripe. In the context of declaratory judgment actions, the ripeness doctrine applies as follows:

A suit for declaratory relief, while allowing a party to anticipate a suit and seek a judicial resolution, must nevertheless meet this keystone limitation. In hornbook form, a declaratory action must be ripe in order to be justiciable, and is ripe only where an actual controversy exists. An actual controversy exists where a substantial controversy of sufficient immediacy and reality exists between parties having adverse legal interests. Ordinarily whether particular facts are sufficiently immediate to establish an actual controversy yields answers on a case-by-case basis. Whether a declaratory action is ripe, by its very structure, pushes against our insistence upon mature disputes. That is, it contemplates an *ex ante* determination of rights that exists in some tension with traditional notions of ripeness. n7

The obvious issue with requesting a declaratory judgment to resolve an issue with pretrial preservation is that the reasonably foreseeable litigation that gives rise to the duty to preserve may not be a substantial controversy of sufficient immediacy and reality. In the litigation hold letter, the City of Frisco clearly stated that only a potential exists for litigation in connection with [the Project]. n8 As the Court held:

While a "threat of litigation, if specific and concrete, can indeed establish a controversy upon which declaratory judgment can be based," the facts here are not "sufficiently immediate to establish an actual controversy" between the City and the State. Neither the letter nor any of the facts alleged by Plaintiff rise to the level of controversy sufficient to confer jurisdiction. n9

The Court went on to hold that no concrete or developed disagreement actually existed with regards to the preservation of documents, and stated: A pre-enforcement action like Plaintiff's is only ripe "if any remaining questions are purely legal ... [and] further factual development" is not required for effective judicial review. The facts here are not fully developed. The dispute is abstract, hypothetical and not suited for judicial determination. n10

IMPACT

The decision in *Texas v. City of Frisco* emphasizes the awkwardness of being subject to a burdensome pretrial preservation obligation: Though no justiciable controversy may exist at the time the duty to preserve attaches, a party's actions during the pretrial preservation period may have serious consequences in the subsequent litigation. Even if litigation is so probable that it rises to the level of controversy sufficient to confer jurisdiction, as the Court in *City of*

Frisco suggests is possible, a party seeking relief from its preservation duty must then overcome the discretionary hurdle associated with declaratory judgment actions.

As the Supreme Court stated in *MedImmune, Inc. v. Genentech, Inc.*: n11

The Declaratory Judgment Act provides that a court *may* declare the rights and other legal relations of any interested party, 28 U.S.C. § 2201(a) (emphasis added), not that it *must* do so. This text has long been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants.

The Court emphasized the authority vested in District Courts by stating:

We have found it more consistent with the statute, however, to vest district courts with discretion in the first instance, because facts bearing on the usefulness of the declaratory judgment remedy, and the fitness of the case for resolution, are peculiarly within their grasp. n12

The likelihood of a judge voluntarily inserting himself into a discovery dispute prior to the filing of a Complaint in the underlying substantive action seems small. The likelihood of a judges decision to abstain from entertaining a declaratory judgment action being overturned on appeal seems smaller.

PRACTICE TIPS

A party subject to a pretrial preservation obligation must, unfortunately, fend for itself absent party agreement. TxDOT acted appropriately in requesting a meet and confer with City of Frisco, as an agreement with the opposing party remains the most effective means of establishing explicit guidelines for the preservation of documents and insulating oneself from potential discovery sanctions for spoliation.

Even if the opposing party does not comply, requesting a meet and confer is an important step for a party trying to establish good faith preservation. The *City of Frisco* court noted that, while they do not specifically address pre-suit litigation hold requests, the Rules of Civil Procedure n13 contemplate that the parties will act in good faith in the preservation and production of documents, and encouraged the parties to handle the preservation of documents in response to their respective litigation holds in such good faith. n14 The party requesting the meet and confer is in a better position to decide for themselves what documents they consider relevant, and can later point to their opponents failure to take advantage of the opportunity to participate in the preservation process should any documents be lost.

Though there is always some uncertainty when determining what documents will be relevant to a claim that is not yet filed, one thing is clear in the aftermath of *City of Frisco*: Until the substantive claim is filed, judges are not likely to waste judicial resources and specify what constitutes good faith in the pretrial preservation context. Parties subject to a preservation obligation, therefore, should not waste their own resources seeking judicial intervention. Parties should, instead, rely on negotiation with their opponent to establish the boundaries of their preservation obligation and leverage the fact that, outside of any guidance from the opponent, they will determine for themselves what documents will be necessary in proving the opponents claim.

A party who still feels uncomfortable going forward without judicial intervention and who prefers, instead, to rely on the possibility that a court will entertain a declaratory judgment action must first develop a specific set of facts to present to the judge in the hopes of clearing the specific and concrete hurdle set forth in *City of Frisco*. While this is sure to be a difficult task because formal discovery has not yet taken place, a possibly substantial paper trail may already exist depending on the nature of the dispute. The party seeking a declaratory judgment must gather those documents and present them in a manner that shows a significant threat of litigation.

Finally, the party seeking a declaratory judgment must persuade the judge to do the unlikely and exercise their discretion to hear the case. Rather than argue in terms of the burdens imposed on the preserving party, an argument focused on the notion of judicial economy may be more persuasive. A judge may be more likely to entertain a

declaratory judgment action knowing that an early decision on the preservation issue will avoid future motion practice regarding the scope of the preservation obligation and, possibly, even hearings on motions for sanctions. An argument focusing on the waste of judicial resources later in litigation also seems to emphasize the likelihood of that litigation occurring, thereby strengthening the specific and concrete controversy argument.

Return to Text

n1 The Sedona Conference Commentary on Legal Holds: The Trigger & the Process, Guideline 6, at 12 (Aug. 2007 Public Comment Version), *available at* http://www.thesedonaconference.org/content/miscFiles/Legal_holds.pdf.

n2 No. 4:07cv383, 2008 U.S. Dist. LEXIS 24353 (E.D. Tex. Mar. 27, 2008)

n3 Complaint, Exh. A (*available at* <http://ralphlosey.files.wordpress.com/2008/04/exb-a.pdf>).

n4 *Id.* at 2.

n5 Complaint, 3 (*available at* <http://ralphlosey.files.wordpress.com/2008/04/tx-v-city-of-frisco-complaint-la021316.pdf>).

n6 *Id.* TxDOT argued that any claim brought by the City of Frisco regarding the environmental impact of the Plan would be brought pursuant to the National Environmental Policy Act, 42 U.S.C. §§ 4321-4347 (NEPA), and, therefore, under the Administrative Procedure Act, 5 U.S.C. § 552 et seq. (APA). The NEPA and APA would only allow a plaintiff to request the agency record and, even then, only after a final decision had been rendered. Complaint at 9.

n7 *City of Frisco*, U.S. Dist. LEXIS 24353, at *5 (citing *Shields v. Norton*, 289 F.3d 832, 835 (5th Cir. 2002)).

n8 Complaint, Exh. A.

n9 *City of Frisco*, U.S. Dist. LEXIS 24353, at *8-9.

n10 *Id.* at 9 (internal citations omitted).

n11 *MedImmune, Inc. v. Genentech, Inc.*, __ U.S. __, 127 S. Ct. 764, 776 (2007) (internal citations omitted).

n12 *Id.* (internal citations omitted).

n13 The court in *City of Frisco* cited generally to *Fed. R. Civ. Proc.* 37.

n14 *City of Frisco*, 2008 U.S. Dist. LEXIS 24353 at *10.

ABOUT THE AUTHOR(S):

Ronald J. Hedges is counsel to Nixon Peabody LLP in its New York City office. He served as a United States Magistrate Judge in the United States District Court for the District of New Jersey from 1986 to 2007. Among other things, Mr. Hedges was a member of the Editorial Team for *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases* (Mar. 2007). He was also the drafter of Local Civil Rule 5.3 of the United States District Court for the District of New Jersey, which established procedures for protective and sealing orders. For more information, or to contact Mr. Hedges, go to http://www.nixonpeabody.com/attorneys_detail1.asp?ID=1324. Mr. Hedges would like to thank Nixon Peabody associate Luis A. Casillas for his dedicated assistance on this project. Mr. Casillas is an associate in the firm's Business Litigation Group, and is a recent graduate of the Benjamin N. Cardozo School of Law.



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John K. Rabiej: How Shallow Is the Rule 37(e) Safe Harbor?

2008 Emerging Issues 2902

John K. Rabiej: How Shallow Is the Rule 37(e) Safe Harbor?

By John K. Rabiej

September 11, 2008

SUMMARY: In *Nucor Corp. v. Bell*, the court sanctioned a party for continuing to operate its laptop computer after litigation commenced, which may have destroyed relevant, residual/deleted ESI on the computer's hard drive. John K. Rabiej, Chief of the Rules Committee Support Office, which staffs the Judicial Conference's Standing and Advisory Rules Committees, discusses the implications of the court's ruling and suggests strategies to deal with it.

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ARTICLE: JOHN K. RABIEJ: HOW SHALLOW IS THE RULE 37(e) SAFE HARBOR?

In *Nucor Corp. v. Bell*, 2008 U.S. Dist. LEXIS 52808 (D.S.C. Feb. 1, 2008), the court sanctioned the defendant for continuing to operate his laptop computer, potentially destroying relevant electronically stored information (ESI), which had been earlier deleted but remained on the computer's available disk space. *See* 7 Moore's Federal Practice, Ch. 37A, *Discovery of Electronically Stored Information*, § 37A.03[3] (discussion of residual/deleted ESI). The court declined to apply Rule 37(e), which was intended to provide limited protection to a party from sanctions under certain conditions for the loss of relevant ESI resulting from the routine, good-faith operation of a computer. The court ruled that the safe harbor only protected a party from sanctions imposed under the civil rules and did not apply when a court sanctions a party under its inherent powers outside the Rule 37(e) framework.

Rule 37(e) was intended to provide real, though limited, protection to parties to continue the routine, good-faith operation of electronic information systems, even if ESI might be lost in the process. The court's sanction in *Nucor Corp.* underscored a latent gaping hole in the safe-harbor protection that the rulemakers had recognized but which they had hoped would not be resorted to by the courts. The court's ruling is especially significant because it deals with ESI that is not reasonably accessible under Rule 26(b)(2) and a party's duty to preserve it.

Purpose of Rule 37(e) Safe-Harbor Protection

Rule 37(e) balances the rights of litigants to have relevant evidence preserved and the needs of businesses to continue normal operations. Requiring a party at the start of all litigation to suspend, for example, the auto-delete function that eliminates email stored after a certain number of days or the recycling of backup tapes would cripple most businesses. In addition, preventing a business from turning on its computers in an effort to preserve all relevant ESI

would provide a too-lopsided advantage to one side. On balance, the costs of significant business interruptions caused by the suspension of routine computer operations would be heavy and widespread, while the potential benefits of preserving critical ESI that was not available from other sources would be relatively marginal and infrequent.

Because relevant ESI might be lost, however, Rule 37(e)'s safe-harbor protection is circumscribed and applies only under specified conditions. First, the continued operation of an electronic information system must be done in good faith to secure the rule's protection. Determining the meaning of good faith and whether a party must take steps to prevent the loss of information on sources that it believes are not reasonably accessible depends on the circumstances of each case. One factor is whether the party reasonably believes that the information on such sources is likely to be discoverable and not available from reasonably accessible sources. *See* Committee Note to *Fed. R. Civ. P. 37(e)* (2006). Accordingly, a party may not deliberately continue computer operations knowing that relevant ESI, which is not available from another source, is being destroyed in the process.

The background rulemaking materials provide additional guidance. Good faith is described as a culpability standard intermediate between a negligence and a reckless or intentional culpability standard. Under this definition, a party would be protected from sanctions under Rule 37(e) for negligently failing to suspend computer operations even though the party should have known that the continued operation of a computer would destroy relevant ESI not available from another source. Even if the party's actions exceeded negligence, Rule 37(e) might protect the party as long as the party's actions did not rise to a reckless or intentional level of culpability.

Second, Rule 37(e)'s safe-harbor protection may not be available under exceptional circumstances. Again, the rule's background materials offer guidance as to the meaning. In the discussion of changes made to the rule after public comment, the limited role of this provision is clarified. The provision is intended to protect an entirely innocent party requesting discovery against *serious prejudice* arising from the loss of potentially *important* information. (Emphasis added.)

Third, Rule 37(e)'s safe harbor protects a party only from sanctions imposed under the civil rules. The obligation to preserve relevant, non-privileged evidence arises from common law, not from the civil rules. Because the substantive common law establishes both the preservation duty and spoliation sanctions enforcing the duty, Rule 37(e) expressly applies only to sanctions imposed under the civil rules. Extending the reach of the rule to apply to sanctions under the court's inherent powers would have tested the limits of the rulemaking authority.

Though acknowledging the limited reach of the rule, it was expected that courts would rely on the rule's good faith and exceptional circumstances conditions as grounds for imposing spoliation sanctions, even if imposed under the court's inherent powers. In analogous contexts, courts have applied for a long time the same standards and analysis that apply to sanctions under Rule 37 in general as they do to discovery sanctions under their inherent powers. *See* 7 Moore's Federal Practice, Ch. 37A, *Discovery of Electronically Stored Information*, § 37A.50 (noting that the standards governing the sanctions of a party under the court's inherent authority or under Rule 37 are the same). The expectation that the Rule 37(e) conditions would be relied on by courts when sanctioning parties under their inherent power was based on these past analogous experiences. This expectation apparently was not met in *Nucor Corp.*

Court's Ruling

In *Nucor Corp.*, the defendant admitted intentionally destroying a thumb-drive device, which contained relevant ESI, precisely because he anticipated litigation. It was later determined that the defendant viewed documents downloaded from the thumb-drive device to the laptop computer. Despite a preservation order prohibiting the defendant from destroying or altering any electronic documents, the defendant continued to operate the laptop computer. The defendant also installed, reinstalled, and then uninstalled a new software program on the laptop computer, which

consumed substantial disk space (73.3 megabytes of data). The installation and un-installation had overwritten and destroyed potentially relevant ESI, which would have identified the specific trade-secret documents the defendant had viewed on the laptop computer that had been transmitted from the thumb-drive device. In addition, the defendant continued to operate the laptop computer, which also served to overwrite available disk space and destroy residual/deleted ESI, though consuming much less disk space. The court concluded that the defendant acted intentionally and that it would strain credulity to believe that defendants did not know the laptop would contain relevant evidence in this litigation (*Nucor Corp.* at *23). It also ruled that the employee was solely responsible for the destruction of the thumb-drive device, but that both the employee and employer-corporation were responsible for the destruction of ESI caused by the continued computer operations.

The plaintiff moved for sanctions under Rule 37 for spoliation for installing software programs and operating the laptop computer, which permanently destroyed ESI that had been earlier transmitted from the thumb-drive device and later deleted from the laptop computer. The defendant contended that operation of its computer was protected under Rule 37(e). The court found that the defendant committed spoliation by installing the software programs and operating the laptop computer, which destroyed residual/deleted ESI that was not available from other sources. The court's ruling would have been unexceptionable, but for the basis for the sanction. The court did not ground its sanctions in Rule 37(e), but instead, relied exclusively on its inherent authority. *Id.* at *15-16 n. 3.

Though the court did not expressly rely on the conditions specified in Rule 37(e), the facts of the case provide ample support for such a ruling. The evidence manifests a pattern demonstrating that the defendant did not act in good faith in continuing computer operations. Clearly, the defendant's actions in destroying the only other source of relevant ESI and then installing and uninstalling software programs, overwriting deleted data on the laptop computer, did not represent routine good faith operations. Because the defendant had intentionally destroyed the alternative thumb-drive source of the ESI, the defendant was obligated to take the necessary measures to protect and preserve the ESI on the laptop computer, though it was not reasonably accessible. Under these circumstances, the defendant should have imposed a litigation hold suspending further operation of the laptop computer or making a forensic mirror image of its hard drive (*see* Committee Note to *Fed. R. Civ. P. 37(e)* (2006)). Alternatively, the defendant's destruction of the thumb drive met the rule's exceptional circumstances condition and would support the court's sanctions for failing to suspend computer operations. The ESI that was potentially lost by the defendant's actions was important and seriously prejudiced the plaintiff.

The court in *Nucor Corp.* held that Rule 37(e) by its plain language did not apply to sanctions under the court's inherent powers. Of course, the court may have implicitly relied on the good faith and exceptional circumstances conditions when it sanctioned the defendant. But the court's opinion leaves open the question whether Rule 37(e)'s conditions apply in all cases. The court's reluctance to apply Rule 37(e), which provides protection if the party acts in good faith, may be explained by its finding that the defendant's actions did not manifest bad faith because the defendant did not deliberately intend to bring about loss of evidence. *Nucor Corp.* at *23. Though the defendant's continued operation of the computer was intentional, the court did not find that the defendant deliberately intended to destroy evidence. The rule, of course, does not require a showing of bad faith or that the party acted intentionally or recklessly to forfeit the safe-harbor protection. Indeed, the rule recognizes a culpability standard lower than bad faith, which the defendant in *Nucor Corp.* exceeded, forfeiting his eligibility for the safe-harbor protection.

Conclusions

Though limited, Rule 37(e)'s safe-harbor protection represents a key component of the 2006 e-discovery rule amendments. The court in *Nucor Corp.* opted to sanction the defendant under its inherent power apparently outside the framework of Rule 37(e) and refrained from expressly relying on the limiting conditions specified in Rule 37(e) when it sanctioned the defendant for continuing routine computer operations. But the court could have relied on the Rule 37(e) conditions, which also supported a finding that the safe-harbor protection was inapplicable.

It remains to be seen what lesson courts will take from the *Nucor Corp.* ruling. If courts were to regularly sanction parties for spoliation of ESI resulting from routine, good-faith computer operations under their inherent powers without reference to the limiting conditions in Rule 37(e), the rule's safe-harbor protection would be rendered virtually meaningless. Parties would be subject to sanctions for merely acting negligently in continuing routine computer operations. To protect themselves against harsh spoliation sanctions, parties would be required to take the safest course and suspend all routine computer operations at the commencement of litigation, including recycling of backup tapes, auto-deletion of old e-mails, and even turning on a computer. On the other hand, if courts find that the conditions specified in Rule 37(e) were implicitly followed in *Nucor Corp.* and they rely on the same conditions when sanctioning parties under their inherent power, parties could still continue their computer operations in good faith with some degree of confidence without fear of sanctions.

Nucor Corp. underscores the importance of parties discussing preservation obligations as early as possible in the litigation. Both parties should know what is being preserved at an early stage in the litigation and any concerns or objections should be immediately raised and addressed before the consequences become severe. If the preservation issues are not addressed and a discovery dispute later develops, a party requesting relevant ESI, which was destroyed as part of routine computer operations, can look to the court's ruling in *Nucor Corp.* for authority to sanction a party outside the civil rules under the court's inherent powers. And the party could argue that mere negligence is sufficient to sanction the responding party. Conversely, the responding party can argue that the court's ruling is consistent with Rule 37(e) and that the "good faith" and "exceptional circumstances" conditions remain applicable in all cases. Accordingly, the party could argue that a showing of culpability beyond negligence would be required to sanction the party.

The better practice would be to recognize that the routine, good-faith operation of a computer system establishes a defense under the conditions specified in Rule 37(e) against spoliation sanctions imposed under either the civil rules or the court's inherent power.

ABOUT THE AUTHOR(S):

John K. Rabiej is the chief of the Rules Committee Support Office of the Administrative Office of the United States Courts. His office staffs the Advisory Committees of Appellate, Bankruptcy, Civil, Criminal, and Evidence Rules and the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. He has served as chief since 1992. As chief of the office he works directly with the rules committees' chairs and reporters on drafts of proposed rule amendments and prepares reports to the Judicial Conference and Congress on the amendments. He is a graduate of the University of Illinois College of Law. He was inducted into the American Law Institute in May 2004.



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Richard D. Rosen on Rights of Returning Servicemembers in Texas

2008 Emerging Issues 2872

Richard D. Rosen on Rights of Returning Servicemembers in Texas

By Richard D. Rosen

September 10, 2008

SUMMARY: Thousands of men and women serving in the armed forces in such places as Iraq, Afghanistan and the Balkans, will return to Texas to resume their civilian lives, joining more than 1.7 million veterans already residing in Texas. Attorneys should be aware of both federal and state statutes that protect veterans from some adverse effects their service may have had on their civilian lives and livelihoods as well as offer additional unique benefits.

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ARTICLE: For the foreseeable future, thousands of men and women serving in the armed forces in such places as Iraq, Afghanistan, and the Balkans, will return to Texas to resume their civilian lives, joining the more than 1.7 million veterans already residing in the state. Both federal and state statute afford to these veterans protections from some of the adverse effects their service may have had on their civilian lives and livelihoods as well as benefits unique to those who shoulder the defense of their nation in the military. Attorneys representing returning servicemembers and those representing parties who deal with them, such as employers, creditors, landlords, and adverse litigants, should be familiar with the basic structure of these laws.

Federal law. Two federal statutes provide special protections to men and women returning from military service: the Servicemembers Civil Relief Act of 2003, *50 U.S.C. app. §§ 501-596*, and the Uniformed Services Employment and Reemployment Rights Act of 1994, *38 U.S.C. §§ 4301-4334*. The former furnishes a variety of protections from the deleterious impact of military service, while the latter confers employment-related security. Other veteran benefits are provided by the GI Bill, including the newly enacted Post-9/11 Veterans Educational Assistance Act of 2008, Pub. L. No. 110-252, Title 5, *122 Stat. 2357*. Information about these programs can be found at <http://www.vba.va.gov/VBA/>.

Servicemembers Civil Relief Act (SCRA) of 2003.

Origins and Purpose. The SCRA has its genesis in the Soldiers and Sailors Civil Relief Acts of 1918 and 1940, enacted during the First and Second World Wars, respectively. Constitutionally predicated on Congress war powers, *Dameron v. Brodhead*, 345 U.S. 322 (1953), the Acts purpose is to provide for, strengthen, and expedite the national defense by protecting servicemembers to enable [them] to devote their entire energy to the defense needs of the Nation, and to provide for the temporary suspension of judicial and administrative proceedings that may adversely affect the civil rights of servicemembers during their military service. *50 U.S.C. app. § 502*. Interpreting an earlier version of the

Act, the Supreme Court held that the Act is to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation. *Boone v. Lightner*, 319 U.S. 561, 575 (1943).

Persons Protected. The SCRA protects active and Reserve members of the uniformed services (including the Public Health Service and National Oceanic and Atmospheric Administration) as well as members of the National Guard called to federal service or activated for more than 30 days to respond to a federally declared national emergency. 50 U.S.C. app. § 511.

Implications for Returning Servicemembers. Although primarily concerned with protecting the rights of currently serving members of the military, the SCRA has important implications for those who leave the armed forces. The Act includes protections from judicial and administrative processes and shelter from some of the adverse economic impact of military service that extend beyond active military service.

Judicial and Administrative Procedural Protections. Three principal SCRA provisions shield servicemembers from the effects of administrative and judicial proceedings during their absence from the civilian community: protections from default judgments, stays of ongoing proceedings, and tolling of statutes of limitations. The Act does not apply to criminal proceedings. 50 U.S.C. app. § 512(b).

Default Judgment Protection.

Prerequisite to Entry of Default Judgments. Before any court may enter a default judgment against a defendant, the plaintiff must file an affidavit stating whether or not the defendant is a member of the military or that the plaintiff is unable to discern whether the defendant is in the armed forces. 50 U.S.C. app. § 521(b)(1). If the defendant is a member of the armed forces, the court must appoint an attorney to represent the defendant servicemember; however, if the attorney cannot locate the defendant servicemember, the attorney may not waive any defense or otherwise bind the defendant servicemember in the case. 50 U.S.C. app. § 521(b)(2).

Right to Reopen Default Judgment. If the court enters a default judgment against a defendant servicemember during his or her period of military service or within 60 days after leaving military service, the servicemember may petition the court to reopen the judgment. 50 U.S.C. app. § 512(g). Provided the defendant servicemember has not entered an appearance in the proceeding, id. § 512(a), the court must grant the petition if it appears (1) that the servicemember was materially affected by reason of his or her military service from defending the action, and (2) that the servicemember has a meritorious or legal defense to the action. 50 U.S.C. app. § 521(g)(1); see, e.g., *Flynn v. Great American Mgt. Co.*, 246 Va. 93, 431 S.E.2d 327 (1993) (prejudice requirement); *Murdock v. Murdock*, 338 S.C. 322, 526 S.E.2d 241 (1999) (prejudice requirement); *Urbana College v. Conway*, 29 Ohio App.3d 13, 502 N.E.2d 675 (1985) (meritorious defense requirement); *La Mar v. La Mar*, 19 Ariz. App. 128, 505 P.2d 566 (1973) (meritorious defense requirement). The purpose of the provision is to prevent default judgments from being entered against members of the armed services in circumstances where they might be unable to appear and defend themselves. *United States v. Kaufman*, 453 F.2d 306, 308-309 (2nd Cir. 1971).

Effect of Default Judgment. A default judgment subject to SCRA is not void, but merely voidable. *Hawkins v. Hawkins*, 999 S.W.2d 171, 174 (Tex. App. 1999). A servicemember must file a petition to open a default judgment with the court that entered it not later than 90 days after termination or release from military service. 50 U.S.C. app. § 521(g)(2). Even if a court vacates, sets aside, or reverses a default judgment against a servicemember, the court's action may not impair a right or title acquired by a bona fide purchaser for value under the judgment. 50 U.S.C. app. § 512(h).

Stay of Judicial & Administrative Proceedings.

Application for Stay. Servicemembers, as well as former servicemembers who are within 90 days of their release from the armed forces, may apply for a stay of any civil or administrative proceeding in which they are party at any

stage before final judgment. *50 U.S.C. app. §§ 522(a), (b)*.

Prerequisites for Stay. An application for a stay of proceedings must include (1) a letter or other communication describing how the servicemembers current military duties materially affect his or her ability to appear and stating a date when the servicemember will be available, and (2) a letter or other communication from the servicemembers commanding officer stating that the servicemembers current military duties prevents appearance and that military leave is not authorized at that time. *50 U.S.C. app. § 522(b)(2)*. The fact that a party to an action is serving in the armed forces is not--in and of itself--a basis for a stay. *Boone, 319 U.S. at 568; In re Burrell, 230 B.R. 309, 313-314 (E.D. Tex. 1999)*.

Courts Discretion. A motion for stay is addressed to the discretion of the trial court, *Boone, 319 U.S. at 575; Strong v. Potomac Leasing Co., 722 S.W.2d 429, 481 (Tex. App. 1986)*; however, where the evidence supports a servicemembers claim that military service materially affects his or her ability to prosecute or defend an action, the trial court abuses its discretion if it does not grant the stay. See, e.g., *Bond v. Bond, 547 S.W.2d 43, 45 (Tex. App. 1976)* (trial court abused its discretion in refusing to grant two-week continuance to servicemember who was restricted to base until his retirement); *Ulmer v. Mackey, 242 S.W.2d 679, 681 (Tex. App. 1951)* (trial court abused its discretion in refusing to grant stay to defendant-servicemember in Korea performing combat duties at time of trial). Moreover, simply because a stay may cause inconvenience to other parties to the action or proceeding is not a basis for denying it. *Semler v. Oertwig, 234 Iowa 233, 241, 12 N.W.2d 265, 270 (1943)*.

Effect of Application for Stay. An application for a stay neither constitutes an appearance for jurisdictional purposes nor a waiver of any procedural or substantive defense (e.g., lack of personal jurisdiction). *50 U.S.C. app. § 522(c)*. Servicemembers granted a stay of proceedings may apply for additional stays if their military service continues to affect materially their ability to defend or prosecute the action. *50 U.S.C. app. § 522(d)(1)*. If the court denies an additional stay, it must appoint counsel to represent the servicemember in the proceeding. *50 U.S.C. app. § 522(d)(2)*.

Tolling of the Statute of Limitations.

Nature of Provision. The period of a servicemembers military service may not be included in computing any civil or administrative limitation period. In short, statutes of limitation are tolled during a servicemembers military service. *50 U.S.C. app. § 526(a); Lester v. United States, 487 F. Supp. 1033, 1038 (N.D. Tex. 1980); First Natl Bank of Hico v. English, 240 S.W.2d 503, 506 (Tex. App. 1951)*. Thus, when servicemembers return to civilian life, their time spent in the military is deducted from virtually all temporal limits on causes of action either in favor or against them.

Periods Tolled by Military Service. Tolled are periods limited by law, regulation, or order for bringing any action or proceeding in a court, or before any board, bureau, commission, department, or other agency of a state (including its political subdivisions) or federal government by or against the servicemember or his or her estate. *50 U.S.C. app. § 526(a)*. Similarly, a period of military service is not included in computing any period for the redemption of real property sold or forfeited to enforce an obligation, tax, or assessment. *50 U.S.C. app. § 526(b)*. The Act does not apply, however, to limitation periods prescribed by U.S. internal revenue laws. *50 U.S.C. app. § 526(c)*. The provision extends to members of the Reserve components while in an active military status, but not to Reservists performing weekend drills or individual unit training. *Min v. Avila, 991 S.W.2d 495, 506-507 (Tex. App. 1999)*. It is also inapplicable to members of the National Guard unless they are called to federal service. *Bowen v. United States, 49 Fed. Cl. 673, 676 (2001)*, affd, *292 F.3d 1383 (Fed. Cir. 2002)*. Finally, the SCRA does not toll statutes of limitations for persons related to members of the military but who are not themselves in the armed forces. See, e.g., *Lester, 487 F. Supp. at 1039* (claim of servicemembers wife not tolled).

Automatic Application. Unlike the SCRA sections dealing with default judgments and stays of proceedings, the tolling provision does not depend upon a servicemembers ability to demonstrate that military service materially affected his or her ability to participate in the proceeding. *Conroy v. Aniskoff, 507 U.S. 511, 514 (1993); In re A.H. Robins Co.,*

996 F.2d 716, 718 (4th Cir. 1993) (the tolling provision is unconditional). Tolling is automatic under the statute; it is not restricted to those servicemembers engaged in battle or who are otherwise handicapped from asserting their legal claims. *Bickford v. United States*, 228 Ct. Cl. 321, 656 F.2d 636, 640 (1981). Moreover, the Act tolls limitations periods regardless of whether the cause of action arose before or during military service. *Thompson v. Reedman*, 201 F. Supp. 837, 838 (E.D. Pa. 1961). The statute does not preclude, however, such defenses as laches--an inexcusable delay in bringing an action causing prejudice to the defendant. *Foster v. United States*, 733 F.2d 88, 90 (Fed. Cir. 1984).

Effect of Tolling. The tolling provision cuts both ways: it applies whether the servicemember is a plaintiff or a defendant and may inure to the benefit of the non-servicemember party. Thus, in *Scruggs v. Troncalli*, 307 S.W.2d 300, 304 (Tex. App. 1957), the court applied the tolling provision to a defendant servicemember, holding that the period of military service could not be included in computing the time during which the defendant was allegedly in adverse possession of land.

Economic protections. Most SCRA protections from the economic dislocations of military service apply only to currently serving members of the armed forces. For example, the Act provides temporary shelter to both servicemembers and their dependents from eviction, 50 U.S.C. app. § 531; permits servicemembers to terminate pre-existing leases and installment contracts, 50 U.S.C. app. § 535; and caps interest on pre-existing liabilities to six percent. 50 U.S.C. app. § 527.

Foreclosure of mortgages and other security interests.

Nature of Protection. The SCRA affords protection--extending beyond a period of military service--from foreclosure of mortgages and other security interests on real or personal property provided (1) the obligation secured by the mortgages or security interests originated before military service and (2) the servicemembers ability to meet the obligation is materially affected by military service. 50 U.S.C. app. § 533(a). The SCRA gives servicemembers time to bring their mortgage obligations current before foreclosure proceedings may be brought against them. In an action filed during, or within 90 days after, a period of military service to enforce such an obligation, the court may sua sponte--or shall upon application of the servicemember--stay the proceedings for a period of time or adjust the obligation to preserve the interests of the parties. 50 U.S.C. app. § 533(b). Sales, foreclosures, or seizures of property for breaches of such obligations during, or within 90 days after, a period of military service, are invalid except by court order or agreement of the servicemember waiving his or her rights under the Act. 50 U.S.C. app. § 533(c); see 50 U.S.C. app. § 517 (waiver of SCRA rights by written agreement). Violation of the section constitutes a misdemeanor, 50 U.S.C. app. § 533(d)(1), and the SCRA's rights and remedies are in addition to any remedy for wrongful conversion otherwise available under law to the person claiming relief under [the] section, including consequential and punitive damages. 50 U.S.C. app. § 533(d)(2).

Practice Note: Under the recently enacted Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, §2203, 122 Stat. 2654, 2849, Congress expanded the SCRA protection against mortgage foreclosures from 90 days to nine months following release or discharge from military service. In addition, Congress limited the rate of interest on mortgage obligations to six percent during the period of military service and for one year after release or discharge from such service. 50 U.S.C. app. § 2203(b). The Act became effective on July 30, 2008, and its provisions expire on December 31, 2010. 50 U.S.C. app. § 2203(c). The Act also requires the Secretary of Defense to develop and implement a program to advise servicemembers returning from active duty abroad about how to prevent or forestall mortgage foreclosures, including credit and home-mortgage counseling. 50 U.S.C. app. § 2202.

Protection Prerequisites. Servicemembers usually establish that their military service materially affected their ability to meet mortgage or similar obligations by providing evidence comparing their pre-service and military-service incomes. See *Federal Natl Mtg. Assn v. Deziel*, 136 F. Supp. 859, 860-861 (E.D. Mich. 1956); *Queens County Savings Bank v. Thaler*, 181 Misc. 229, 230, 44 N.Y.S.2d 4, 5-6 (N.Y. Sup. Ct. 1943); see generally Kathleen H. Switzer,

Mortgage Defaults and the Soldiers and Sailors Civil Relief Act: Assigning the Burden of Proof When Applying the Material Effect Test, 18 Real Estate L.J. 171, 178-179 (1993). If servicemembers can demonstrate that their military service materially affected their ability to meet their obligations, courts generally afford three types of relief:

(1) A stay of the proceedings, or an extension of the maturity dates of [the servicemembers] obligations by way of diminished payments.

(2) Where foreclosure judgment has already been ordered, a reopening or setting aside of the judgment in order that the [servicemember] may assert a defense; and

(3) Where a sale has been had under a judgment of foreclosure, invocation of the statutory redemption period, extended by a period equal to [the servicemembers] military service.

The Judge Advocate General's School Guide to the Servicemembers Civil Relief Act 82 (ABA 2007) (footnotes omitted) [hereafter Guide to SCRA]; James P. Pottorff, Contemporary Applications of the Soldiers and Sailors Civil Relief Act, 132 *Mil. L. Rev.* 115, 128 (1991).

Anticipatory relief.

Nature of Protection. The SCRA allows servicemembers to seek declaratory relief suspending certain contractual obligations and tax assessments where the servicemembers ability to comply with the obligations or pay the assessment has been materially affected by their military service. 50 U.S.C. *app.* § 591. A servicemember may, during military service or within 180 days of discharge from military service, apply to a court for relief from contractual obligations incurred before military service or from a tax or assessment falling due before or during military service. 50 U.S.C. *app.* § 591(a). The obligation or tax need not be in arrears for a servicemember to apply for relief. *Application of Marks*, 181 *Misc.* 497, 501, 46 *N.Y.S.2d* 755, 758 (*N.Y. Sup. Ct.* 1944). The court may grant a stay of the enforcement of an obligation either during a period of military service or at or after the termination of such service. 50 U.S.C. *app.* §§ 591(b)(1)(A), 591(b)(2)(A).

Temporal Limits of Stay. The length of the stay depends upon the nature of the obligation. For purchases of real estate or obligations secured by real estate, the court may stay enforcement of the obligation during military service, and permit servicemembers to satisfy back payments by spreading them over the remaining life of the of the contract plus a period equal to the period of military service. 50 U.S.C. *app.* § 591(b)(1); see also Guide to SCRA at 88. For non-real estate-related obligations and taxes or assessments, the servicemember must satisfy his or her obligations within a period of time equal to the servicemembers period of military service. 50 U.S.C. *app.* § 591(b)(2)(B); see also Guide to SCRA at 88. When a court grants a stay, the servicemember is not subject to fines or penalties for the period of compliance with the terms and conditions of the stay. 50 U.S.C. *app.* § 591(c).

Effect of Stay. The fact a servicemember applies for or receives a stay in connection with the payment of any tax, penalty, insurance premium, or other civil obligation or liability may not provide the basis for adverse credit or lending determinations, including adverse reports on the servicemembers creditworthiness, refusals to insure the servicemember, or changes in the conditions required for insurance. 50 U.S.C. *app.* § 518.

Tax relief. Where a servicemembers ability to pay federal or state income tax falling due before or during military service has been materially affected by his or her military service, the IRS or state taxing authority must defer collection of income tax upon notice from the taxpayer for a period not more than 180 days after termination or release from the armed forces. 50 U.S.C. *app.* § 570(a). No interest or penalty may accrue for the period of deferment by reason of nonpayment of the deferred tax. 50 U.S.C. *app.* § 570(b). The SCRA suspends statutes of limitation for the collection of deferred taxes for the period of military service and for an additional 270 days thereafter. 50 U.S.C. *app.* § 570(c). Finally, the section only defers tax collection, not the filing of returns. Military personnel must look elsewhere for filing

extensions or postponements. Guide to SCRA at 100 (citing *I.R.C. § 7508(a)(1)*, 26 U.S.C. § 7508(a) (permitting personnel in combat zone or participating in contingency operation to postpone filing federal income tax returns for the duration of combat service plus 180 days)).

State of residence.

Nature of the Protection. The SCRA preserves servicemembers state of residence, which is important for purposes of state taxes. A servicemember neither loses nor acquires residence for purposes of state income or personal property taxes by reason of being sent to a particular state in compliance with military orders. *50 U.S.C. app. § 571(a)*. Take, for example, a servicemember who is a domiciliary of Texas who receives military orders to report for duty in California. The servicemember does not lose his or her Texas residence by virtue of performing military service in California, and the servicemember is not liable to the State of California for taxes on his or her military compensation or personal property that accompanies him or her to California. *50 U.S.C. app. §§ 571(b-c)*; see *Snapp v. Neal*, 382 U.S. 397 (1966) (ad valorem tax on house trailer barred by prior version of SCRA); *California v. Buzard*, 382 U.S. 386, 395 (1966) (tax on automobile). And once the servicemember returns to Texas after fulfilling his or her military commitment, the State of California may not attempt to impose an income or personal property tax on the servicemember for the period of time spent in California.

Limitations. The residency provision is inapplicable to a spouses income and personal property, although the tax jurisdiction may not use military compensation of a nonresident servicemember to increase the tax liability imposed on income earned by the spouse. *50 U.S.C. app. § 571(d)*. Nor does the provision apply to non-military income received by the servicemember (e.g., through a part-time job); however, like spousal income, the tax jurisdiction may not use the servicemembers military compensation to increase the tax rate. *50 U.S.C. app. § 571(d)*. Finally, the section does not apply to other forms of taxation, such as real property taxes, *United States v. Onslow Co. Bd. of Education*, 728 F.2d 628, 636 (4th Cir. 1984); taxes on property used in a trade or business, *50 U.S.C. app. § 571(c)(3)*; or sales and use taxes. *Sullivan v. United States*, 395 U.S. 169, 175 (1969).

Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994.

General. The Uniformed Services Employment and Reemployment Rights Act of 1994 is the latest in a series of laws protecting veterans employment and reemployment rights going back to the Selective Training and Service Act of 1940, and preceded most recently by the Veterans Reemployment Rights Act (VRRA) of 1974. *20 C.F.R. § 1002.2*. In enacting USERRA, Congress emphasized its continuity with earlier statutes, and it intended that the large body of case law developed under earlier statutes remain in full force and effect to extent consistent with USERRA. *20 C.F.R. § 1002.2*; *Rogers v. City of San Antonio*, 392 F.3d 758, 762 (5th Cir. 2004).

USERRAs Objectives. USERRAs principal purposes are (1) to encourage military service by eliminating or minimizing disadvantages to civilian careers resulting from such service; (2) to minimize the disruption of the lives of servicemembers as well as their employers, fellow employees, and communities, by providing for prompt reemployment of servicemembers upon their completion of service; and (3) to prohibit discrimination against persons because of their military service. *38 U.S.C. § 4301*. The Act accomplishes these objectives by requiring--with limited exceptions--the immediate reemployment of persons called away for military service and by prohibiting discrimination against employees because of their military service.

Employers Included under USERRA. The Act applies to virtually every employer in the United States, regardless of number of employees they hire--an employer of one falls under the Act. *20 C.F.R. § 1002.34(a)*; *Cole v. Swint*, 961 F.2d 58, 60 (5th Cir. 1992). The term employer means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, and includes federal, state, and local governments. *38 U.S.C. § 4303(4)*.

Meaning of Uniformed Service. The uniformed services under the Act are the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency. 38 U.S.C. § 4303(16). USERRA's protections cover all categories of military training and service, including duty performed on a voluntary or involuntary basis, in time of peace or war, in the active or Reserve Components of the armed forces. 38 U.S.C. § 4303(13); 20 C.F.R. § 1002.6. While National Guard service under authority of state law is not covered by USERRA, 20 C.F.R. § 1002.57(a), National Guard service under federal authority is protected. Included is duty performed by the National Guard when called to federal service and active duty for training, inactive duty training, or full-time National Guard duty under title 32, *United States Code*. 20 C.F.R. § 1002.6.

Notice of Rights and Duties. USERRA requires employers to post notices of employee rights and benefits as well as the obligations of employers and employees under the Act. 38 U.S.C. § 4334(a). A copy of the required notice appears at http://www.dol.gov/vets/programs/userra/USERRA_PRIVATE.pdf.

Reemployment Rights.

Prerequisites for Reemployment. If an employee is absent from a position of civilian employment by reason of military service, he or she is entitled to prompt reemployment by the same employer if--

(1) **The employee left his or her job to perform voluntary or involuntary military service.** 38 U.S.C. § 4312(a); 20 C.F.R. § 1002.32(a).

(2) **The employee provided advanced written or verbal notice of military service to the employer.** 38 U.S.C. § 4312(a)(1); 20 C.F.R. § 1002.32(a)(1). The Act does not require notice if prevented by military necessity (e.g., classified missions, short-notice deployments) or, under all of the relevant circumstances, giving notice is otherwise impossible or unreasonable (e.g., employers absence at the time service commences). 38 U.S.C. § 4312(b); 20 C.F.R. § 1002.86; see also H.R. Rep. No. 103-65, at 25-26, reprinted in 1994 U.S.C.C.A.N. 2449, 2458-2459.

(3) **The cumulative length of the employees current absence for military service plus all previous absences for military service with the same employer does not exceed five years.** 38 U.S.C. § 4312(a)(2); 20 C.F.R. §§ 1002.32(a)(2), 1002.101. The Act excludes significant periods of service from the five year cumulative total, including weekend and annual training for Guard and Reserve members and service during wars, national emergencies, and operational missions. 38 U.S.C. § 4312(c); see also 20 C.F.R. § 1002.103 (listing all periods excluded from the five-year limit).

(4) **The employee was released or discharged from military service under honorable conditions.** 38 U.S.C. §§ 4304, 4313(a); 20 C.F.R. § 1002.32(a)(4). Employees separated from the armed forces with a dishonorable or bad conduct discharge as a result of a court-martial conviction or who receive a discharge under other than honorable conditions by reason of an adverse administrative proceeding are not eligible for reemployment under the Act. 20 C.F.R. § 1002.32(a)(4).

(5) **The employee reports to, or submits an application for reemployment to, the employer in a timely manner following his or her military service.** 38 U.S.C. § 4312(a)(3), 20 C.F.R. § 1002.115. Whether an employee has reported to work or filed an application for reemployment in a timely manner depends upon the length of the

employees period of military service. The Act establishes the time periods for compliance with the timeliness requirement; however, an employee who fails to report or apply for reemployment within the appropriate period does not automatically forfeit the entitlement to reemployment. Instead, the employee is subject to the employers established policies pertaining to discipline for absence from scheduled work. *38 U.S.C. § 4312(e)(3); 20 C.F.R. 1002.117(a)*. USERRAs timeliness requirements are--

a. For periods of military service less than 31 days: The employee must report to work or apply for reemployment not later than the beginning of the first full regularly scheduled work period (e.g. shift) on the first full calendar day following the completion of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of service to the persons residence. *38 U.S.C. § 4312(e)(1)(A)(i)*. For example, if the employee completes a period of service and travel home, arriving at ten oclock in the evening, he or she cannot be required to report to the employer until the beginning of the next full regularly scheduled work period that begins at least eight hours after arriving home, i.e., no earlier than six oclock the next morning. *20 C.F.R. § 1002.115(a)*. If it is impossible or unreasonable for the employee to report within such time period through no fault of the employee, he or she must report to the employer as soon as possible after the expiration of the eight-hour period. *20 C.F.R. § 1002.115(a); 38 U.S.C. § 4312(e)(1)(A)(ii)*.

b. For periods of military service more than 30 days but less than 181 days: The employee must report to work or apply for reemployment not later than 14 days after the completion of service or if submitting such application within such period is impossible or unreasonable through no fault of the employee, the next first full calendar day when submission of such application becomes possible. *38 U.S.C. § 4312(e)(1)(C); 20 C.F.R. § 1002.115(b)*.

c. For periods of military service more than 180 days: The employee must report to work or apply for reemployment not later than 90 days after the completion of the period of service. *38 U.S.C. § 4312(e)(1)(D); 20 C.F.R. § 1002.115(c)*.

d. For employees hospitalized or convalescing from a service-connected illness or injury: The employee must report to work or apply for reemployment at the end of the period necessary for the employee to recover from the illness or injury. *38 U.S.C. § 4312(e)(2)(A)*. Generally, the period of recovery may not exceed two years except that it must be extended by the minimum time necessary to accommodate circumstances beyond the employees control that make reporting within the period impossible or unreasonable. *38 U.S.C. § 4312(e)(2)(B); 20 C.F.R. § 1002.116*.

Nature of Right to Reemployment. If employees meet the conditions described above, USERRA requires employers to hire them promptly in the positions of employment they would have been employed had their employment not been interrupted by military service, provided they are qualified to perform the positions duties. *38 U.S.C. § 4313(a)(1)(A)*. If employees are not qualified to perform the duties, employers must make reasonable efforts to qualify them. *38 U.S.C. § 4313(a)(1)(B)*. The term promptly means as soon as practicable and generally may not exceed two weeks absent unusual circumstances. *20 C.F.R. § 1002.181*. For employees who performed military service for more than 90 days, the employee must be restored to a position of like seniority, status and pay, the duties of which the person is qualified to perform. *38 U.S.C. § 4313(a)(2)(A)*.

Escalator Principle. Returning employees must not only be promptly reemployed, they must also receive the seniority and perquisites of seniority they earned before they departed for military services **plus** any additional seniority, rights, and benefits they would have attained had they remained continuously employed. *38 U.S.C. § 4316(a)*. [T]he returning veteran does not step back on the seniority escalator at the point he stepped off. He steps back on the point he would have occupied had he kept his position continuously during the period of military service. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-285 (1946); H.R. Rep. No. 103-65, at 30, reprinted in 1994 U.S.C.C.A.N. 2449, 2463. Thus, employees are entitled to all of the perquisites of seniority (e.g., promotions, pay raises) based on their pre-service length of employment plus the period spent in military service. In other words, [t]he employer must determine the seniority rights, status, and rate of pay as though the employee had been continuously employed during the period of service. *20 C.F.R. § 1002.193*. A seniority-based right or benefit is one that accrues with,

or is determined by, longevity in employment, 38 U.S.C. § 4303(12) (defining seniority as longevity in employment); 20 C.F.R. § 1002.212; see, e.g., *Alabama Power Co. v. Davis*, 431 U.S. 581 (1977) (company pension benefits); it does not include benefits, rights, or status not based on longevity. 38 U.S.C. § 4316(b)(3); *McKinney v. Missouri-Texas RR. Co.*, 357 U.S. 265 (1958); *Rogers v. City of San Antonio*, 392 F.3d 758, 764 (5th Cir. 2004). Returning employees receive promotions and pay increases if there is a reasonable certainty they would have received the pay increases and promotions absent military service. 20 C.F.R. §§ 1002.191, 1002.193, 1002.236. A reasonable certainty means a high probability. 20 C.F.R. § 1002.213; see also H.R. Rep. No. 103-65, at 31, reprinted in 1994 U.S.C.C.A.N. 2449, 2464.

Employer-Provided Health Insurance. Returning employees are entitled to immediate reinstatement of their employer-provided health insurance (if any) without a waiting period or exclusion for preexisting conditions other than those conditions determined to be service-connected by the Veterans Administration. 38 U.S.C. § 4317(b); 20 C.F.R. § 1002.168(a). In addition, employees may elect continuing coverage under their employers health-insurance plan for up to 24 months while on qualifying military leave. 38 U.S.C. § 4317(a)(1); 20 C.F.R. § 1002.164. If called to active duty for less than 31 days, the employee may not be required to pay more than the regular employee share for health insurance; if he or she is away for more than 31 days, the employee may pay 102% of the full premium, representing the employees and employers full share plus 2% for administrative costs. 38 U.S.C. § 4317(a)(2); 20 C.F.R. § 1002.166. The Act neither requires employers to establish a health plan if they do already have one, nor permits employees to initiate new health plan coverage at the beginning of a period of service if they did not previously have such coverage. 20 C.F.R. §§ 1002.164(b-c).

Employer-Funded Pension Plans. An employer may not treat a returning employee as having incurred a break in service for purposes of participation, vesting, and accrual of benefits in an employer-maintained pension plan. 38 U.S.C. § 4318(a)(2); 20 C.F.R. § 1002.259. The amount (if any) of an employers obligation to the plan during the period of qualifying military service depends upon the type of pension plan, whether employer contributions are contingent upon employee contributions to the plan, and whether the employee elects to make up his or her contributions to the plan upon reemployment. 38 U.S.C. § 4318(b); 20 C.F.R. §§ 1002.261--1002.267.

Accrued Leave. Upon an employees request, employers must permit employees whose employment is interrupted because of military service to use, during their service, any vacation, annual, or similar leave with pay accrued before the commencement of service. 38 U.S.C. § 4316(d). Employers may not, however, require employees to use vacation, annual, or similar leave during their military service. 38 U.S.C. § 4316(d).

Disabled Veterans. Employers must make reasonable efforts to accommodate returning employees suffering from service-connected disabilities by placing them in positions of employment they would have attained but for their military service. 20 C.F.R. § 1002.225. If the disability is not an impediment for the position, the disabling condition is irrelevant for USERRA purposes. Uniformed Services Employment & Reemployment Rights Act of 1994, Final Regulations, 70 Fed. Reg. 75,277 (Dec. 19, 2005). If the disability limits the employees ability to perform the job, the Act requires the employer to make reasonable efforts to accommodate the disability. 38 U.S.C. § 4313(a)(3); 20 C.F.R. § 1002.226. If despite the employers reasonable efforts to accommodate the disability, the returning disabled employee cannot become qualified for the position, the employee must receive any other position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer. 38 U.S.C. § 4313(a)(3)(A); 20 C.F.R. § 1002.225(a). If no such position exists, the employer must place the employee in a position which is the nearest approximation . . . in terms of seniority, status, and pay consistent with circumstances of such persons case. 38 U.S.C. § 4313(a)(3)(B); 20 C.F.R. § 1002.225(b).

Discharge of Returning Employees. The Act protects servicemembers from being fired following their reemployment. Except for cause, a returning employee may not be fired within one year after being reemployed if the employees period of military service was more than 180 days, or within 180 days if the employees service was more than 30 days but less than 181 days. 38 U.S.C. § 4316(c); 20 C.F.R. § 1002.247. If the employer fires a returning employee within these USERRA-protected periods, it bears the burden of proving that the employee was discharged for cause (e.g., employee misconduct, reductions-in-force). 20 C.F.R. § 1002.248; *Ferguson v. Walker*, 397 F. Supp. 2d

964, 972 (N.D. Ill. 2005).

Exceptions to Reemployment. Employers have three possible defenses for denying reemployment to returning servicemembers, 38 U.S.C. § 4312(d), and they have the burden of establishing the defenses. 38 U.S.C. § 4312(d)(2). Specifically, even if an employee is otherwise eligible for reemployment, the employer is not required to reemploy him or her--

(1) If the employers circumstances have so changed as to make such reemployment impossible or unreasonable. 38 U.S.C. § 4312(d)(1)(A). For example, an employer may be excused from reemploying the employee where there has been an intervening reduction in force that would have included that employee. 20 C.F.R. § 1002.139(a). The impossible or unreasonable circumstances exception is, however, narrowly construed. Uniformed Services Employment & Reemployment Rights Act of 1994, Final Regulations, 70 Fed. Reg. 75,261 (Dec. 19, 2005). The employer may not refuse to reemploy a returning servicemember simply because it hired another employee to fill the position during the servicemembers absence. 20 C.F.R. § 1002.139(a). If mere replacement of the employee would exempt an employer from the Act, its protections would be meaningless. *Cole v. Swint*, 961 F.2d 58, 60 (5th Cir. 1992). In such circumstances, the employer has the burden of displac[ing] the replacement worker or ensur[ing] the returning employee is placed in a position of like seniority, status, and benefits. Major Michele A. Forte, Reemployment Rights for the Guard and Reserve: Will Civilian Employers Pay the Price for National Defense, 59 A.F.L. Rev. 287, 313 (2007) (footnote omitted); see, e.g., *Nichols v. Department of Veterans Affairs*, 11 F.3d 160, 163 (Fed. Cir. 1993); *Fitz v. Board of Educ.*, 662 F. Supp. 1011, 1014 (E.D. Mich. 1985), affd, 802 F.2d 457 (6th Cir. 1986).

(2) If assisting the returning employee in becoming qualified for reemployment would impose an undue hardship on the employer. 38 U.S.C. § 4312(d)(1)(B). The term undue hardship means actions requiring significant difficulty or expense, when considered in light of (a) the nature and cost of the needed action; (b) the employers overall financial resources, including such factors as the number of its employees and the impact of the accommodation on its operations; and (c) the type of operations the employer conducts, including such factors as the composition, structure, and functions of its work force and the geographic separateness of the employers facilities. 38 U.S.C. § 4303(15).

(3) If the employment from which the servicemember left was only for a brief, nonrecurrent period and there was no reasonable expectation that the employment would continue indefinitely or for a significant period. 38 U.S.C. § 4312(d)(1)(C).

Enforcement.

Remedial Mechanisms: State & Private Employers. A servicemember denied reemployment under the Act has the option of seeking assistance from the Department of Labors Veterans Employment and Training Service (VETS) or initiating a private cause of action directly against the employer. 38 U.S.C. §§ 4322(a), 4323(a); 20 C.F.R. § 1002.303. If the servicemember seeks assistance from VETS, the Service will investigate the claim and attempt to resolve it with the employer. 38 U.S.C. §§ 4321--4322, 4326; 20 C.F.R. §§ 1002.288--1002.291. If VETS is unsuccessful, the servicemember may seek referral of the case to the U.S. Attorney General, who may commence an action on his or her behalf. 38 U.S.C. § 4322(a)(1); 20 C.F.R. §§ 1002.292. Alternatively, if the servicemember is unsuccessful in securing relief through VETS and the Attorney General, he or she may sue private employers in United States district court or state employers in state court. 38 U.S.C. §§ 4323(b)(2-3); 20 C.F.R. §§ 1002.303--1002.305. For lawsuits against private employers in U.S. district court, venue is proper in any district where the employer maintains a place of business. 38 U.S.C. § 4323(c)(2); 20 C.F.R. § 1002.307. In spite of the statutory right to file suit, the U.S. Court of Appeals for the Fifth Circuit has held that USERRA does not preclude enforcement of individual contracts to arbitrate employment-related disputes. *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672, 681 (5th Cir. 2004). Returning

servicemembers or their attorneys having questions or needing assistance may contact the National Committee for Employer Support to the Guard and Reserve (ESGR) at 1-800-336-4590 or may visit the ESGR website at <http://esgr.org/userra.asp>.

Remedial Mechanisms: Federal Agency Employers. Where a federal agency has failed to comply with USERRA, the employee may generally seek relief before the Merit Systems Protection Board (MSPB). 38 U.S.C. § 4324. The Office of Special Counsel (OSC) will represent a federal-sector claimant if requested and if the OSC is reasonably satisfied that the claimant is entitled to the relief sought. 38 U.S.C. § 4324. Where a federal-sector claimant does not want OSC representation, or if the OSC is not reasonably satisfied the claimant is entitled relief, the claimant may appeal to the MSPB on his or her own behalf using privately retained counsel. 38 U.S.C. § 4324; see also H.R. Rep. No. 103-65, at 40, reprinted in 1994 U.S.C.C.A.N. 2449, 2473.

Statute of Limitations & Laches. USERRA does not have a statute of limitation and specifically proscribes the application of state statutes of limitations to proceedings under the Act. 38 U.S.C. § 4323(i). Some federal courts have applied the federal general four-year statute of limitations (28 U.S.C. § 1658) to USERRA claims. See, e.g., *Wagner v. Novartis Pharm. Corp.*, --- F. Supp. 2d ---, 2008 U.S. Dist. LEXIS 52974 (E.D. Tenn. Jul. 10, 2008); *ONeil v. Putnam Retail Mgt., LLP*, 407 F. Supp. 310, 316 (D. Mass. 2005); see generally *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382 (2004) (application of general statute of limitations to federal statutes acts enacted after 1990). Servicemembers who unreasonably delay in seeking relief to the prejudice of the employer may be barred by laches. *Miller v. City of Indianapolis*, 281 F.3d 648, 653 (7th Cir. 2002).

Remedies. Once a violation of USERRA is established, a court may order an employer to comply with the Acts reemployment provisions, and it may direct the employer to compensate the returning employee for lost wages and benefits suffered as a result of the employers noncompliance. 38 U.S.C. §§ 4323(d)(1)(A-B); 20 C.F.R. §§ 1002.312(a-b). If the court finds the employers noncompliance with the Act was willful, it may award to the returning employee an amount equal to his or her lost wages and benefits as liquidated damages. 38 U.S.C. § 4323(d)(1)(C); 20 C.F.R. § 1002.312(c). If successful, the returning employee may also recover attorneys fees, expert witness fees, and litigation costs. 38 U.S.C. § 4323(h)(2); 20 C.F.R. § 1002.310. On the other hand, no court costs or fees may be assessed against the returning employee. 38 U.S.C. § 4323(h)(1); 20 C.F.R. § 1002.310.

Nondiscrimination.

Prohibited Actions. Although not directly related to the rights of returning servicemembers, practitioners should recognize that USERRA prohibits discrimination against employees who serve, have served, or will serve in the armed forces. 38 U.S.C. § 4311(a). Congress intended that USERRA's anti-discrimination provision be broadly construed and strictly enforced. H.R. Rep. No. 103-65, at 23, reprinted in 1994 U.S.C.C.A.N. 2449, 2456. Thus, employers may not fire or take other adverse employment actions against employees before they serve or after they return because of their membership or anticipated membership in the military. 38 U.S.C. § 4311(a). USERRA also prohibits employers from taking adverse employment actions as reprisals against employees who seek the protections of USERRA or who cooperate with investigations under the Act. 38 U.S.C. § 4311(b). An adverse employment action is a tangible change in working conditions that produces a material employment disadvantage. *Clegg v. Arkansas Dept of Correction*, 496 F.3d 922, 927 (8th Cir. 2007) (internal quotations omitted). Examples of adverse employment actions include transfer to positions that are less stable or deny an employees ability to earn bonuses, *Maxfield v. Clintas Corp.*, 427 F.2d 544, 552 (8th Cir. 2005); transfer to jobs having less regular schedules and longer work days, *Hill v. Michelin North America, Inc.*, 252 F.3d 307, 313 (4th Cir. 2001); denial of a promotion, *Brandsasse v. City of Suffolk*, 72 F. Supp. 2d 608, 614 (E.D. Va. 1999); opening an investigation of an employee following the employees request for accommodation of his military service, *Brandsasse v. City of Suffolk*, 72 F. Supp. 2d 608, 615; failure to offer make-up promotional exams upon return from military service, *Fink v. City of New York*, 129 F. Supp. 2d 511, 520 (E.D.N.Y.2001), and terminating an employee during a reduction-in-force because of the employees National Guard membership. *Brinkley v. Dialysis*

Clinic, Inc., 403 F. Supp. 2d 1090, 1100 (M.D. Ala. 2005).

Burden of Proof.

Employees Burden. An employer violates USERRA if the employee can establish that his or her military service, claim for USERRA relief, or cooperation with an investigation under the Act was a motivating factor (not the sole factor) in the denial of employment, promotion, or any benefit of employment. 38 U.S.C. § 4311(c)(2); *Coffman v. Chugach Support Serv., Inc.*, 411 F.3d 1231, 1238-1239 (11th Cir. 2005); *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898-899 (9th Cir. 2002). An employee may prove discriminatory motive or intent either by direct or circumstantial evidence, and [d]iscriminatory motivation under the USERRA may be reasonably inferred from a variety of factors, including proximity in time between the employees military activity and the adverse employment action, inconsistencies between the proffered reason and other actions of the employer, an employers expressed hostility towards members protected by the statute together with knowledge of the employees military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses. *Sheehan v. Department of the Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001); see also *Sutherland v. SOS Internatl, Ltd.*, 541 F. Supp. 2d 787, 793 (E.D. Va. 2008).

Employers Burden. If the employee successfully establishes that the employer was at least partially motivated by his or her military service, the burden shifts to the employer to prove that it would have taken the action in the absence of the employees military service, claim, or cooperation. *Maxfield*, 427 F.3d at 551. [T]he employee does not have the burden of showing that the employers stated reason is a pretext. Instead, the employer must show, by a preponderance of the evidence, that the stated reason was not a pretext; that is, that the action would have been taken in the absence of [the employees military] service. *Velazquez-Garcia v. Horizon Lines of Puerto Rico, Inc.* 473 F.3d 11, 17 (1st Cir. 2007) (quoting 38 U.S.C. § 4311(c)) (emphasis in the original); see also *Grosjean v. FirstEnergy*, 481 F. Supp. 878, 883 (N.D. Ohio 2002); *Snowman v. Imco Recycling, Inc.*, 347 F. Supp. 2d 338 (N.D. Tex. 2004) (employer met burden where it proved decision to terminate employee was made before employee informed employer about military service).

Enforcement. The provisions relating to the enforcement of a returning employees reemployment rights are applicable to discrimination claims under the Act.

Texas Law. In addition to the federal government, the State of Texas furnishes various protections to returning servicemembers.

Reemployment Rights of Public Employees.

Reemployment Rights. A public employee who leaves a state or local governmental entity to enter active military service is entitled to be reemployed by the governmental entity upon the completion of service. Tex Govt Code § 613.002(a). The employee must be rehired in the same department in which he or she was employed at the time of entry onto active duty and in the same position or a position of similar seniority, status, and pay. Tex Govt Code §§ 613.002(a)(2), (a)(3). The returning employee is considered to have been on furlough or leave of absence during his or her period of military service and may participate in retirement or other benefits to which public employees are entitled. Tex Govt Code § 613.006. The Texas Attorney General has opined that a returning public employee is entitled to credit for pay purposes for the time spent on military leave, Op. Texas Atty. Gen. No. MW-109, June 18, 1971; Op. Texas Atty. Gen. No. MW-100, Dec. 13, 1979, as well as sick leave accumulated before the employee entered active duty. Op. Texas Atty. Gen. No. M-886, Dec. 20, 1979. An employee is not entitled to accumulate sick and annual leave while performing military service. Op. Texas Atty. Gen. No. M-886, Dec. 20, 1979; however, his or her service counts for longevity purposes in determining the amount of sick and annual leave the employee earns upon his or her return. Op. Texas Atty. Gen. No. H-941, Feb. 9, 1977; see e.g., Tex Govt Code § 661.152 (accrual of vacation leave based on longevity).

Prerequisites. To be entitled to reemployment, the returning public employee must be discharged, separated, or released from active military under honorable conditions not later than the fifth anniversary of entry onto active duty and must be physically and mentally qualified to perform the duties of the position. Tex Govt Code § 613.002(b). If the public employee cannot perform the duties of the position because of a disability sustained during military service, the governmental entity must rehire the returning employee in a position the employee can perform and that has like seniority, status, and pay as the former position or has the nearest possible seniority, status, and pay. Tex Govt Code § 613.003. The returning employee must apply for reemployment not later than the 90th day after the employee is discharged or released from active military service. Tex Govt Code § 613.004(a). The application for employment must (1) be made to the same governmental entity that employed the veteran before he or she entered military service, (2) be in writing, and (3) include evidence of a discharge under honorable conditions (usually a DD Form 214). Tex Govt Code § 613.004(b).

Protection from Discharge. Veterans reemployed by governmental entities may not be discharged from the position within one year of the date of reemployment. Tex Govt Code § 613.005.

Enforcement. Returning veterans may sue public officials failing to comply with the Texas reemployment statute in the district court in the district in which the individual is a public official. Tex Govt Code § 613.021(a). Alternatively, the district attorney of the appropriate district may seek relief on behalf of the veteran. Tex Govt Code § 613.022. Veterans seeking judicial relief are not subject to payment of court costs or fees. Tex Govt Code § 613.023.

Public Employee Military Leave.

National Guard & Reserve Activations For Emergencies. A state employee called by the governor to state active duty as a member of the National Guard because of an emergency is entitled to be paid emergency leave without a loss of military leave and without a deduction in salary. Tex Govt Code §§ 431.0825, 661.903. A state employee called to federal active duty as a member of the National Guard may not generally receive the employees state salary; Tex Govt Code § 661.903; however, state employees who are members of the Reserve or National Guard and who are activated for a federal national emergency are entitled to an unpaid leave of absence and continue to accrue state service credit for purposes of longevity pay while on military duty although they do not accrue vacation or sick leave during an their absence. Tex Govt Code §§ 661.904(a-b). Such employees also accrue retirement service credit by receiving at least one hour of state pay during each month of active military service. Tex Govt Code § 661.904(f). The head of the state agency must grant sufficient emergency leave as differential pay to a state employee on unpaid military leave if the employees military pay is less than the employees state gross pay, but the combination of emergency leave and military pay may not exceed the employees actual state gross pay. Tex Govt Code § 661.9041(a). In addition, Texas law provides that persons called to active military duty as a member of the Texas National Guard who suffer economic hardship as a result of serving on active duty are eligible to receive supplemental pay. Tex Govt Code § 431.0821(a).

Military Leave. State and local employees, who are members of the Reserve or National Guard, receive a paid leave of absence on days in which the employees are engaged in authorized military training or duty for a period not exceeding 15 workdays per federal fiscal year. Tex Govt Code § 431.005. During these leaves of absence, employees are not subject to loss of time, efficiency rating, personal time, sick leave, or vacation time. Tex Govt Code § 431.005.

State Employment Preference.

Qualifying Veterans. To qualify for a veterans employment preference, a person must (1) have served in the military for not less than 90 consecutive days during a federal national emergency or was discharged from military service for an established service-connected disability; (2) have received an honorable discharge; and (3) be competent. Tex. Govt Code § 657.002(a). In addition, a veterans surviving spouse who has not remarried or an orphan of a veteran

qualifies for a veterans employment preference if (1) the veteran was killed while on active duty; (2) the veteran served in the military for not less than 90 consecutive days during a federal national emergency; and (3) the spouse or orphan is competent. Tex Govt Code § 657.002(b).

Nature of Preference. Qualified veterans receive an employment preference with a state public entity or public work over other applicants for the same position who do not have a greater qualification. Tex Govt Code § 657.003(a). A public entity is a public department, commission, board, or agency. Tex Govt Code § 657.001(2). Qualified veterans with service-connected disabilities are entitled to a preference for positions for which there is no competitive examination over all other applicants for the same position without a service-connected disability and who do not have greater qualifications. Tex Govt Code § 657.003(b). Where a state agency requires an examination for employment and if a qualifying veteran achieves the minimum test score, the veteran must receive an additional 10-points added to the score; a disabled veteran gets--in addition to the 10 points--an additional 5-points (i.e., 15 points). Tex Govt Code § 657.003(c). Qualified veterans also receive a retention preference during reductions-in-force, so long as the reduction involves employees of a similar type or classification. Tex Govt Code § 675.007.

Minimum Level of Preferences. Texas law requires a public entity or public work to give preferences in hiring to qualified veterans so that at least 40% of the employees of the public entity or public work are selected from qualified veterans. Tex Govt Code § 657.004(a). Public entities or public works that have not achieved the 40% minimum must, in filling vacancies, give preferences to individuals entitled to a veterans employment preference until they have reached at least the 40% goal. Tex Govt Code § 657.004(a). Moreover, public entities or public works must, when possible, give 10% of preferences to qualified veterans discharged from the armed services within the preceding 18 months. Tex Govt Code § 657.004(b).

Enforcement. Qualified veterans who claim that a public entity or work has violated the preference statute may appeal the action of the public entity or public work by filing a written complaint with its governing body. Tex Govt Code § 657.010(a). The governing body must respond to the complaint within 15 business days. Tex Govt Code § 657.010(b). The governing body may render a different hiring decision than the decision that is the subject of the complaint if the governing body determines that the veterans preference was not applied. Tex Govt Code § 657.010(b). Texas courts also may overturn the hiring process where a public official has failed to award the required veterans preference; however, sovereign immunity bars the award of money damages or an injunction requiring appointment of the veteran into the position. *King v. Texas Dept of Human Serv.*, 28 S.W.3d 27, 33-34 (Tex. App. 2000).

Education Benefits.

Tuition & Fee Waiver (Hazelwood Act). Veterans who are Texas citizens, who entered military service in Texas, and who resided in the state at least twelve months before their military service are exempt from the payment of tuition and fees in Texas institutions of higher education (excluding general deposit fees, student services fees, and any fees or charges for lodging, board, or clothing). Tex. Educ. Code §§ 54.203(a), 54.203(b-1). Veterans must have served a minimum (excluding training) of 180 days and must have served during a time of war or federal national emergency. Tex. Educ. Code § 54.203(a)(4). If veterans are entitled to federal education assistance (e.g., GI Bill), they must use those benefits before relying upon the state grant. Tex. Educ. Code § 54.203(e). Veterans may not receive the benefits of the statute for more than a cumulative total of 150 semester credit hours. Tex. Educ. Code § 54.203(c). In determining whether to admit a person to any higher educational program, including those awarding a baccalaureate, graduate, postgraduate, or professional degree, an institution of higher education may not consider the fact that the person is eligible for an exemption from tuition and fees. Tex. Educ. Code § 54.203(j). Finally, the tuition and fee exemption provisions also apply to the children of members of the armed forces (1) who were killed in action; (2) who die while in service; (3) who are missing in action; (4) whose death is directly caused by a service-connected illness or injury; or (5) who are totally disabled as a result of a service-related injury. Similarly, children of Texas National Guard

members killed on active duty or who are totally disabled as the result of a service-related injury are also exempt from tuition and fees. Tex. Educ. Code § 54.203(b).

Former Prisoners of War (POW). Veterans who were Texas residents at the time of their entry on active duty and who were classified as POWs on or after January 1, 1999, are exempt from paying tuition and fees at institutions of higher education for up to 120 semester credit hours. Tex. Educ. Code § 54.219(b). To be eligible, veterans must be enrolled for at least 12 semester credit hours. Tex. Educ. Code § 54.219(a)(b)(3). Eligible veterans are also exempt for paying fees and charges for room and board if they live on campus, and institutions must provide them a stipend for room and board if they live off campus. Tex. Educ. Code § 54.219(c). The institution must also award a scholarship to cover the costs of books and similar materials required for courses. Tex. Educ. Code § 54.219(d). Children of servicemembers who are either classified as POWs or missing-in-action are entitled to exemption from tuition and fees, except room, board, and clothing fees. Tex. Educ. Code § 54.209.

Readmission After Military Service. Institutions of higher education must readmit students who withdraw to perform active military service without requiring reapplication or fees, provided the student is otherwise eligible to return. Tex. Educ. Code § 51.9242(a). The statute does not apply, however, to students who withdraw solely to perform one or more training exercises as a member of the Texas National Guard. Tex. Educ. Code § 51.9242(a). Eligible veterans have one year to return to the institution after their release from active military service. Tex. Educ. Code § 51.9242(b). The institution must provide financial assistance previously given to the veteran before his or her withdrawal if the veteran meets current eligibility requirements for the assistance, other than requirement directly affected by the his or her service (such as continuous enrollment), and it must allow the veteran the same academic status he or she had before withdrawing, including any course credit awarded by the institution. Tex. Educ. Code § 51.9242(b).

Other Benefits. The State of Texas offers a variety of other benefits to veterans, notably to veterans who have service-connected disabilities, such as the award of credit at institutions of higher education for certain military training, Tex. Educ. Code § 51.3041; waiver or reduction of fees for concealed handgun permits, Tex Govt Code § 411.1951; waiver of fees for hunting and fishing licenses for disabled veterans and Texas residents on active duty, Tex. Parks & Wild. Code §§ 41.012; 46.004; exemption from payment of drivers license fees for certain disabled veterans, Tex. Transp. Code § 521.426; the use of specialty military license plates, Tex. Transp. Code §§ 504.301--541.315; partial exemption from real property taxes for disabled veterans, Tex. Tax Code § 11.22; state preferences for goods produced or offered by Texas bidders owned by disabled veterans, Tex. Govt Code § 2155.444(a); and loans, housing, and financial assistance from the state. Tex. Nat. Res. Code chs. 161, 162, & 164. More information about these and other benefits are available from the Texas Veterans Commission (<http://www.tvc.state.tx.us/>) and the Texas Veterans Land Board (<http://www.glo.state.tx.us/vlb/>).

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n1 By its terms, USERRA applies to state governments as employers; however, the Supreme Court has held that Congress may neither abrogate a states Eleventh Amendment immunity in the federal courts through legislation enacted under its Article I powers. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), nor require state courts to enforce such federal laws. *Alden v. Maine*, 527 U.S. 706 (1999). USERRA is an exercise of Congress article I war powers and cannot abrogate a states sovereign immunity. *Velasquez v. Frapwell*, 160 F.3d 389 (7th Cir. 1998), vacated on other grounds, 165 F.3d 329 (7th Cir. 1999); but see Major Timothy M. Harner, *The Soldier and the State: Whether the Abrogation of State Sovereign Immunity in USERRA Enforcement Actions Is a Valid Exercise of the Congressional War Powers*, 195 *Mil. L. Rev.* 91 (2008) (arguing USERRA is a valid exercise of Congress war powers). State employees may, however, seek injunctive relief in

federal court against state officials, *id.* at 394, or seek to have the United States bring suit on their behalf. 38 *U.S.C. § 4323(a)*. Moreover, as will be discussed below, Texas law affords USERRA-like protections to employees of state and local governments. *Tex. Govt Code §§ 613.001--613.006*.

n2 The Texas Attorney General has opined that the residency requirement is unconstitutional. *Op. Texas Atty. Gen. No. DM-468*, March 12, 1998. The Attorney General also opined that a court would likely strike offending fixed-point requirement but leave remainder intact, thus extending exemption to all honorably discharged resident veterans. *Op. Texas Atty. Gen. No. DM-468*, March 12, 1998.

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Arthur Best on State v. Sweet

2008 Emerging Issues 2803

Arthur Best on State v. Sweet, 949 A.2d 809 (N.J. 2008)

By Arthur Best

September 9, 2008

SUMMARY: New Jersey interprets Crawford narrowly, to exempt test certificates used in connection with breath testing instruments from Confrontation Clause requirements in prosecutions for driving while intoxicated.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Overview

Current Confrontation Clause jurisprudence requires the exclusion of testimonial hearsay unless the declarant testifies or is unavailable and the defendant had an opportunity to develop the declarant's statement prior to trial. Many statements made by or to police as part of the investigation of past crimes or past alleged crimes would seem to fit the Supreme Court's definition of testimonial, but narrow understandings of that term have been adopted by many appellate courts. In *State v. Sweet*, 949 A.2d 809 (N.J. 2008), the New Jersey Supreme Court considered the proper Confrontation Clause treatment of foundational documents concerning the status of Breathalyzer brand blood alcohol measuring devices. The documents at stake in two companion cases were device inspection certificates and certificates describing reagent ampoules used in the device.

Pertinent Legal Principles

Crawford v. Washington, 541 U.S. 36 (2004) and *Davis v. Washington*, 547 U.S. 813 (2006) held that the Confrontation Clause applies only to testimonial hearsay. Understood most broadly, those decisions hold that a statement is testimonial if its primary purpose is to establish or prove past events potentially relevant to a criminal prosecution or if an objective witness would reasonably believe that the statement would be available for use at a trial.

State v. Chun, 943 A.2d 114 (N.J. 2008) applied the Confrontation Clause to documentary evidence related to a breath testing device different from the one involved in the current case. The court determined that admissibility of results from this device required introduction of numerous foundation documents, such as documents describing calibration of the device. It held that such documents were not subject to Confrontation Clause requirements. The court stated,

[t]o be sure, some of these documents and certificates are prepared by the police, but none of them relates to or

reports a past fact and none of them is generated or prepared in order to establish any fact that is an element of the offense. . . The fact that they may be used to demonstrate that a device, which was used to conduct the breath tests for a particular defendant, was in good working order does not transform them into evidence of an element of the offense nor make them testimonial in the constitutional sense.

State v. Chun, 943 A.2d 114, 167 (N.J. 2008).

For an overview of Confrontation Clause issues, see 1-3 United States Supreme Court Cases and Comments P 3.05.

Application of Doctrine to Breathalyzer Devices

The New Jersey Supreme Court followed the analysis it had recently developed in *State v. Chun*, and determined that the foundational documents associated with Breathalyzer brand testing devices could be introduced without regard to the Confrontation Clause requirements of *Crawford* and *Davis*. This required two stages of analysis, considering basic hearsay issues as well as Confrontation Clause issues.

Basic Hearsay Analysis. With regard to hearsay, the Court concluded that the documents are hearsay but that they are within the coverage of the business records exception. The documents are hearsay because they describe facts about whether or not the devices were in good working order, and they were introduced to establish that those facts were true (and that the devices were working properly when they were used to test the breath of particular defendants). The documents fit the business records exception because they were made in the regular course of business, were prepared reasonably contemporaneously with the events they described, and there was no credible challenge to their trustworthiness.

Confrontation Clause Analysis. The Court characterized the documents as non-testimonial hearsay and therefore exempt from Confrontation Clause requirements. This accords with decisions in many other jurisdictions, such as *Bohsancurt v. Eisenberg*, 212 Ariz. 182, 129 P.3d 471, 476-77 (Ariz. Ct. App. 2006) (maintenance and calibration records for breath testing machine are not testimonial); *Rackoff v. State*, 281 Ga. 306, 637 S.E.2d 706, 707, 709 (Ga. 2006) (inspection certifications are not testimonial); and *People v. Kim*, 368 Ill. App. 3d 717, 859 N.E.2d 92, 93-94, 307 Ill. Dec. 92 (Ill. App. Ct. 2006), *appeal denied*, 224 Ill. 2d 589, 871 N.E.2d 60, 312 Ill. Dec. 660 (Ill. 2007) (device test affidavit is non-testimonial). The Court based its conclusion on the idea the ampoule and device certificates did not relate to any past facts that must be proved to establish an element of a charged offense. The Court contrasted these documents with reports of the analysis of a suspected controlled substance sought to be introduced in a drug crime prosecution. Those laboratory reports would relate to the crux of the criminal prosecution and ought therefore to be characterized as testimonial, in the Courts analysis.

Significantly, the Court noted that the State had raised what the Court termed strong policy considerations to support characterizing the documents as non-testimonial. As described by the Court, the State suggested that given the sheer volume of driving while intoxicated prosecutions conducted, numbering more than 25,000 each year, requiring the testimony of the authors of foundational certificates -- in contrast with the Breathalyzer blood alcohol content reports that establish the offense -- is impractical. *State v. Sweet*, 949 A.2d 809, 815 (2008). Undoubtedly the factual assertions in this argument are valid. However, in another context, the United States Supreme Court has rejected the idea that simplifying the work of law enforcement and facilitating criminal prosecution can properly affect the application of the *Confrontation Clause*. In *Giles v. California*, 128 S.Ct. 2678 (2008), the majority opinion stated:

[W]e are puzzled by the dissent's decision to devote its peroration to domestic abuse cases. Is the suggestion that we should have one Confrontation Clause (the one the Framers adopted and *Crawford* described) for all other crimes, but a special, improvised, Confrontation Clause for those crimes that are frequently directed against women? Domestic violence is an intolerable offense that legislatures may choose to combat through many means -- from increasing criminal penalties to adding resources for investigation and prosecution to funding awareness and prevention

campaigns. But for that serious crime, as for others, abridging the constitutional rights of criminal defendants is not in the State's arsenal.

Giles v. California, 128 S.Ct. 2678, 2693 (2008).

For an analysis of the developing understanding of when hearsay is testimonial, see 1-14 Weinstein's Evidence Manual § 14.03.

Social Factors Influencing Narrow Application of Confrontation Clause. The Courts statement that the documents such as the ones in the current case do not relate to any past facts necessary to support the appellants convictions suggests that the Court was inclined to find a way to avoid application of the Confrontation Clause. Undoubtedly the facts described in those documents *were* essential to the prosecutions, given the choices the prosecution had made in how to establish the elements of its case, even though the underlying crimes might have been established with other types of proof. Nonetheless, practical concerns about tens of thousands of cases may have led the Court to reach the conclusion it did. Further, the Court may have assumed that cross-examination of the authors of the documents would likely have been entirely unavailing for the defendants.

These considerations were apparent in *Sweets* companion case, *State v. Buda*, 949 A.2d 761 (N.J. 2008). *Buda* considered the admissibility of statements by a three-year-old child to a Youth and Family Services worker who interviewed the child in a hospital. The child made a statement about the source of injuries he had sustained, and that statement was admitted against a defendant accused of assaulting him. The Supreme Court characterized the statement as non-testimonial because it was obtained while a dangerous situation was present and was made to protect the declarant from the risk of future harm. This interpretation fits the framework of *Davis v. Washington* which characterized a 911 call seeking help as *non-testimonial* and characterized statements to a police officer made while the declarant was in a position of safety as *testimonial*. The New Jersey Supreme Court chose to characterize the child who was in a hospital and whose injuries were being investigated by the police as more like a declarant seeking help in a 911 emergency call than like a declarant being interviewed after a crime has been committed. That characterization may well have been influenced by a strong desire to facilitate the protection of child victims of abuse, rather than by a neutral application of the United States Supreme Courts evolving Confrontation Clause analysis.

Counsel in future New Jersey cases and cases in other states where the frontiers of the new Confrontation Clause jurisprudence are being determined should be alert to courts willingness to consider extrinsic policy factors such as inconvenience to the government and the need to protect victims from future abuse. Where those inclinations are contrary to a clients position, counsel should rely on the unambiguous statements of the majority in *Giles* and seek to influence courts to follow that decisions dictates, despite the risk of hampering some criminal prosecutions.

RELATED LINKS: For an overview of Confrontation Clause issues, see

- 1-3 United States Supreme Court Cases and Comments P 3.05

For an analysis of the developing understanding of when hearsay is testimonial, see

- 1-14 Weinstein's Evidence Manual § 14.03

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Arthur Best on Monti v. Wenkert

2008 Emerging Issues 2810

Arthur Best on Monti v. Wenkert, 947 A.2d 261 (Conn. 2008)

By Arthur Best

September 9, 2008

SUMMARY: As a matter of first impression, high-low settlement agreement between estate and a defendant was required to be disclosed both to the court and to non-settling defendant doctor promptly upon its execution.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Overview

In *Monti v. Wenkert*, 947 A.2d 261 (Conn. 2008), the Connecticut Supreme Court analyzed how high-low settlements should be treated in multiple-defendant cases, in terms of their disclosure to non-settling defendants and possible disclosure to the jury as a means of showing bias or prejudice on the part of the settling defendant. The Courts analysis shows that even very slight possibilities of prejudice are adequate to support a requirement of disclosure. The Courts holding also opens the door to the use of such settlements for impeachment.

Factual Context

The factual context of this wrongful death medical malpractice case is important for understanding the Courts treatment of possible bias issues. The decedent, who was seventeen years old, went to the office of Dr. Mark J. Decker in early November, 1996, complaining of an earache. She received a prescription for an antibiotic. About a week later, she returned to the office complaining of headache, loss of appetite, and other symptoms. She was told to continue on the medication. The next day she went to a hospital emergency room, was diagnosed as suffering from an allergic reaction to the antibiotic, was given a different antibiotic, and was sent home. A day later, she returned to the hospital and was admitted to its intensive care unit, suffering from throat tightness, difficulty swallowing, and an increased respiratory rate. Dr. Decker was her attending physician at the hospital. He discharged her after three days. When Dr. Decker discharged the decedent, he told her parents that there was nothing medically wrong with her.

The day after her discharge from the hospital, the decedents mother took her to see her regular psychiatrist, Dr. Naomi E. Wenkert. The decedent collapsed outside the psychiatrists office door, but recovered and began to breathe more normally. Her lips were bluish and purple, which can indicate that a persons blood is deficient in oxygen. Dr.

Wenkert diagnosed the decedent as having a panic attack. She conducted the scheduled counseling session and prescribed a sedative. The decedent died that evening, from a cause determined to have been acute respiratory distress syndrome caused by a viral infection that neither Dr. Decker nor Dr. Wenkert diagnosed.

Course of Trial

The decedents parents sued a number of defendants for their daughters wrongful death, but the court treated them as equivalent to two defendants: Dr. Decker and Dr. Wenkert. The plaintiffs introduced testimony attempting to show that each doctors conduct was below the relevant standard of care. Dr. Wenkert testified that she had been told that the decedent was discharged from the hospital because she was fine. The plaintiffs questioned her about her evaluation of the decedents symptoms, and about whether she would have made the same decision to see the decedent if she had been informed that she had a serious medical condition such as viral pneumonia. After the plaintiffs had rested their case, and after Dr. Wenkert testified, the plaintiffs and Dr. Wenkert executed a settlement agreement. The agreement was a high-low agreement specifying that the plaintiffs would recover from \$300,000 to \$1,000,000, depending on the verdict, from Dr. Wenkerts insurers.

The jury found that Dr. Wenkert was free from liability, and that Dr. Decker was liable for substantial damages. Following the trial, the Dr. Decker became aware of the high-low agreement. On appeal, he argued that the agreement should have been disclosed to him, and that the failure to disclose it impaired his ability to challenge certain evidence and to impeach Dr. Wenkerts expert witness.

Supreme Courts Analysis

The Connecticut Supreme Court grounded its discussion of this high-low agreement by analyzing Mary Carter agreements and their treatment in many other states. It relied on *Vermont Union School District No. 21 v. H.P. Cummings Construction Co.*, 143 Vt. 416, 426-27, 469 A.2d 742 (1983) for a definition of a Mary Carter agreement as "a contract by which one or more defendants in a multi-party case secretly align themselves with the plaintiff and agree to continue as active defendants in the suit while working to aid in the plaintiff's case; in exchange, their own maximum liability will be diminished proportionately by increasing the liability of the nonagreeing defendant or defendants," noting that such agreements have four distinct features: "[(1) the] agreeing defendants must remain in the action in the posture of defendants . . . [(2) the] agreement must be kept secret . . . [(3) the] agreeing defendants guarantee to the plaintiff a certain monetary recovery regardless of the outcome of the lawsuit . . . [and (4) the] agreeing defendants' liability is decreased in direct proportion to the increase in the nonagreeing defendants' liability." *Id.*, 427.

The obvious risk in Mary Carter agreements is that the settling defendant has an incentive to become highly adversarial to other defendants who have not settled, and can offer testimony that puts both the settling defendant and other defendants in a bad light, since the settling defendants ultimate financial liability has been limited and will even be reduced depending on the allocation of responsibility to other parties. Not surprisingly, many states regulate such agreements, either by barring them, or by requiring their disclosure either to other parties or to other parties and the jury.

For a general description and analysis of Mary Carter agreements, see 15A Am Jur 2d Compromise and Settlement § 21. See also 57B Am Jur 2d Negligence § 1057, for a comparison of disclosed and non-disclosed contingent settlement agreements. A survey of jurisdictions positions on propriety and required disclosure of such agreements is provided at 57B Am Jur 2d Negligence § 1058.

Does agreeing to a high-low settlement agreement bias a party against others in the case who have not settled? That possibility would be a rationale for requiring disclosure of such agreements, and the Connecticut court accepts that idea that one who participates in such an agreement might expend less resources to defend against liability, knowing that he will have to pay some minimum amount regardless of the verdict. *Monti v. Wenkert*, 947 A.2d 261, 275 (Conn.

2008). This is a kind of bias in favor of the plaintiff.

Showing a strong interest in identifying reasons why high-low agreements might impair the fairness of the judicial process, the Court also stated that once a high-low settlement has been accepted, the plaintiff might more vigorously pursue liability against the nonsettling defendant because there is no cap on a verdict against him. *Id.* The power of this argument would necessarily depend on the facts of a case, but ordinarily plaintiff always have strong incentives to vigorously pursue liability against all defendants; the fact that the Court chose to highlight the theoretical chance that a plaintiff's resources might be reallocated suggests that the Court is highly likely to require disclosures of all sorts of agreements among parties, even where the concrete likelihood that the agreements will affect the fairness of a trial is small.

Indeed, on the facts of this case, the Court held that no harm occurred because of the non-disclosure of the agreement. The Court did not analyze whether that factual finding might have been understood to undermine the Court's conclusion that disclosure of such agreements should be the rule going forward.

Counsel can take two important points from the Court's decision. One is the explicit result of the case that requires disclosure of high-low and Mary Carter agreements to non-settling parties. The second point is that where virtually any claim of possible bias can be made, this opinion should offer strong support for permitting an inquiry into the bias as part of cross-examination. The opinion adopts a very low threshold for concluding that factors extrinsic to the merits of a case could affect a person's presentation of evidence, and for that reason represents a position highly accepting of various kinds of bias evidence.

Impeachment Use of High-Low Agreements. The Court approved decisions holding that agreements of the type involved in this case may be used for impeachment purposes, but noted that they may not be used for the purpose of proving liability or damages. When they are used for impeachment, the trial court must give the jury a cautionary instruction to the effect that the evidence is relevant for impeachment only, and not as proof of a party's underlying claim or defense.

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Arthur Best on State v. Sanchez

2008 Emerging Issues 2812

Arthur Best on State v. Sanchez, 177 P.3d 444 (Mont. 2008)

By Arthur Best

September 9, 2008

SUMMARY: Considering whether an accusatory note by someone who was subsequently murdered: 1) is hearsay, 2) is "testimonial" hearsay for purposes of the Confrontation Clause, and 3) is admissible under the forfeiture by wrongdoing doctrine.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Overview.

In *State v. Sanchez*, 177 P.3d 444 (Mont. 2008), the victim, Aleasha Chenowith (AC) was shot and killed outside her home. Raul Sanchez (RS) was charged with deliberate homicide for this killing, and was convicted after a trial in which the court admitted testimonial and documentary evidence of out-of-court statements by the victim. The Montana Supreme Courts opinion provided a detailed analysis of how hearsay, the Confrontation Clause and the concept of forfeiture by wrongdoing should apply to statements by a declarant who was murdered.

Hearsay analysis of out-of-court statements.

1. ACs sisters testimony. The trial court admitted testimony by ACs sister in which the sister testified that AC once told her that RS has said that if AC ever got RS angry, RS would obtain something from Mexico that would eat her stomach in a matter of days. This testimony included two out of court statements. For the first statement, the declarant was RS, and the out-of-court words were something like If you get me angry, I will obtain something from Mexico that will harm you. For the second statement, the declarant was AC, and the out-of-court words were something like Recently, RS said he might harm me.

The trial court overruled a hearsay objection to these statements on the ground that there was no effort to prove the truth of the matter asserted. The Montana Supreme Court agreed, noting that there was no effort to show that RS really could obtain poison from Mexico and stating that the relevance of the statement was to show a pattern of threats or that RS contemplated killing AC.

Counsel should be aware that the trial court and Supreme Court failed to analyze this testimony as double hearsay, even though there were two declarants and two statements. Clearer argument might have protected the defendant from

admission of the testimony. With regard to the out-of-court words by RS, there is no hearsay problem, since RS was a defendant and his words are all admissions when sought to be introduced against him. The missing part of the courts analysis, however, involves whether there was any admissible evidence to show that RS actually did say those words. The only evidence offered for that proposition was testimony by the sister of AC in which the sister quoted ACs out-of-court statement to the effect that RS had once said certain words.

See 1-14 Weinstein's Evidence Manual § 14.05 for treatment of multiple hearsay situations.

ACs out-of-court statement was offered for its truth: the proposition that RS had said certain words. The courts conclusion that the words of RS were not offered for their truth avoided considering that ACs words had to be true in order for them to be relevant. A mistaken or untruthful statement by AC that RS had made certain statements would have had no relevance at the trial. The out-of-court statement by AC that RS had spoken certain words was introduced to show that RS had in fact spoken those words. For that reason it had to be covered by a hearsay exception in order for it to be admissible, and both courts ignored that aspect of the analysis.

2. ACs neighbors testimony. A neighbor of AC testified that AC told her that RS had said during an argument You cross me, I kill you. With regard to this testimony, the Supreme Court did focus on the reliability of ACs out-of-court statement. The Supreme Court examined whether an exception existed that could permit its admission to show that the event it described (RSs having said certain words) really did occur. It noted that the dying declarations exception fails to legitimize its admission since she did not believe death was imminent when she made the statement. The present sense impression could not cover the statement since the statement was made the day after having observed the event it described. The excited utterance exception failed to apply because testimony showed that AC was unconcerned about the threat when she recounted it. For these reasons, the Court held that the statement was wrongly admitted, although the error was harmless.

The Supreme Court did not explicitly compare its treatment of ACs statement to her neighbor with its treatment of ACs statement to her sister. Apparently the difference that mattered to the court was that the statement to the sister involved poison -- and there was no effort to show that the defendant used poison to kill AC -- but that the statement to the neighbor involved a threat to kill -- and the states case did involve an effort to show that RS actually did deliberately kill AC.

3. ACs note. The prosecution offered into evidence a note that had been written by AC that was found in her residence after she was killed. It was headed To whom it concerns and stated that RS had threatened to kill her and that if she became sick and perhaps died you will have some answers. The Supreme Court held that admission of this note was improper, since there was no hearsay exception to cover the statement by RS incorporated in the note that RS would kill AC. The hearsay error was harmless, the Court found, because the impact on the jury of properly-admitted other evidence related to deliberate homicide qualitatively would have outweighed any impact from the wrongly-admitted hearsay.

Was the accusatory note testimonial hearsay?

On appeal, the defendant argued that admission of the accusatory note violated his Confrontation Clause rights, since it was testimonial hearsay and therefore inadmissible unless he had had a prior opportunity to cross-examine the declarant. (Admissibility of testimonial hearsay also requires a showing that the declarant was unavailable at trial, which was true of this declarant.) The majority of the Montana Supreme Court ruled that the note was testimonial, because the declarant might reasonably have expected that the its contents would be used at a trial. The court reviewed the formality of the note (its use of the formal to whom it concerns language, and its explicit purpose of explaining an untimely death or poisoning if such were to occur. It was accusatory, it provided date and time documentation of a threat, and it gave a name and motive for a likely killer. The court stated that the notes substance and its comprehensive

salutation indicate that it reasonably included law enforcement. *State v. Sanchez*, 17 P.3d 444, 453 (Mont. 2008). Also, the court gave weight to additional circumstances, including the fact that the declarant signed her name to the note and also printed her name, and that she left the note in a location where it would easily be found if her death was being investigated.

For an analysis of the developing understanding of when hearsay is testimonial, see 1-14 Weinstein's Evidence Manual § 14.03.

Does the forfeiture by wrongdoing doctrine allow admission of the note?

The Montana court considered whether forfeiture of Confrontation Clause rights occurs whenever a defendant's conduct causes the unavailability of a declarant or only when a defendant commits wrongdoing with the intent to prevent a witness from testifying. It decided this issue prior to the United States Supreme Court's decision in *Giles v. California*, 128 S. Ct 2678 (2008). The Montana court reached a conclusion contrary to the *Giles* holding, so its analysis is of historical interest only, although it happens to be a clear example of a category of cases that received special attention by the *Giles* court. The *Giles* court held that forfeiture by wrongdoing occurs only when a defendant engages in conduct designed to prevent a witness from testifying, such as offering a bribe. The forfeiture by wrongdoing doctrine does not apply where evidence suggests that a defendant had caused a person to be absent but had not done so to prevent the person from testifying. The Court referred to cases in this second category as including the typical murder case involving accusatorial statements by the victim.

1-17 Weinstein's Evidence Manual § 17.06 offers an analysis of the specific provision in the Federal Rules of Evidence governing forfeiture of hearsay objections by wrongdoing. The Supreme Court relied in part on the *Federal Rule of Evidence 804(b)(6)* to support its conclusion that forfeiture should be understood as limited to instances where wrongdoing is specifically intended to prevent testimony.

With specific reference to domestic violence cases, the Supreme Court in *Giles* offered dictum describing a possibly expansive definition of conduct meant to procure the unavailability of a witness. It stated that domestic violence is often intended to dissuade a victim from resorting to outside help, and is often meant to prevent testimony to police officers or cooperation in criminal prosecutions. If such an abusive relationship culminates in a murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution -- rendering her prior statements admissible under the forfeiture doctrine. An additional understanding of this dictum may come from a concurring opinion. In that concurrence by two Justices, it was stated that the element of intention would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process.

In future cases of this type, prosecutors will seek to operationalize the Courts dictum. Appellate decisions will likely determine what kinds of abuse scenarios will be treated as adequately supporting the conclusion that a defendant's murder of a victim was suffused with an overall intent to isolate her and to stop her from communicating with police or prosecutors.

RELATED LINKS: For treatment of multiple hearsay situations, see

- 1-14 Weinstein's Evidence Manual § 14.05

For an analysis of the developing understanding of when hearsay is testimonial, see

- 1-14 Weinstein's Evidence Manual § 14.03

For an analysis of the specific provision in the Federal Rules of Evidence governing forfeiture of hearsay objections by wrongdoing

- 1-17 Weinstein's Evidence Manual § 17.06

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William C. Bochet on Wein v. Morris, 194 N.J. 364, 944 A.2d 642 (2008)

2008 Emerging Issues 2868

New Jersey Supreme Court Sustains Arbitration Award in Ten-Year-Old Case by William C. Bochet

By William C. Bochet

September 9, 2008

SUMMARY: William C. Bochet explores the long history of *Wein v. Morris, 194 N.J. 364, 944 A.2d 642 (2008)* and its implications on arbitration in New Jersey.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: The Supreme Court finally put an end to *Wein v. Morris, 194 N.J. 364, 944 A.2d 64 (2008)*, a drawn-out matter that was the subject of an earlier published decision by the Appellate Division. The Court held that an order to stay litigation for arbitration is a final order for purposes of appeal as of right. It also found that a party's participation in arbitration could constitute waiver of any objection to that means of dispute resolution.

Off to Arbitration. Plaintiffs were a realty company and its brokers who entered into lease commission agreements with the defendant property owners. These agreements provided for the plaintiffs to find national drug store tenants for defendants' commercial properties. Prospective tenants were shown the real estate, but negotiations for leases bogged down. The frustrated owners eventually bypassed the realtors and entered into leases with tenants on their own. A failure to pay commissions to the plaintiffs brought this tortuous action into being.

The lease commission agreements between the parties contained an arbitration clause that mandated that any disputes between the parties be submitted to arbitration under the rules of the American Arbitration Association. Notwithstanding this clear-cut requirement, the plaintiffs commenced suit in the Superior Court. Defendants joined issue and the parties undertook almost five years of discovery. There was no mention of arbitration, save a half-hearted motion by defendants to compel arbitration after discovery had concluded. That motion was withdrawn.

After discovery concluded, defendants filed a motion for summary judgment. Plaintiffs responded with a similar cross-motion. The filings were massive. On the return date of the motions, the trial judge, *sua sponte* -- words normally meaning by itself but more likely for itself in this instance -- ordered the parties to arbitrate and dismissed the case. This action consequently facilitated the exit from chambers of moving papers which included over 300 pages of factual contentions and two bankers boxes of exhibits.

Despite the parties agreement that arbitration had been waived, no one appealed the dismissal of the lawsuit. Arbitration proceeded and an award in favor of plaintiffs was issued, after 16 days of hearings before a retired judge. A subsequent award of future commissions to plaintiffs was made by the arbitrator, as a re-calculation, since no reconsideration of a final award was permissible under AAA rules.

Plaintiffs returned to court to enter judgment on the award. The trial court, surprising no one -- this time -- entered judgment.

The Appellate Division reversed. In a reported decision [*Wein v. Morris*, 388 N.J. Super. 640, 909 A.2d 1186 (App. Div. 2006)], the panel found that the trial judge erred in ordering arbitration after five years of litigation. This set the stage for the parties and counsel, to shuffle, briefs in hand, to the Supreme Court of New Jersey.

Finally, an Order. Our appellate courts zealously guard their prerogative to be selective when considering cases for review which have not reached a final judgment. The scheme is designed to avoid piecemeal appeals in the course of litigation. Thus, only appeals from final judgments may be made as of right [N.J. Ct. R. 2:2-3(a)]. All other intrusions into the appellate stratus must be by its leave, a sanctification which is rarely bestowed [N.J. Ct. R. 2:2-3(b)]. An interlocutory appeal for which leave was not granted is likely to be dismissed, *Vitanza v. James*, 397 N.J. Super. 516, 938 A.2d 166 (App. Div. 2008). Improper certification of interlocutory orders as final, (N.J. Ct. R. 4:42-2), is a stratagem that is particularly detested, *Janicky v. Point Bay Fuel, Inc.*, 396 N.J. Super. 545, 935 A.2d 803 (App. Div. 2007).

The Appellate Division and the Supreme Court had to grapple over this issue, as the *Wein* matter was a case where there were arguably two final orders. The first was the order of dismissal which was foisted upon the nonplussed parties at the apex of five years of discovery, capped by their overabundant summary judgment filings. The second happened almost two years later, when the court entered judgment on the arbitration award. The Appellate Division went with the second order, holding that the order of dismissal was not final since arbitration of the issues remained on the horizon. It reversed the final order of judgment, jettisoned the arbitration award and remanded the case for trial.

The Supreme Court was inclined toward the earlier order as being final. Its opinion pointed out that the order of dismissal was inappropriate. The proper method -- if impromptu conduct of that sort is ever apropos -- was for the trial judge to order a stay of the lawsuit during the pendency of the arbitration proceedings. The Court held that an order to stay a case during arbitration is a final order for purposes of an appeal as of right and recommended amendment of N.J. Ct. R. 2:2-3(a) in that regard. Out of fairness to the parties in the case, however, the ruling was made prospective, thus allowing the appeal to remain viable.

No Second Chance. The Appellate Divisions reversal of the order to compel arbitration and dismiss the litigation brought about a situation where the parties participation in lengthy arbitration would come to no avail. This disturbed the Supreme Court, which also must have had a distaste for seeing the effect upon its vaunted case disposition averages by the addition of a ten-year-old case to the trial calendar. An alternate solution loomed to assuage this perturbation.

Highgate Development Corp. v. Kirsh, 224 N.J. Super. 328, 540 A.2d 861 (App. Div. 1988) was a case which followed a lengthy arbitration process over a dispute between the plaintiff contractor and the defendant homeowners. The contract between the parties called for arbitration by the American Arbitration Association in one paragraph and by private arbitrators in a rider. The parties submitted to the AAA. Its arbitrator ultimately ruled in favor of the plaintiff. The plaintiff then filed an action to confirm the arbitrators award. This was denied by the trial court which ruled that the AAA had no jurisdiction over the matter as a result of the riders provision for private arbitration. The Appellate Division reversed that order. It held that the defendants participation in the AAA proceedings waived any right they may have had to demand private arbitration. The court noted that, although the defendants asserted objection at the outset, their overall course of conduct bespoke acquiescence in the process. The defendants should not be permitted to submit the dispute to the AAA arbitrator with the ...expectation that they could have a second bite at the apple if they were dissatisfied with the first. *Id.* at 336.

In *Wein*, the Appellate Divisions shelving of the award to plaintiffs, after sixteen days of arbitration hearings, served to give that same second bite of the apple to the defendant property owners. Citing *Highgate, above*, and its consideration of the totality of the circumstances, the Supreme Court held that the defendants had waived their objection to arbitration by fervently participating in it. While they objected to the order of the trial court, they neither objected to the arbitrator nor did they seek to appeal the courts order. These circumstances called for reinstatement of the arbitration award. The Supreme Court reversed that portion of the Appellate Divisions judgment that remanded the case for trial.

Lesson Learned. The lesson from this is that a partys conduct could trump the formalities of objection in the eyes of the court. The defendants simply did not demonstrate their disapprobation of arbitration. Their actions spoke louder than their words.

Reconsidering Reconsideration. After the arbitrators award was rendered, the plaintiffs requested that the arbitrator amend the award to include future commissions and attorneys fees. This was despite the AAA rules that prohibited reconsideration on the merits, but allowed correction of technical errors. The arbitrator amended the award on the question of future commissions and recalculated one commission.

The Supreme Court ended its decision with one small tidbit of benefit for the defendants. It agreed with the Appellate Division that the arbitrator had no power to modify a final award. The amendment violated the *functus officio* doctrine by doing so. This doctrine ...provides that arbitrators exhaust their power when they make a final determination on the matters submitted by them. *Kimm v. Blisset, LLC*, 388 N.J. Super. 14, 27, 905 A.2d 887 (App. Div. 2006), *certif denied*, 189 N.J. 428, 915 A.2d 1051 (2007). The three exceptions to this doctrine are clerical mistakes, undecided issues and clarification of an award. None applied to the amendment here, and so went the future commissions.

For additional information about arbitration in New Jersey see: **LexisNexis Practice Guide NJ Pretrial Practice Chapter 6 Arbitration.**

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Arthur Best on Manna v. State

2008 Emerging Issues 2799

Arthur Best on Manna v. State, 945 A.2d 1149 (Del. 2008) The Delaware Supreme Court reviews and applies the pro-defendant "mercy" rule.

By Arthur Best

September 8, 2008

SUMMARY: Reviewing separate uses of evidence of honest character as general character evidence on behalf of a criminal defendant and as refutation of an effort to show that a testifying defendant has testified untruthfully, and holding that general honesty is a trait relevant to an alleged crime of robbery.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Overview. In this criminal case, *Manna v. State*, 945 A.2d 1149 (Del. 2008), the defendant was charged with participating in the robbery of a convenience store. At trial, he testified and denied participating in the robbery. He sought to introduce testimony from four witnesses who would testify that he had a reputation for being honest and truthful. The trial court excluded this testimony for a number of reasons, all of which were rejected by the Delaware Supreme Court. The trial court confused general character evidence with credibility character evidence and also ignored the historical basis for permitting criminal defendants the option of introducing evidence of their good character. The Supreme Court reviewed the history and modern application of the overlapping rules concerning general and credibility character evidence.

Crucial Evidence. The defendant sought to have a friend of this family, an aunt, his youth minister and his lacrosse coach all testify that he had a reputation for being honest and truthful. The trial court denied admissibility of this evidence because it believed that the defendant's credibility as a witness had not been impeached. The trial court also stated that the only point to be served by introduction of the evidence in question was to evoke sympathy for the Defendant. *Manna v. State*, 945 A.2d 1149, 1151 (Del. 2008).

Relationship between General Character Evidence and Credibility Character Evidence. Delaware Evidence Rule 404(a), similar to *Federal Rule of Evidence 404(a)*, provides:

Evidence of a person's character or a trait of his character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same; or if evidence of a trait of character of the

alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution; (2) Character of alleged victim. Except as otherwise provided by statute, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor; (3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

This is a codification of what has sometimes been called the mercy rule, a common law principle that allows a criminal defendant who has acquired a good reputation to let the jury know about that reputation, in the hope that it will lead the jury to entertain a reasonable doubt about the defendant's intent to commit a crime. In its modern codifications, the rule does not permit introduction of all character evidence about a defendant, but requires that the character evidence relate to a pertinent trait of character.

For a description of the mercy rule in the context of federal evidence law, see 1-404 Federal Rules of Evidence Manual 404.02

Delaware Evidence Rule 608(a) provides:

Except as provided in 11 Del. C. §§ 3508 and 3509, the credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) The evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked.

This provision is similar to *Federal Rule of Evidence 608(a)*. It elaborates the exception set out in Rule 404(a)(3) that authorizes the use of character evidence about witnesses.

Key Elements in the Character Evidence Rules.

1. There is a difference between using character evidence to refute a contention that a defendant committed a crime, covered by Rule 404(a)(1), and using character evidence to attack or bolster the credibility of a witness (who may or may not be a defendant), covered by Rule 608(a).
2. When a defendant seeks to use character evidence to refute a charge, the defendant must show that the particular character trait a character witness will testify about is relevant (or pertinent) to the charged crime.
3. When a party seeks to use character evidence to bolster the credibility of a witness, the evidence is admissible only if there has previously been an attack on the credibility of that witness.

Rationale and Application of Rule 404(a). The United States Supreme Court has explained the significance of a criminal defendant's right to introduce character evidence. In *Michelson v. United States*, 355 U.S. 469, 476 (1948), the Court wrote:

[A defendant] may introduce affirmative testimony that the general estimate of his character is so favorable that the jury may infer that he would not be likely to commit the offense charged. This privilege is sometimes valuable to a defendant for this Court has held that such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed.

Under Delaware law, this historic rationale for defendant's character evidence has been recognized, and a jury instruction similar to the one described in *Michelson* is available.

Delaware's Application of the Defendant's Right to Introduce Character Evidence. Critical to applying Rule 404(a) rule is an understanding of what character traits are pertinent to a particular charged crime. The Delaware Supreme

Court has adopted a pro-defendant generous view of this issue. In this case, for example, it held that the offense of robbery involves dishonesty, and that therefore character evidence about honesty and truthfulness should be treated as pertinent. Because the defendants character witnesses were prepared to testify about those traits, their testimony was precisely the type of testimony Rule 404(a) is designed to permit. For that reason, the Court held that the trial court had erred in excluding the character evidence.

In another context, the Delaware Supreme Court has held that drug offenses do not involve the kind of dishonesty that makes them relevant for impeachment. See *Gregory v. State*, 616 A.2d 1198, 1204 (Del.1992). This had the effect of decreasing the availability of character evidence against a defendant, while the ruling in the current case has the effect of increasing the availability of character evidence in favor of a defendant. This combination of holdings is consistent with the original pro-defendant origin of the so-called mercy rule."

Distinguishing Character Evidence Used for Impeachment. The trial court in this case mistakenly excluded the character evidence in part because it was confused about the distinction between character evidence used for impeachment and character evidence used to attack the prosecutions substantive case. Because the trial court believed that the defendants character for truthfulness had not been attacked in cross-examination, the court prohibited the use of character evidence under Rule 608.

See 1-12 Weinstein's Evidence Manual § 12.03 for analysis of character evidence to rehabilitate the credibility of a witness who has been impeached by a showing of characteristic untruthfulness.

If Rule 608 had been the defendants only avenue for admission of the character evidence, the Courts ultimate decision to exclude the evidence would likely have been affirmed. The Delaware Supreme Court stressed that trial courts are in the best position to determine whether cross-examination has attacked the credibility of a witness in a way that should permit bolstering of that witness with character evidence. It is not true, the court stated, that every time a defendant takes the stand, the defendant will be entitled to introduce character evidence if his or her testimony is challenged.

The trial courts error was to believe that rejecting the bolstering rationale for character evidence under Rule 608 was totally dispositive on the issue of character evidence. Since Rule 404(a) offers a basis different from the Rule 608 basis for admitting character evidence, the ruling on Rule 608 did not *require* exclusion of the evidence.

Prejudice and Confusion of Issues. The trial court also held that Delaware Rule of Evidence 403 permitted exclusion of the evidence on grounds of prejudice, confusion, or waste of time. The Supreme Court rejected that basis for the trial court ruling. Ordinarily, a trial courts analysis of admissibility of character evidence is highly fact-dependent and would be reversed only by a showing of abuse of discretion. In this case, the trial court excluded *all four* character witnesses, and did so in the mistaken impression that garnering sympathy is a forbidden rationale for use of character evidence. For these reasons, the defendant was held to have established abuse of discretion. A ruling to admit testimony by any number of character witnesses greater than zero would likely have been sustained, but the total bar of that category of evidence was an abuse of discretion.

RELATED LINKS: For a description of the mercy rule in the context of federal evidence law, see

- 1-404 Federal Rules of Evidence Manual 404.02

For analysis of character evidence to rehabilitate the credibility of a witness who has been impeached by a showing of characteristic untruthfulness, see

- 1-12 Weinstein's Evidence Manual § 12.03

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Discretionary Appellate Review Under CAFA: Vairo on Spivey v. Vertrue, Inc

2008 Emerging Issues 2804

Discretionary Appellate Review Under CAFA: Vairo on Spivey v. Vertrue, Inc

By Georgene Vairo

September 4, 2008

SUMMARY: In *Spivey v. Vertrue, Inc.*, the Seventh Circuit held that the Class Action Fairness Acts provision on discretionary appellate of remand orders must be interpreted literally, so that an application to appeal is timely if filed not less than 7 days after entry of the order." This commentary, by Moores Federal Practice Editorial Board member Georgene Vairo, analyzes the Seventh Circuits approach to interpreting this statutory language.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE:

Cite as: Vairo, Georgene. "*Spivey v. Vertrue, Inc.*" LexisNexis Expert Commentary, (*Insert date you accessed the document online*).

The Class Action Fairness Act (CAFA") has spawned more than its share of interpretive disputes. At the time of its passage, we predicted the issue involved in *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 2008 U.S. App. LEXIS 12419 (7th Cir. June 11, 2008); the probable drafting flaw in the language of 28 U.S.C. § 1453(c)(1), which provides for discretionary appellate review of district court orders granting or denying a motion to remand an action removed to federal court under CAFA back to state court [see **Class Action Fairness Act of 2005 With Commentary and Analysis by Georgene M. Vairo of Moores Federal Practice Board of Editors** (LexisNexis 2005)]. *Spivey* is important because the Seventh Circuit has created a circuit split by holding that the time limit for this CAFA provision should be read literally, so that an application to appeal is timely if filed not less than 7 days after entry of the order." Judge Frank Easterbrooks amusing opinion not only reminds one of the old Miller Lite beer commercials -- Great Taste . . . Less Filling -- but makes a lot of sense. (The Great Taste...Less Filling!" advertising campaign was ranked by **Advertising Age** magazine as the 8th best advertising campaign in history. See http://en.wikipedia.org/wiki/Miller_Lite.)

Background. The plaintiff filed suit in state court as a class action, alleging that the defendant, a marketer, systematically submitted unauthorized charges to its customers' credit cards. The defendant removed the case to federal court under CAFA. The plaintiff moved to remand, arguing that CAFA's amount in controversy requirement was not met because the amount in controversy did not exceed \$5 million. The district court agreed and remanded the case.

The defendant then filed for leave to appeal the remand as authorized by CAFA, 28 U.S.C. § 1453(c)(1), which provides that a court of appeals may accept an appeal from an order granting or denying remand if application is made to the court of appeals not less than 7 days after entry of the order." The defendant's lawyer mailed the petition on the seventh day after the district court's remand order, and the petition reached the court of appeals and was filed" on the tenth day after the remand order was filed. The plaintiff argued that the petition was too late and the court of appeals lacked jurisdiction.

Petition Was Timely. Because the defendant's petition for leave to appeal was filed ten days after the remand order it met the not less than 7 days after entry of the order" under the language of the statute. Excluding weekends when counting the 7-day period, as required by Appellate Rule 26(a)(2), arguably the period would be extended to not less than 9 days" after the entry of the remand order. Because the defendant filed the petition on the tenth day, it was timely, i.e., it was filed not less than 7 or 9 days" after the filing of the order.

The plaintiff's argument was that the statute should not be interpreted literally because Congress did not mean what it said. And, Judge Easterbrook agreed that CAFAs drafters intended to write not more than 7 days" or not later than 7 days," or within 7 days" because time limits for appeals are always set the last date allowed for action, rather than the earliest time to file something. Additionally, taking an even closer look at the ugly wording of the provision, he noted: No one noticed the gaffe (or the misuse of the word less' when correct diction requires fewer') before the statute was enacted." Nonetheless, even though it was doubtless" that Congress intended a short deadline, legislative history can not justify reading a statute to mean the opposite of what it says." Nor is the fact that Congress wrote an imprecise or even perverse deadline reason to disregard the enacted language. Moreover, [t]he garble has attracted considerable attention by both judges and law reviews, but Congress has not enacted a technical-corrections bill."

The Seventh Circuit is the first to hold that less" means less." Every other circuit has ruled that less" means more" [see *Estate of Pew v. Cardarelli*, 527 F.3d 25, 28 (2d Cir. 2008); *Morgan v. Gay*, 466 F.3d 276, 277 (3d Cir. 2006); *Amalgamated Transit Union v. Laidlaw Transit Services, Inc.*, 435 F.3d 1140, 1146 (9th Cir. 2006), rehearing en banc denied, 448 F.3d 1092 (9th Cir. 2006) (Bybee, J., and five other judges dissenting); *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1093 n.2 (10th Cir. 2005); *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1326 (11th Cir. 2006)].

Those courts cited three reasons why less" should mean more", i.e., that Congress wanted any petition to appeal to be filed in no more than 7 days." First, the intent of Congress was to compel prompt action so that the removal question could be quickly decided. Second, these courts were concerned about the abuses that may result if there were an open-ended period for appealing the order. Third, they invoked the rule that when the uncontested legislative history is at odds with the language of the statute, that legislative intent controls. It also bears mentioning that, except for the Ninth Circuit case, the party petitioning filed on the 6th or 7th day after the order was filed. Accordingly, these courts were reviving an otherwise untimely petition. And, the Ninth Circuit, after holding that less" means more," revived the plaintiffs otherwise untimely petition (filed 43 days after the district court order), invoking its authority to suspend the rules for good cause [see *Fed. R. App. P.* 2].

However, the Seventh Circuit refused to adopt a statutory interpretation that did such violence to the text: Legislative history may help disambiguate a cloudy text by showing how words work in context; it does not permit a judge to turn a clear text on its head." It, however, agreed with the result that most of the courts had reached, but on a different ground. According to the Seventh Circuit, a petition filed *before* the period has elapsed should also be accepted. Under Appellate Rule 4(a)(2), a premature notice of appeal remains on file and springs into effect when the decision becomes appealable. The same approach makes sense for a premature request for leave to appeal.

But to the extent that language in other circuits' opinions implies that they would deem a petition filed on the eighth day or later day jurisdictionally late, the Seventh Circuit took issue. A statute should not be construed to sand-bag litigants by misleading language or pull the rug out from under a litigant who relied on statutory text. Accordingly, in the Seventh Circuit, a petition for appeal under CAFA that is filed after the 7-day period is timely. Litigants should be able to rely on the enacted language of a statute (which also would have justified the result in the Ninth Circuit case).

Finally, the Seventh Circuit noted that its holding does not give litigants forever to appeal. Appellate Rule 5(a)(2) says that, when there is no other limit, a petition for permission to appeal must be filed within the time provided by Rule 4(a) for filing a notice of appeal," or in other words within 30 days. Reading § 1453(c)(1) to mean what it says thus does not authorize indefinite delay. Although it may allow a party 23 days more than the authors anticipated, our reading avoids nasty surprises for litigants who believe--and are entitled to believe--that courts will honor the language in the enrolled bill that the President signs."

Amount in Controversy Was Adequately Pleaded. Under CAFA, the district courts have original and removal jurisdiction of cases if, among other requirements, the amount in controversy exceeds \$5 million. The defendant submitted an affidavit to the effect that its billings, for a portion of the programs described in the complaint, amounted to almost \$7 million. The Seventh Circuit interpreted the complaint, which alleged that the defendant made unauthorized charges as a standard practice, as putting into controversy the propriety of all the defendant's charges.

The removing party, as the proponent of federal jurisdiction, bears the burden of describing how the controversy exceeds \$5 million. This is a pleading requirement, not a matter of proof. The demonstration concerns what the plaintiff is claiming, not whether the plaintiff is likely to win or be awarded everything that is claimed. Once the proponent of federal jurisdiction has explained plausibly how the stakes exceed \$5 million, *cf. Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) [discussed in July 2007 **MOORES FEDERAL PRACTICE UPDATE**, p. 149], then the case belongs in federal court unless it is legally impossible for the plaintiff to recover that much." The district court had found that recovery of more than \$5 million was uncertain, but uncertainty is not impossibility.

Accordingly, the Seventh Circuit granted the petition and accepted the appeal, and decided the appeal by reversing the remand to state court. The case was then remanded to the federal district court for adjudication on the merits.

RELATED LINKS: See Moore's Federal Practice for additional information:

- 5 Moore's Federal Practice (3d Ed.) § 23.63[2][c];
- 5 Moore's Federal Practice (3d Ed.) § 23.63A[5][b];
- 16 Moore's Federal Practice (3d Ed.) § 107.43A;
- 19 Moore's Federal Practice (3d Ed.) § 202.11[5]

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Vairo on FC Inv. Group LC v. IFX Mkts., Ltd.

2008 Emerging Issues 2805

Whether a Website Constitutes Personal Jurisdiction: Vairo on FC Inv. Group LC v. IFX Mkts., Ltd.

By Georgene Vairo

September 4, 2008

SUMMARY: In *FC Inv. Group v. IFX Mkts., Ltd.*, the D.C. Court of Appeals held that general personal jurisdiction could not be predicated on a website without a showing that forum residents actually conducted continuous and systematic" business with the defendant through the website. This commentary, by Moores Federal Practice Editorial Board member Georgene Vairo, analyzes this important case, including RICO's service of process provision.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Cite as: Vairo, Georgene. "*FC Inv. Group LC v. IFX Mkts., Ltd.*" LexisNexis Expert Commentary, (*Insert date you accessed the document online*).

FC Inv. Group LC v. IFX Mkts., Ltd., 529 F.3d 1087, 2008 U.S. App. LEXIS 13312 (D.C. Cir. June 20, 2008) is significant because it addresses a number of personal jurisdiction issues. Most importantly, the D.C. Circuit held that general personal jurisdiction could not be predicated on a website without a showing that forum residents actually conducted continuous and systematic" business with the defendant through the website, thereby clarifying the extent to which a website can be used to establish general jurisdiction. Second, the court ruled that personal jurisdiction may not be based on RICO's nationwide service provision unless at least one defendant has minimum contacts with the forum jurisdiction.

Background. Two plaintiffs sued a London-based currency broker, IFX, alleging that the broker conspired to defraud them of millions of dollars through a currency investment scheme. The district court denied their motion for jurisdictional discovery and ultimately dismissed their complaint for lack of personal jurisdiction. On appeal, the D.C. Circuit addressed several issues with respect to personal jurisdiction, including a question as to the interpretation of the RICO jurisdictional provision.

Internet Website May Not Be Sufficient Basis for General Personal Jurisdiction. The defendant maintained a website that, the plaintiffs alleged, allowed forum residents to make large value transactions over the Internet. The court of appeals noted that the mere accessibility of a defendant's website does not establish the necessary minimum contacts required for general jurisdiction. The website must also be 1) an interactive, rather than a passive website through which users merely access information, and 2) residents of the forum must actually use the website to conduct transactions

with the defendant in a continuous and systematic" way.

The record showed evidence of only one resident of the District of Columbia that had an online account with the defendant, and this was for only six months. This limited contact, unrelated to the plaintiffs or their claims, was not sufficient to support personal jurisdiction.

Regarding the first requirement C an interactive website C the district court held that IFX's website was not sufficiently active" to support its general jurisdiction over IFX. It properly contrasted IFX's website with the website in another D.C. Circuit case in which the court held that a website maintained by Ameritrade, a Nebraska-based securities broker, was sufficiently interactive" to support general jurisdiction in the District because the website allowed District residents to [1] open Ameritrade brokerage accounts online; [2] transmit funds to their accounts electronically; . . . [3] use those accounts to buy and sell securities, borrow from Ameritrade on margin, and [] pay Ameritrade brokerage commissions and interest" [see *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 512 (D.C. Cir. 2002)]. Although both IFX's and Ameritrade's websites allowed users to conduct financial transactions online, there was one critical difference between the two: unlike Ameritrade's website, the IFX website did not allow for online account registration. To become an IFX customer, one was required to download an application form, sign it and return it along with required identification documents . . . certified by an attorney, . . . an embassy authority, consulate or high commission of the country of issue." This deficiency rendered the IFX website as not sufficiently active for general jurisdiction, according to the district court.

But, the D.C. Circuit noted that a foreign defendant that is doing business" with continuous and systematic contacts" in the District, via Internet, mail or some combination of the two, suffices for general jurisdiction. It quoted *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 467, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985): [I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by *mail and wire* communications across state lines, thus obviating the need for physical presence within a State in which the business is conducted." (emphasis added). Thus, because IFX made its mail-in registration form readily available for download on its website, the district court's focus on IFX's lack of an *online* registration feature may have been misplaced.

However, the D.C. Circuit did not reach the merits of the district court's holding on this issue because of its holding as to the second requirement C use by residents. The D.C. Circuit squarely held that limited contact with a single District customer C unrelated to the plaintiffs or their claims C does not support the district court's exercise of general jurisdiction.

Comment. The question whether a website suffices for general jurisdiction is very important. By holding squarely that use by only one resident is not enough, the D.C. Circuit begs the question of how many residents C unrelated to the plaintiff or its claims C need to have used the website. This is a difficult problem. By quoting *Burger King*, the D.C. Circuit opens the door to expanded use of a website to support general jurisdiction. The old Bricks Test" for general jurisdiction may be eroding.

Court Did Not Err in Denying Jurisdictional Discovery. The plaintiffs next argued that the district court should have allowed discovery to determine the volume of transactions by the single District of Columbia resident who used the website, and also to determine whether residents of Maryland and Virginia might have used the defendant's website while at work in the District.

The district court did not abuse its discretion, the D.C. Circuit held. Business contacts with a single customer, no matter how extensive, would be insufficient to support general jurisdiction over a foreign corporation. Discovery as to Maryland and Virginia residents would have been merely a fishing expedition." A district court has broad discretion with respect to discovery, and need not grant a request based on conjecture or speculation.

Comment. Of course it makes eminent sense to say that the district court has broad jurisdiction over discovery. On the other hand, at the motion-to-dismiss phase of a litigation, the plaintiff may not have access to the evidence it needs

to meet its burden. Accordingly, even though the D.C. Circuit is correct to leave the question to the district court, one hopes that district courts will be sensitive to this need.

Plaintiffs Failed to Establish Specific Personal Jurisdiction. The plaintiffs also argued that specific jurisdiction could be exercised based on the defendant's regular phone calls to the plaintiffs in the forum in furtherance of the alleged fraudulent scheme. The district court had analyzed this question under a subsection of the District of Columbia long-arm statute that allowed jurisdiction over defendants transacting business" in the District and concluded that phone calls alone could not constitute transacting business." The plaintiffs argued that the district court should have analyzed the question under another subsection. However, the plaintiffs did not raise this subsection in the district court and in fact failed to invoke the applicable long-arm statute at all. It is the plaintiffs' burden, the court of appeals said, to establish the court's personal jurisdiction over the defendant. Accordingly, it was their responsibility to raise the question in a manner that gave the district court fair notice of their arguments so the court could rule and so the issue could be preserved for appeal. The plaintiffs were not entitled to raise this theory on appeal.

Comment. Bad lawyering? This is another reminder that plaintiffs lawyers need to be ready to meet forum selection arguments that defendants are likely to raise. By not being ready to deal specifically with the defendants specific personal jurisdiction arguments from the outset, the plaintiffs attorneys hurt themselves.

Jurisdiction Could Not Be Based on Agency or Conspiracy Theory. The plaintiffs also argued that specific jurisdiction existed because the defendant conspired with another entity (against whom the plaintiffs had obtained a judgment in separate litigation). To prevail on this theory of jurisdiction under the applicable long-arm statute, the plaintiffs had to plead with particularity facts sufficient to demonstrate the existence of a conspiracy, which they had not done. Nor did the complaint plead with particularity overt acts within the forum taken in furtherance of the conspiracy. There were allegations as to a business relationship between the defendant and the other entity, but not as to any specific agreement or understanding to commit fraud. A bare allegation of a conspiracy or agency was insufficient to establish personal jurisdiction.

Jurisdiction Could Not Be Based on RICO's Nationwide Service Provision. The plaintiffs had alleged a conspiracy under RICO, and argued that personal jurisdiction could be exercised even in the absence of minimum contacts with the forum because of RICO's nationwide service of process provision (*see* 18 U.S.C. ' 1965). The D.C. Circuit noted that there are differing views on the interpretation of this provision. It adopted the reasoning of the Second Circuit, which has held that a civil RICO action may be brought only in a district court where personal jurisdiction based on minimum contacts is established as to at least one defendant [*see PT United Can Co. Ltd. v. Crown Cork & Seal Co.*, 138 F.3d 65, 70 (2d Cir. 1998)].

Section 1965 contains four parts, which must be read together. Subsection (a) grants jurisdiction over an original defendant C it allows the action to be brought in any district in which the defendant resides, is found, has an agent, or transacts his affairs." Thus, minimum contacts with the forum must be established as to at least this first defendant. Subsection (b) allows nationwide service and jurisdiction over other parties" not residing in the forum, who may be additional defendants of any kind. Next, subsection (c) simply allows service of subpoenas on witnesses. Subsection (d) then provides that [a]ll other process" may be served where the person resides, is found, has an agent, or transacts his affairs." Reading this subsection in context, it means process other than a summons of a defendant or subpoena of a witness. Thus, it is subsection (b), not (d), that grants nationwide service, and only if jurisdiction exists over at least one defendant under subsection (a).

Here there was only one defendant. The court could not exercise personal jurisdiction over that defendant because it lacked minimum contacts with the forum. And because there was no defendant over which the court could otherwise exercise jurisdiction, the nationwide service provision was inapplicable. Accordingly, the court of appeals affirmed the district court's judgment dismissing the action.

Comment. Overall, the D.C. Circuit's opinion is a primer on current personal jurisdiction trends. The use of a

federal nationwide service statute sounds inviting. But, it is clearly plaintiffs responsibility to ensure that statutory standards are understood and met.

RELATED LINKS: See Moore's Federal Practice for additional information:

- 16 Moore's Federal Practice (3d Ed.) §§ 108.44[3];
- 16 Moore's Federal Practice (3d Ed.) § 108.123

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Professor Kent Sinclair on Hicks v. Mellis, 275 Va. 213, 657 S.E.2d 142 (2008).

2008 Emerging Issues 2708

Nonsuits -- Notice -- Non-Prosecution? A Legislative Gap Leads to Strange Procedural Wrangle about Striking Inactive Cases from the Docket, and Reinstating Them at Plaintiff's Behest Without Notice (in Order to Obtain a Nonsuit?)

By Prof. Kent Sinclair

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SUMMARY: In its recent decision in *Hicks v. Mellis*, 275 Va. 213 (2008) the Supreme Court of Virginia dealt with the same statute that led to the striking down of local docket management procedures in a case last year, Code §8.01-335. In this Commentary, Professor Kent Sinclair reviews the implications of this decision for circuit court docket management practices, nonsuits, and dismissals of actions for failure to actively advance their preparation.

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ARTICLE: Great strides have been made in Virginia practice in the last three years, with the unification of pleading legal and equitable claims in a single complaint, the adoption of a modern form of res judicata doctrine focusing on the same conduct, transaction or occurrence, and clarification and improvement of nonsuit doctrine and the nonsuit statute. Docket management remains a contentious arena, however, and a recent decision highlights a matter on which the General Assembly might offer some assistance at the intersection of docket management and nonsuit practice in Virginia.

On striking facts where the reinstatement was followed by a nonsuit, and where neither the reinstatement nor the nonsuit were on notice to a named defendant in a medical malpractice action, the Court in *Hicks v. Mellis*, 275 Va. 213 (2008) has given express consideration to the failure of current law to require notice to a defendant whose rights are arguably affected significantly by the trial court's actions in implementing these procedures.

Recent Case Law. Just a few months ago, the Supreme Court of Virginia reviewed an appeal involving the dismissal of "Unserved Cases," answering the question whether aggressive docket management in Circuit and District Courts to toss out claims based on violation of the "One Year Rule" regarding service of process will be valid. In *Collins v. Shepherd*, 274 Va. 390, 649 S.E.2d 672, 2007 Virginia LEXIS 116 (Sept. 14, 2007), the Court held invalid a local rule of the trial court which was used in a civil case for personal injury damages as the basis for a *sua sponte* order of dismissal entered with prejudice pursuant. The Court found that the a local rule providing for the dismissal of cases not served upon the defendant within one year of filing was invalid because it conflicts with Code §§ 8.01-335. Without a rule or statutory basis for its actions in dismissing a case where service of process was not completed, the circuit court was without authority to dismiss the case pursuant to the local rule.

Virginia Code § 8.01-4 has been amended multiple times in the past decade to protect against what has been perceived by some as balkanized or simply overreaching local Rules. That statute which governs both district court and circuit court local rule enactments provides the authority for limited local rules, focusing on rules "necessary to promote proper order and decorum and the efficient and safe use of courthouse facilities and clerks' offices." Even this grudging charter for the creation of local rules is expressly limited by the provision that no "substantive rights" may be affected by those rules. The statute, as amended in 1999 and again in 2000, reads today as follows:

The district courts and circuit courts may, from time to time, prescribe rules for their respective districts and circuits. Such rules shall be limited to those rules necessary to promote proper order and decorum and the efficient and safe use of courthouse facilities and clerks' offices. No rule of any such court shall be prescribed or enforced which is inconsistent with this statute or any other statutory provision, or the Rules of Supreme Court or contrary to the decided cases, or which has the effect of abridging substantive rights of persons before such court. Any rule of court which violates the provisions of this section shall be invalid.

The courts may prescribe certain docket control procedures which shall not abridge the substantive rights of the parties nor deprive any party the opportunity to present its position as to the merits of a case solely due to the unfamiliarity of counsel of record with any such docket control procedures.

Obviously, "docket control procedures" come in for special scrutiny under the second paragraph of Code §8.01-4, quoted above. The evident legislative concern was for trial and motion scheduling procedures that could catch counsel from distant locales unaware, with prerequisites or limitations that do not generally apply in Virginia practice being enforced to prevent, truncate or peremptorily schedule pretrial or trial proceedings to the detriment of anyone not fully conversant with local practice.

In *Collins*, the Supreme Court, which acknowledged "the laudable goal" of concluding all civil cases, except by leave of court and in suits for divorce, within twelve months of filing, concluded that the circuit court did not have the authority to adopt a local rule that essentially translated Rule 3:5(e) into a mode of procedure for the court dismissing unserved cases *sua sponte*. Based in part on the language in Code § 8.01-4 expressly stating that local rules must not abridge the substantive rights of the parties or deprive any party from having a case heard on the merits, the Supreme Court found that the General Assembly's intention was that local rules govern the administration, but not become the determining factor in the ultimate outcome, of cases.

An important part of the analysis of local procedures given in the *Collins* decision last fall was the tension between such efforts and the express provisions of Code §8.01-335, which governs circuit courts' authority to discontinue inactive cases, and provides, in relevant part, that:

[A]ny court in which is pending an action, wherein for more than two years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket and the action shall thereby be discontinued.

Any court in which is pending a case wherein for more than three years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket and the action shall thereby be discontinued. The court may dismiss cases under this subsection without any notice to the parties. The clerk shall provide the parties with a copy of the final order discontinuing or dismissing the case. Any case discontinued or dismissed under the provisions of this subsection may be reinstated, on motion, after notice to the parties in interest, if known, or their counsel of record within one year from the date of such order but not after.

Under Code § 8.01-335(A), the earliest point at which the circuit court may discontinue a pending case is after two years of inactivity, and even then discontinuance may be ordered only if neither party requests a continuance or the parties fail to abide by a schedule set by the court following a continuance. In the *Collins* decision, the Supreme Court noted that a case must be inactive for three years before a circuit court may dismiss it *sua sponte* under Code §

8.01-335(B). In *Collins*, the procedure utilized by the circuit court to enter the dismissal order was done pursuant to a local rule that, under Code § 8.01-4, the circuit court was not authorized to adopt. Thus the Court concluded that the mode of procedure utilized by the circuit court was one that it could not lawfully adopt. Accordingly, the dismissal order was void ab initio and subject to challenge at any time, the "21-day rule" notwithstanding.

Additionally, the Court remarked in *Collins* that Code § 8.01-335 provides the parties to a discontinued case the opportunity to reinstate the case within one year of the discontinuance, and that the right to nonsuit an unserved action is an important option for plaintiffs. Both of these matters are now addressed in the new decision in *Hicks v. Mellis*.

Background Facts in *Hicks v. Mellis*. A child born in October of 1989 was allegedly injured by medical malpractice in 1990. Suit was filed in 1993 against the Commonwealth, the hospital, and unnamed health care providers; this suit was nonsuited in 1995. In October of 1999 a second action on the claim was filed naming the defendant doctor and another physician, among various defendants, but none of the several defendants was served.

After more than three years with no further filings or proceedings in the case, early in 2003 the circuit court entered an order under Code § 8.01-335(B) discontinuing and striking the case from the docket. Eleven months later the plaintiff filed a timely motion to reinstate the case pursuant to Code § 8.01-335(B). The circuit court, after observing that none of the defendants had been served with process, entered an order of reinstatement returning the case to the courts docket. In early 2004, plaintiff filed a motion for nonsuit, which the circuit court granted by order in May of 2004. On the same day, plaintiff filed a third motion for judgment naming only the treating physician as a defendant.

The defendant first received notice of the plaintiff's claim when he was served in May of 2005, just under one year after the case was filed. Upon consideration of defendant's special plea of the statute of limitations the circuit court concluded that reinstatement of the case had been improvidently allowed because Code § 8.01-335(B) required that the parties in interest be notified prior to reinstating a case that had been stricken from the docket, and the defendant doctor had not received such notice. Thus, the circuit court concluded that the case remained stricken from the docket, that the second nonsuit was of no effect, and that the third motion for judgment was barred by the statute of limitations under Code § 8.01-243.1. From a judgment implementing that analysis, the plaintiff appealed.

Legal Analysis in the Recent Case. The Supreme Court in *Hicks v. Mellis* reviewed the language of Code § 8.01-335(B), which governs reinstatement of inactive cases discontinued from the docket. This portion of the statute provides:

B. Any court in which is pending a case wherein for more than three years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket and the action shall thereby be discontinued. The court may dismiss cases under this subsection without any notice to the parties. The clerk shall provide the parties with a copy of the final order discontinuing or dismissing the case. *Any case discontinued or dismissed under the provisions of this subsection may be reinstated, on motion, after notice to the parties in interest, if known, or their counsel of record within one year from the date of such order but not after.* (Emphasis added).

The Supreme Court held that this language is plain: it provides that any court in which an action is pending for more than three years with no order or proceeding, except to continue it, may, in its discretion, order the case to be stricken from the docket and discontinued. The Court noted that under the provisions of subsection (B) the trial judge may dismiss cases under this subsection without any prior notice to the parties. The section further provides that any case that is discontinued or dismissed under this provision may be reinstated, on motion, after notice to the parties in interest, if known, or their counsel of record, within one year from the date of such order but not after.

Notice Required Notice Omitted. Under this statutory language, a circuit court may enter an order reinstating a discontinued case only after notice is given to known parties in interest. The Supreme Court in *Hicks v. Mellis* observed that the parties to that appeal did not dispute that the defendant doctor was a known party in interest to the discontinued action. Therefore, the circuit court entered the reinstatement order contrary to the notice provision set forth in Code §

8.01-335(B), and the effect of that order on the present litigation must be considered.

Traversing doctrine that has been recited a half-dozen times by the Court in the last five years, in *Hicks v Mellis* the Supreme Court noted that an order is void ab initio if the court did not have the jurisdiction to render the order, or if the court employed an unlawful mode of procedure in entering the order. Because an order that is void ab initio is a complete nullity, the order may be challenged directly or collaterally by all persons, anywhere, at any time, or in any manner. These principles are reviewed in several leading cases, such as *Singh v. Mooney*, 261 Va. 48, 51-52, 541 S.E.2d 549, 551 (2001); *Evans v. Smyth-Wythe Airport Commn*, 255 Va. 69, 73, 495 S.E.2d 825, 828 (1998); *Lapidus v. Lapidus*, 226 Va. 575, 579, 311 S.E.2d 786, 788 (1984). In contrast, an order is voidable if its issuance was reversible error but was within the courts jurisdiction to enter. A court has jurisdiction to err, as well as to correctly decide the issues presented in a case, and the remedy to correct an error by a trial court is to appeal the courts decision upon entry of a final order, not to collaterally attack the erroneous decision in a separate action. Traditional case law on these points includes: *Collins v. Shepherd*, 274 Va. 390, 649 S.E.2d 672 (2007), *Evans v. Smyth-Wythe Airport Commn*, *Lapidus v. Lapidus*, and *Anthony v. Kasey*, 83 Va. 338, 340, 5 S.E. 176, 177 (1887).

The Court has repeatedly observed that a challenge to an order based on a trial courts misapplication of a statute generally raises a question of court error, not a question of the courts jurisdiction. Review of Code § 8.01-335(B) in the present case demonstrates that the circuit court had jurisdiction to enter the reinstatement order but misapplied the statute.

Code § 8.01-335(B). Code § 8.01-335(B) permits a circuit court to enter a reinstatement order without prior notice to anyone when the circuit court has determined that there are no known interested parties or counsel of record. Thus, in *Hicks v. Mellis* the Court concluded that while prior notice is prescribed prior notice is not "a jurisdictional requirement" for entry of a reinstatement order under the statute.

The Court found some discretion latent within Code § 8.01-335(B), since the statute provides that a circuit court may reinstate a discontinued action after notice to the parties in interest, if known, or their counsel of record. The Court found it significant that the statute does not direct that notice be given only to named defendants or their counsel of record, but leaves for the circuit courts determination the issue whether there are known parties who have an interest in the litigation, a matter that will rest on the facts and circumstances of a particular case. The Court concluded:

The potentially broad scope of the inquiry may require that the circuit court decide both issues of fact and of law in reaching a conclusion. Such determinations are core functions of our courts in the exercise of their jurisdiction.

Of course, the defendant doctor easily could be identified as a person of interest in the medical malpractice case pending in *Hicks v. Mellis* he was a named defendant! However the Court found that this fact did not change the nature of the legal determination that the circuit court was required to make under the statute. Thus, the circuit courts failure to apply the statute properly while error -- did not affect the courts jurisdiction to enter the reinstatement order.

On similar reasoning the Court concluded that the trial courts reinstatement order was not void ab initio on the ground that the court employed an "unlawful mode of procedure." Code § 8.01-335(B) required that the circuit court decide whether there were known interested parties entitled to notice before reinstating the case and, thus, the circuit court lawfully could have made this determination and still have reached the wrong result. The Supreme Court concludes that because the misapplication of the statute in the present case occurred in the circuit courts lawful exercise of its jurisdiction, the reinstatement order was merely voidable, rather than void ab initio and, thus, was not subject to collateral attack in the present action.

Notice Redux. The fact that the defendant health care provider was not served in the nonsuited action, and had no other notice of those proceedings, and thus that he did not know that the May 25, 2004 order of nonsuit had been entered and could have been appealed, was both facially unfair and troubling. However, the Supreme Court concluded, this defect in the implementation of the procedural requirements cannot be considered in this collateral action. Rather,

the Court noted the issue as a question for the General Assembly's consideration, and invited in future revisions to the Code. As a result, the Supreme Court found that the circuit court erred in sustaining the defendant's plea of the statute of limitations and in dismissing the suit on that basis. The circuit court's judgment was reversed and the case was remanded for further proceedings.

Nonsuit. In the *Collins* opinion last fall the Court noted that by operation of a procedure effectuated solely by local rule the circuit court dismissed *Collins* case with prejudice without the case being heard on the merits. The Court observed that in the absence of this local rule, "Collins would have retained the right to take a nonsuit and refile his civil action beyond the one-year limitation period established by the local rule," in accord with Code § 8.01-380 and case authority such as *Berry v. F&S Fin. Mktg.*, 271 Va. 329, 332-33, 626 S.E.2d 821, 823 (2006), *Waterman v. Halverson*, 261 Va. 203, 208, 540 S.E.2d 867, 869 (2001), and *McManama v. Plunk*, 250 Va. 27, 32, 458 S.E.2d 759, 762 (1995)). The Supreme Court therefore held in *Collins* that:

"The dismissal under a local rule of a case that the plaintiff would otherwise be able to pursue under the Code, case law, and Rules of Court exceeds the authority delegated to circuit courts under Code § 8.01-4."

The nonsuit mechanism is viewed in that analysis as a means for plaintiff to avoid the general effect of failure to serve process in one year, which is a dismissal on the merits. If nonsuit can be attained, the service failure and bar to entry of judgment evaporates. The recent decision in *Hicks v. Mellis* shows that unless the statutes are changed, a stricken action can be reinstated *then* nonsuited to achieve this goal without giving notice to the defendant whose exposure to suit is thereby extended. This procedure is error, as *Hicks v. Mellis* clearly explains and thus trial courts are exhorted to follow the statutory notice requirements but under the holding of this case, applying current statutory provisions, failure to do so does not render the proceedings void.

Virginia Cross-References Research Leads. For further analysis of the topics of Virginia law addressed herein, please consult the following sources:

For an overview on local rules of court and the movement to require uniform statewide pretrial orders, see **Kent Sinclair & Leigh Middleditch, Virginia Civil Procedure (4th ed.) §1.11.**

An overview of nonsuit practice in Virginia, including the relationship of the "21-day rule" to the availability of nonsuits can be found in

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Professor Sinclair, an active member of the Virginia Bar, teaches the program in Virginia Law & Practice at the University of Virginia School of Law. He is Professor of Law and served for many years as Associate Dean of the Law School. He has written more than a dozen books, and is the author of *Sinclair & Middleditch, Virginia Civil Procedure* (4th ed. 2003 and annual supplements), and co-author of *Friend & Sinclair, Virginia Pleading and Practice* (2nd ed. 2007 with annual supplements). Both are treatises on Virginia law published by Lexis Law Publishing. Professor Sinclair is Chair of the Advisory Committee on Rules of Court for Virginia, and has served as Reporter for the Virginia Model Jury Project for a number of years. He has served on the Board of Governors of the Litigation Section of the Virginia Bar Association and the Boyd-Graves Conference on Virginia Law. He edits the *Virginia Court Advance Rules and Practice Service* for Lexis Law Publishing and is a frequent lecturer at continuing education programs for attorneys and Virginia judges. For the past 15 years he has been Reporter and Editor of the *Guide to Evidence in Virginia*, and starting in 2008 he is co-author of *Friend & Sinclair, The Law of Evidence in Virginia*.



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Professor Kent Sinclair on Univ. of VA Health Svcs. Found. v. Morris

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Charitable Immunity in Virginia -- Salvation by Good Works (if accompanied by a good ratio of paying and donated services and nine other factors!). Minor factors and controlling considerations in obtaining common-law charitable immunity in Virginia courts.

By Kent Sinclair

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SUMMARY: Professor Kent Sinclair discusses the importance of a wide-ranging recent decision in *University of Virginia Health Services Foundation v. Morris*, 275 Va. 319, 657 S.E.2d 512 (2008) and provides an understanding of the true operation of charitable immunity in Virginia.

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ARTICLE: Overview & Importance of the Decision: Considering four "key" relevant factors out of a much larger list of considerations articulated in prior case law, the court found that the University of Virginia's health services foundation as it actually conducts its affairs is not dominantly in accord with the charitable purpose stated in its own articles of incorporation. The Court found that, instead, it operates like a profitable commercial business with extensive revenue and assets. Thus the Court found that this foundation is not immune from tort liability under the doctrine of charitable immunity.

This decision has significant implications for litigation involving medical negligence claims involving hospitals, health services foundations, and other bodies. It addresses both our "presumptions" about charitable status and the nitty-gritty of detailed considerations a court must consider when ruling on a claim of such immunity. At bottom the pending cases focused on the ratio of revenues and the cost of the institution's charitable work, the profit based incentive payment system it had in place, and the absence of charitable gift giving. Code sections 8.01-38 and § 32.1-123 were both construed.

Background Facts

A health services foundation associated with a large public university's medical center is incorporated as a non-profit group practice health care provider organization that employs the physicians who work at the university's medical school. The physicians it employs are also employed by the medical school; they teach and perform research at the medical school and render patient care services at the medical center and regional primary care offices.

One of the purposes stated in the foundation's articles of incorporation is to assist and conduct programs providing

charity medical care to patients who might not otherwise be able to afford it. The foundation bills various charges, receives insurance payments, and engages in patient billing and collections. It receives no funds as contributions or donations. Funds generated by the foundation are used to pay part of the physicians guaranteed salaries and benefits, and certain incentive compensation.

The foundation involved in these collected cases was determined by the Internal Revenue Service to be exempt from federal income tax under § 501(c)(3), and it was further determined to be a public charity rather than a private foundation, as § 509(a)(3) organization. In several medical malpractice cases the foundation raised the defense of charitable immunity, and inconsistent trial court rulings resulted. The recent decision disposed of collected appeals in several of these cases.

General Principles Reprised (and Applied)

In the *Health Services Foundation* case, the Court adhered to the recitation made several times in the last two decades, that the doctrine of charitable immunity is firmly embedded in the law of this Commonwealth and has become a part of the general public policy of the State.

The Court explained that this doctrine is grounded in part in the public policy that the resources of charitable institutions are better used to further the institutions charitable purposes, than to pay tort claims lodged by the charity's beneficiaries. Additionally, it preserves the spirit and intent of philanthropic gifts made by the public to charitable institutions and so that that much of the burden borne by those gifts will not be again cast upon the public.

Limitations on Immunity. Despite these important policy roots, case law has also clearly stated the canon that the doctrine of charitable immunity in Virginia is limited.

First: A charitable institution is immune from liability to beneficiaries for acts of ordinary negligence by its servants or agents, but may be liable for ordinary negligence in the selection and retention of its servants or agents.

Second: Charitable immunity applies only to claims of negligence asserted by those who accept the charitable institutions benefits. A charitable institution is not immune from liability to invitees or strangers with no beneficial relationship to the institution.

Third: A charitable institution is not immune for acts of gross negligence or willful or wanton negligence, as such conduct can never be characterized as an attempt to carry out the mission of the charity to serve its beneficiaries.

Moreover, in addition to these fundamental judicial limitations on charitable immunity, the General Assembly has limited charitable immunity in certain instances. One such limitation is Code § 8.01-38, which denies charitable immunity to most hospitals.

Code § 8.01-38 and Hospital Immunity. Code § 32.1-123 defines hospital to mean any licensed facility in which the primary function is the provision of diagnosis, of treatment, and of medical and nursing services, surgical or nonsurgical, for two or more nonrelated individuals, including hospitals known by varying nomenclature or designation such as sanatoriums, sanitariums and general, acute, rehabilitation, chronic disease, short-term, long-term, outpatient surgical, and inpatient or outpatient maternity hospitals.

Code § 8.01-38 denies immunity to hospitals:

No hospital, as defined in this section, shall be immune from liability for negligence or any other tort on the ground that it is a charitable institution unless (i) such hospital renders exclusively charitable medical services for which service no bill for service is rendered to, nor any charge is ever made to the patient or (ii) the party alleging such negligence or other tort was accepted as a patient by such institution under an express written agreement executed by the hospital and delivered at the time of admission to the patient or the person admitting such patient providing that all medical services

furnished such patient are to be supplied on a charitable basis without financial liability to the patient. . . .

Because Code § 8.01-38 is in derogation of the common law of charitable immunity, the Court holds that it must be strictly construed and not enlarged in its operation by construction beyond its express terms.

The health services organization reviewed in the Court's recent decision did *not* fall under Code §§ 8.01-38 and 32.1-123 as a matter of plain language and statutory construction.

Code § 32.1-123 includes in the definition of hospital only facilit[ies] licensed pursuant to this article. The foundation in the pending cases was not so licensed to operate as a hospital and had never applied for or held a license to operate as a hospital or been subject to any type of hospital accreditation. Because it did not come within the definition of hospital in Code § 32.1-123, the foundation did not fall within the scope of Code § 8.01-38's denial of charitable immunity to hospitals.

Common Law Charitable Immunity Background Standards and Factors. Whether an entity such as the health services foundation before the Court in the recent litigation is eligible for common law charitable immunity from tort liability is a mixed question of law and fact that is subject to de novo review on appeal. Thus a trial court's finding on such a topic may be replaced by that of the appellate court if it disagrees with the conclusions or inferences to be drawn from the facts presented.

The Court's plenary explication of the common-law test was most recently given in *Ola v. YMCA of South Hampton Roads, Inc.*, 270 Va. 550, 621 S.E.2d 70 (2005). That 2005 decision stressed that -- to establish charitable immunity as a bar to tort liability -- an entity must prove at least two distinct elements. *The absence of either element makes the bar of charitable immunity inapplicable:*

- (1) the entity seeking immunity must show it is organized with a recognized charitable purpose, and
- (2) that it operates in fact in accord with that purpose.

Where these two elements are shown, the burden is then on the purportedly immune entity to further establish a third requirement with respect to the particular tort plaintiff: *that the tort claimant was a beneficiary of the charitable institution at the time of the alleged injury.*

Charitable Organization and Operation. In examining whether the organizations articles of incorporation have a charitable or eleemosynary purpose the Supreme Court of Virginia held in *Ola* (and reaffirmed in the Health Services Foundation decision) that "if an organizations charter sets forth a charitable or eleemosynary purpose, there is a rebuttable presumption [that] it operates as a charitable institution in accordance with that purpose." However, the Court warned in *Ola* that:

if the manner in which the organization actually conducts its affairs is not in accord with the charitable purpose, then the presumption may be rebutted and the bar of charitable immunity does not apply.

In its recent Health Services Foundation decision the Supreme Court of Virginia tabulated no fewer than 10 factors that "are indicative of whether a charitable organization operates in fact with a charitable purpose." These factors are:

- (1) Does the entity's charter limit the entity to a charitable or eleemosynary purpose?
- (2) Does the entity's charter contain a not for profit limitation?
- (3) Is the entity's financial purpose to break even or earn a profit?
- (4) Does the entity in fact earn a profit, and if so, how often does that occur?

- (5) If the entity earns a profit (a surplus beyond expenses) must that be used for a charitable purpose?
- (6) Does the entity depend on contributions and donations for a substantial portion of its existence?
- (7) Is the entity exempt from federal income tax and/or local real estate tax?
- (8) Does the entity's provision of services take into consideration a person's ability to pay for such services?
- (9) Does the entity have stockholders or others with an equity stake in its capital?
- (10) Are the directors and officers of the entity compensated and if so, on what basis?

Even this list of 10 broad factors is said by the Court to be "not exclusive," and hence other considerations may be raised in any given case to support a fact-specific analysis of each instance. Further, "no one factor is determinative" and hence the absence of any particular element will not doom or assure a claim of charitable immunity in Virginia.

Articles of Incorporation. The Supreme Court noted in the Health Services Foundation litigations that an entity is entitled to a presumption that it operates as a charitable institution in accordance with the purposes set out in its Articles of Incorporation. In that case the Articles recited that the foundation was formed exclusively for charitable, scientific and educational purposes, as contemplated by *Section 501(c)(3) of the Internal Revenue Code*. Thus the Court found that these Articles of Incorporation established the rebuttable presumption that the foundation was a charitable organization. As a result, the Court noted, "[t]he plaintiffs in the respective cases then had the burden of rebutting the presumption" -- which they did!

Conducting the Business. Rebutting the presumption that a facially nonprofit charitable institution is immune is not difficult. The Court states that while such an entity benefits initially from the presumption, "if the manner in which [it] actually conducts its affairs is not in accord with the charitable purpose, then the presumption may be rebutted and the bar of charitable immunity does not apply." In practice the word "may" could be misleading; it appears that if the conduct of an entity's affairs is not in accord with the charitable nature of its status, the immunity is rebutted.

Four Key Factors. In the Health Services Foundation case the Court found four of the ten articulated factors to be "determinative" in coming to the conclusion that the foundation did not operate in fact with a charitable purpose.

- (1) it was created to correct billing and collection problems;
- (2) the ratio of its revenue compared to the cost of its charitable work is substantially disproportionate;
- (3) its incentive payment structure is functionally a profit-based bonus system, much like a for-profit enterprise; and
- (4) it does not accept charitable gifts.

In discussing these factors as applied to the cases before it, the Court noted that the particular health services entity involved had been largely created to increase the amount of revenue received by the medical center it served. Further, this foundation "aggressively pursues legal collections." After a detailed review of the thousands of claims and millions of dollars involved, the Court concluded that the "magnitude of these practices suggests that the foundation operates more like a for-profit business with a financial purpose of earning a profit than a charitable organization."

Important Ratio. Looking at the various contributed, pro bono and free services of the entity, and comparing that to the income generated, the Court found that the ratio of the foundation's unreimbursed shortfall in a recent year to total revenue and other income was only about 0.66%. It concluded: "The minimal cost" of its charity work "as compared to its income illustrates how small a portion of [its] work is charitable."

Incentive Payments and Profit-Like Approach. Overall, the Supreme Court of Virginia found that the UVA Health Services Foundation's incentive payment structure included a distribution of surplus revenue in a manner more consistent with a successful commercial business than a charitable organization. It noted that the revenue is distributed by the foundation to the medical center departments in accordance with how much revenue those departments generated, rather than how much indigent care is provided, how much research is performed, or how many hours their physicians spent teaching. The Court said that this mode of operation "is functionally a profit-based bonus system." The Court noted that the departments that generate the most revenue received the most money from the foundation, and those physicians who are the most financially productive in their departments generally received the biggest incentive payments. Thus, in the Court's view, the foundation followed the model of a profitable commercial business and not a charitable institution.

Receiving Charitable Contributions as an Important Factor. In addition to the Court's focus on the amount of charitable care provided, the Court made a point about the absence of charitable contributions or donations *received by the entity*. Receipt of contributions or donations is held in the Health Services Foundation case to be an important factor because charitable immunity in Virginia is based on public policy. The reasoning is interesting: If the foundation were required to pay tort awards to the various plaintiffs in the present cases, no philanthropic-minded intentions would be nullified, because no gifts are received. Thus the fact that no charitable donors' intentions would be frustrated by diversion of their gifts to pay tort judgments was an important consideration in determining that the entity is not entitled to protected charitable status.

The Court was quick to point out that receipt of charitable gifts is not a *sine qua non* for entitlement to charitable immunity. It acknowledged that there are some charitable organizations that do not receive or accept donations, particularly if they are previously endowed from a philanthropic gift. These organizations may still be entitled to charitable immunity for other reasons.

Summary and Conclusion. The Supreme Court's analysis of the long list of pertinent factors in Health Services Foundation is illustrative of the necessary analysis under the *Ola* decision and other governing case law. It shows starkly that *the manner in which an entity actually conducts its affairs* is critical. If the "operation" of the entity is not dominantly in accord with the charitable purpose stated in its Articles of Incorporation, it will be denied the protections of the charitable immunity doctrine.

Virginia Cross-References Research Leads. For further analysis of the topics of Virginia law addressed herein, please consult the following sources:

For an overview on charitable immunity in Virginia, see **Kent Sinclair & Leigh Middleditch, Virginia Civil Procedure (4th ed.) § 2.32 Charitable and Related Immunities.**

For a general discussion of the charitable immunity defense, see **Charles E. Friend, Personal Injury Law in Virginia Chapter 11 (Immunities) and § 11.5 (Charitable Immunity).**

A dated but insightful article is: "*Charitable Immunity: What Price Hath Charity?*," 28 U. Rich. L. Rev. 953 (1994).

On the operation of charitable immunity in diverse aspects of Virginia law, see also **Michie's Jurisprudence**, NEGLIGENCE, § 12, and COLLEGES AND UNIVERSITIES, § 10.

On charitable hospitals generally, see **Michie's Jurisprudence**, HOSPITALS AND SANITARIUMS, § 7.

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Professor Sinclair, an active member of the Virginia Bar, teaches the program in Virginia Law & Practice at the University of Virginia School of Law. He is Professor of Law and served for many years as Associate Dean of the Law School. He has written more than a dozen books, and is the author of *Sinclair & Middleditch, Virginia Civil Procedure* (4th ed. 2003 and annual supplements), and co-author of *Friend & Sinclair, Virginia Pleading and Practice* (2nd ed. 2007 with annual supplements). Both are treatises on Virginia law published by Lexis Law Publishing. Professor Sinclair is Chair of the Advisory Committee on Rules of Court for Virginia, and has served as Reporter for the Virginia Model Jury Project for a number of years. He has served on the Board of Governors of the Litigation Section of the Virginia Bar Association and the Boyd-Graves Conference on Virginia Law. He edits the *Virginia Court Advance Rules and Practice Service* for Lexis Law Publishing and is a frequent lecturer at continuing education programs for attorneys and Virginia judges. For the past 15 years he has been Reporter and Editor of the *Guide to Evidence in Virginia*, and starting in 2008 he is co-author of *Friend & Sinclair, The Law of Evidence in Virginia*.



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James Hauser on Frosti v. Creel, 979 So. 2d 912 (Fla. 2008).

2008 Emerging Issues 2698

Calculating Damages to Determine Net Judgment in light of Frosti v. Creel, 979 So. 2d 912 (Fla. 2008).

By James Hauser

August 14, 2008

SUMMARY: When and how to make an offer of judgment can be a puzzling decision. This commentary, written by James C. Hauser, an expert on Florida attorneys fees, analyzes the Florida Supreme Courts interpretation of the statute and court rule governing the decision in Frosti v. Creel.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: In *Frosti v. Creel*, 979 So. 2d 912 (Fla. 2008), the Florida Supreme Court answered two questions interpreting the Offer of Judgment Statute, § 768.79 and Fla. R.Civ.P. 1.442. This commentary discusses the consequences of those answers for practitioners.

Answer Number I: Multiple Damage Awards Will be Combined to Calculate Whether a Party Is Entitled to Attorneys Fees Based on an Offer of Judgment. In order for a plaintiff to recover attorneys fees based on an offer of judgment, the amount recovered by the plaintiff must be greater than 125% of the amount being offered. §768.79(6) (b). However, the statute is silent as to whether an award of compensatory damages must be combined with an award of punitive damages to calculate whether the 125% threshold level has been reached.

In *Frosti*, Ms. Frosti was injured in an automobile accident caused by Mr. Houck. She served an offer of judgment on Mr. Houck, for \$1 in punitive damages, contingent upon Mr. Houck settling for \$24,999 in compensatory damages. The jury returned a verdict of \$20,670 in compensatory damages (which was less the \$24,999 offered), but \$73,800 in punitive damages. The total amount of damages of \$94,470 was more than 125% of the offer of judgment. If the amount of damages was combined, then Ms. Frosti would be entitled to attorneys fees under §768.79. If the amount of damages was not combined, because the compensatory damage award by the jury of \$20,670 was less than the offer of judgment of \$24,999, she would not be entitled to attorneys fees.

To determine the judgment obtained for purposes of calculating whether the amount recovered is greater than the 125% offer of judgment, the Florida Supreme Court held that the key is the net judgment, not the jury verdict. See *Anderson v. King*, 817 So. 2d 1102 (Fla. 2d DCA 2002). To calculate the net judgment the Florida Supreme Court held that the compensatory and punitive damages must be added together. Since the combined total of \$94,470 was more than 125% of the combined offer of \$25,000, Ms. Frosti was entitled to attorneys fees. *Frosti v. Creel*, 979 So. 2d 912 (Fla. 2008).

Answer Number 2: Filing an Offer of Judgment Prior to the Final Judgment Does Not Invalidate the Offer of Judgment. In *Mills v. Martinez*, 909 So. 2d 340 (Fla. 5th DCA 2005), the offer of judgment was filed with the court two years prior to the jury verdict. The 5th DCA held that the premature filing of the offer of judgment did not invalidate it. The 2nd DCA came to the opposite conclusion in *Frosti v. Creel*, 943 So. 2d 1023 (Fla. 2d DCA 2006), holding that the premature filing of the offer of judgment made it void. In *Frosti*, the offer was filed after the jury verdict, but before the final judgment.

Fla.R.Civ.P. 1.442(d) states in part that the proposal for settlement:

... shall not be filed unless *necessary to enforce* the provisions of this

rule. (emphasis added.)

§768.79(3) has a similar provision which states:

the offer shall not be filed ... unless filing is *necessary to enforce* the provisions of this section. (emphasis added.)

The key phrase is necessary to enforce.

The Florida Supreme Court could have ruled that because the offer of judgment in *Frosti* was filed after the jury verdict, but prior to the final judgment, the offer was timely filed. The amount of damages (\$20,670 compensatory and \$73,800 punitive) was known at the time that the offer of judgment was filed with the court. Thus, to determine whether the damages recovered was more than 125% of the \$25,000 offer, so as to Ms. Frosti to attorneys fees under § 768.79 it was necessary to file the offer. However, the Florida Supreme Court went further and held that even if the offer of judgment is filed prior to a determination of damages, the offer will not be invalid. The Florida Supreme Court specifically approved the 5th DCA decision in *Mills* and stated at page 914:

We hold that a motion for attorneys fees and costs made pursuant to Floridas offer of judgment need not be denied because the underlying proposal for settlement was filed in the trial court before the judgment was entered.

The Florida Supreme Courts rationale was that neither the statute nor the rule prohibit the filing of the offer of judgment prior to the final judgment. If the offer of judgment is filed prematurely, the opposing party can always file a motion to strike, with leave to refile the offer of judgment after the verdict or final judgment. While that may make practical sense, the Florida Supreme Courts decision seemingly conflicts with the literal wording of both § 768.79(3) and Fla.R.Civ.P. 1.442(d). Simply put an offer of judgment filed prior to the decision on the merits is not necessary to enforce the offer of judgment. Without knowing the amount of the damages there is no way to know whether the amount of the offer exceeds 125% of the net judgment which would entitle the plaintiff to attorneys fees.

Caution Is required: Even though the Florida Supreme Court ruled that compensatory and punitive damages must be combined to calculate the judgment obtained, the party making the offer still must separate the amount of compensatory damages from the amount of punitive damages in the offer itself. Both Fla.R.Civ.P. 1.442(c) (2) (E) and § 768.79(2) (c) mandate that the offer state with particularity the amount of punitive damages being offered. If the amount of punitive damages is not separately disclosed, then the offer may be defective. Thus, in *Frosti*, if the offer had stated that it was for \$25,000 for both compensatory and punitive damages, the plaintiff may not have been entitled to attorneys fees.

For additional information about the offer of judgment see: *Attorneys Fees in Florida, Second Edition*, Chapter 4, Offer of Judgment. *LexisNexis Practice Guide: Florida Civil Motion Practice*, 13.10 Making a Settlement Offer.

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Ogden on International Federation v Superior Court

2008 Emerging Issues 2681

Professor Gregory Ogden on International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court (2007) 42 Cal. 4th 319

By Mr. Gregory L. Ogden

August 13, 2008

SUMMARY: *Professor Gregory Ogden on International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court (2007) 42 Cal. 4th 319* Get expert commentary on the California Supreme Court decision upholding disclosure of city employees name, job title, and gross salary for employees earning more than \$100,000 per year under the California Public Records Act.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: California Supreme Court upholds disclosure of city employees name, job title, and gross salary for employees earning more than \$100,000 per year under California Public Records Act

Background: In *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court (2007) 42 Cal. 4th 319, 327-329, 64 Cal. Rptr. 3d 693, 165 P. 3d 488*, the California Supreme Court holds that salary information for specific public employees of the City of Oakland earning \$100,000 or more per year is a disclosable public record within the meaning of the California Public Records Act [*Gov. Code §§ 6252(d), 6253(a)*]. Reporters for the Contra Costa Times requested disclosure of this information for the 2003-2004 fiscal year from the City of Oakland. The City refused to provide salary information for specific individuals claiming that this information was exempt from disclosure. After allowing intervention by two public employee unions that opposed disclosure, the superior court ordered disclosure of the salary information and rejected claims for exemption based on the privacy interests of the individuals; and for police officers, the peace officer personnel records exemption was asserted. The Court of Appeal denied the petition of the two unions challenging disclosure.

Holdings: The California Supreme Court held that the salary information was not exempt from disclosure under the personnel and medical records exemption [*Gov. Code § 6254(c)*] because disclosure of this information did not constitute an unwarranted invasion of personal privacy. The California Supreme Court relied upon the public policy supporting the adoption of the public records act, that public access to information about government is essential to government accountability, and that the right of public access to governmental information is protected not only by the California Public Records Act [*Gov. Code §§ 6250 to 6277*], but also by provisions of the California Constitution [Cal.

Const., art. 1, § 3, subd. (b)(1)]. The California Supreme court noted that claims for exemption of salary information for particular public employees based on concerns specific to that employee, such as undercover police officers, could be made under either the personnel and medical records [Gov. Code § 6254(c)], or the public interest exemption [Gov. Code § 6255], but that neither the city nor the unions provided such information to the superior court. The California Supreme court also rejected a claim that disclosure of salary information would violate the public employees right to privacy under the California Constitution [Cal. Const., art. 1, § 1] because the public interest in disclosure of this information outweighed the privacy interest of the employees. Finally, the California Supreme court held that the peace officers personal records exemption [Gov. Code § 6254(k), Penal Code §§ 832.7, 832.8] did not include salary information of peace officers as one of the categories of information exempt from disclosure [Penal code § 832.8], and thus this exemption did not apply to police officer salary information.

California Public Records Act Provisions. The California Public Records Act provides that access to information concerning the conduct of the peoples business is a fundamental and necessary right of every person in this state [Gov. Code § 6250]. The California Constitution also protects public access to information and provides that the people have the right of access to information concerning the conduct of the peoples business, and, therefore, the writings of public officials and agencies shall be open to public scrutiny. [Cal. Const., art. I, § 3, subd. (b)(1)]. However, peace officer privacy rights are protected in the California Constitution as well [Cal. Const., art. I, § 3, subd. (b)(3)]. Public records include any writing containing information relating to the conduct of the publics business prepared, owned, used or retained by any state or local agency [Gov. Code § 6252(e); see also Gov. Code § 6252 (g)]. There are many statutory exemptions under which public records are exempt from disclosure including records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including but not limited to the provisions of the evidence code relating to privilege [Gov. Code § 6254(k)] under which peace officer personnel records are exempt from disclosure under the provisions of Penal Code §§ 832.7, and 832.8. Other exemptions include the privacy exemption, which provides: Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy [are exempt from disclosure] [Gov. Code § 6254(c)], and the public interest exemption which states that the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record [Gov. Code § 6255(a)].

California Public Records Act Policies: The California Public Records Act [Gov. Code §§ 6250-6277] provides for disclosure of public records so that the people of the State of California can be well informed about the records and writings of public officials and agencies. This helps to maintain accountability of those public officials. The media frequently request disclosure of public records (as in this case, reporters for The Contra Costa requested the salary information from the City of Oakland) so that the media can report to the public on the actions of public officials, insofar as those are reflected in the writings records, and other documents of public officials and agencies. However, much of the information that is in the possession of public officials and agencies may be exempt from disclosure under one of the numerous exemptions to the disclosure requirements of the public records act. Typically, a member of the public or a media representative will request disclosure of a public record, and the public agency will either disclose the record, or they will not disclose the record and rely upon one of the listed exemptions in the public records act or other statutes to justify non disclosure. The validity of the exemption claim will be litigated in the court system, and the appellate courts will determine in a case-by-case basis whether or not a particular exemption claim is justified in the circumstances. In many cases, the courts will have to engage in a balancing of competing interests, some of which may support disclosure, and some of which may not support disclosure.

Litigation Significance of International Federation: The International Federation decision is very specific in that it upheld disclosure of salary information for highly paid public employees working for the City of Oakland. The decision is significant in that it rejected the stated grounds for non disclosure based on the personnel and medical records exemption [Gov. Code § 6254(c)], the peace officers personal records exemption [Gov. Code § 6254(k), Penal Code §§ 832.7, 832.8] because salary information was not within the types of the information listed and protected by that exemption, the public interest exemption [Gov. Code § 6255], and the right of privacy recognized in the California

Constitution. This court decision is part of a larger trend in recent decisions of the California Supreme Court including the decision in *Commission on Peace Officer Standards and Training v. Superior Court* (2007) 42 Cal. 4th 278, 64 Cal. Rptr. 3d 661, 165 P. 3d 462 (upholding disclosure of the peace officers name, employing agency, date of new appointment, and termination date) ordering disclosure of public records under the California Public Records Act, and narrowly interpreting exemption to disclosure. The impact of the decision will be felt most directly by public agencies that have highly paid employees officers and therefore maintain personnel data on those employees. News articles that provide lists of highly paid employees of public agencies can provide the public with information about the public agencies use of tax dollars. That can ensure that the public agencies are held accountable to the citizens who pay taxes. In an era in which the public wants transparency from public officials, requiring disclosure of information under the act facilitates both transparency and accountability. The most immediate beneficiary of the decision will be media representatives who are researching information to develop media stories on compensation of public employees. The impact of this decision on public agencies could be substantial to the extent that specific public employers are overly generous with salary and other compensation provided to their employees. Within the world of public records act litigation, this decision is significant, but the information disclosed relates to a small percentage of the overall public employment workforce in the State of California.

Cross References

For further discussion of public records act issues, see California Forms of Pleading and Practice, Public Administrative Law, Volume 41, Ch. 470C, Public Records Act, generally, and specifically, see California Forms of Pleading and Practice, Public Administrative Law, Volume 41, Ch. 470C, Public Records Act, § 470C.13 (Exemptions from Disclosure).

ABOUT THE AUTHOR(S):

Gregory L. Ogden is a professor of law at Pepperdine University where he has taught since 1978. He teaches administrative law, civil procedure, professional responsibility, and remedies. He is a graduate of UCLA, (BA, cum laude) UC Davis school of Law (JD, Law Review Editor), and he has two LLM=s, one from Temple University in legal education, and one from Columbia University in administrative law. He has been an administrative law consultant to the Administrative Conference of the United States, and to the California Law Revision Commission. He has taught administrative law for over 25 years, and was the principal author of *California Public Agency Practice*, (three volumes, Matthew, Bender & Co., Inc...1989), and *California Public Administrative Law* (two volumes in *California Forms of Pleading and Practice*, (LexisNexis Matthew Bender), the leading treatise on California administrative law. In fall 2005, He completed a major revision of a State Administrative Law in California chapter (200 pages) for a multi volume treatise on *California Environmental Law and Land Use Practice* (LexisNexis Matthew Bender). He has authored several articles in the administrative law field, including most recently the following article in the Journal of the NAALJ: Ogden, Gregory L., AThe Role of Demeanor Evidence in Determining Credibility of Witnesses in Fact Finding: The Views of ALJ=s, @ 20 Journal of NAALJ 1 (2000). Professor Ogden was the 1999 NAALJ Fellowship recipient, and he presented his fellowship paper on demeanor evidence at the 1999 NAALJ Conference in Asheville, North Carolina.



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Ogden on Peace Officer Standards v Superior Court

2008 Emerging Issues 2682

Professor Gregory Ogden on Commission on Peace Officer Standards and Training v. Superior Court (2007) 42 Cal. 4th 278

By Gregory L. Ogden

August 13, 2008

SUMMARY: *Professor Gregory Ogden on Commission on Peace Officer Standards and Training v. Superior Court (2007) 42 Cal. 4th 278* Get expert commentary on the California Supreme Court decision upholding disclosure of police officer names, employing agencies, and employment dates under California Public Records Act.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: California Supreme Court upholds disclosure of police officer names, employing agencies, and employment dates under California Public Records Act

Background. In *Commission on Peace Officer Standards and Training v. Superior Court (2007) 42 Cal. 4th 278, 64 Cal. Rptr. 3d 661, 165 P. 3d 462*, the California Supreme Court holds that information relating to California peace officers that is maintained in an electronic database by the California Commission on Peace Officer Standards and Training was a public record that was disclosable under The California Public Records Act [Gov. Code § 6252(e), (g)]. Disclosure of this information was requested by the Los Angeles Times for the purpose of documenting trends in the movement of police officers from one department to another department. The information requested included the peace officers name and birth date, employing department, appointment dates, termination dates, and reason for termination. The Commission denied the request. The Newspaper filed a petition for a writ of mandate under the California Public Records Act with the superior court. The superior court ordered disclosure of the peace officers name, employing agency, date of new appointment, and termination date. The California Court of Appeal issued a writ of mandate under Gov. Code § 6259(c) vacating the superior court judgment and ordering that the records not be disclosed.

Holdings: The California Supreme Court reversed the court of appeal and held that these records were public records that were not exempt from disclosure under Gov. Code § 6354(k) (statutory exemptions including privilege) and were not exempt from disclosure under the peace officer personnel records statutory provisions [Penal Code §§ 832.7, 832.8] because the content of the information sought was not within the enumerated listings in Penal Code Section § 832.8, and therefore Section 832.7 did not apply to preclude disclosure. The Supreme Court also held that no other statutory exemption in the California Public Records Act applied to exempt disclosure of these records. The California Supreme Court rejected the argument that the records kept by the Commission were categorically exempt under Gov. Code § 6254(c) because the privacy and safety interest of the peace officers as a group did not outweigh the public

interest in disclosure of the information. Thus, disclosure of these records would not constitute an unwarranted invasion of personal privacy. However, The California Supreme Court also held that the Commission could seek to justify exclusion from the disclosed records of information about specific officers because disclosure of that information would jeopardize the safety or efficacy of the peace officers. The exclusion would be based on a showing under the personnel and medical records exemption [*Gov. Code* § 6254(c)], and under the public interest exemption [*Gov. Code* § 6255]. The California Supreme Court remanded the case back to the Superior Court to allow the Commission to make such a showing.

California Public Records Act Provisions. The California Public Records Act provides that access to information concerning the conduct of the peoples business is a fundamental and necessary right of every person in this state [*Gov. Code* § 6250]. The California Constitution also protects public access to information and provides that the people have the right of access to information concerning the conduct of the peoples business, and, therefore, the writings of public officials and agencies shall be open to public scrutiny [Cal. Const., art. I, § 3, subd. (b)(1)]. However, peace officer privacy rights are protected in the California Constitution as well [Cal. Const., art. I, § 3, subd. (b)(3)]. Public records include any writing containing information relating to the conduct of the publics business prepared, owned, used or retained by any state or local agency [*Gov. Code* § 6252(e); *see also Gov. Code* § 6252(g)]. There are many statutory exemptions under which public records are exempt from disclosure including records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including but not limited to the provisions of the evidence code relating to privilege [*Gov. Code* § 6254(k)] under which peace officer personnel records are exempt from disclosure under the provisions of *Penal Code* §§ 832.7, and 832.8. Other exemptions include the privacy exemption, which provides: Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy [are exempt from disclosure] [*Gov. Code* § 6254(c)], and the public interest exemption which states that the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record [*Gov. Code* § 6255(a)].

California Public Records Act Policies: The California Public Records Act [*Gov. Code* §§ 6250 to 6277] provides for disclosure of public records so that the people of the State of California can be well informed about the records and writings of public officials and agencies. This helps to maintain accountability of those public officials. The mass media frequently request disclosure of public records (as in this case, the Los Angeles Times requested the Commission records) so that the media can report to the public on the actions of public officials, insofar as those are reflected in the writings records, and other documents of public officials and agencies. However, much of the information that is in the possession of public officials and agencies may be exempt from disclosure under one of the numerous exemptions to the disclosure requirements of the public records act. Typically, a member of the public or a media representative will request disclosure of a public record, and the public agency will either disclose the record, or they will not disclose the record and rely upon one of the listed exemptions in the public records act or other statutes to justify nondisclosure. The validity of the exemption claim will be litigated in the court system, and the appellate courts will determine in a case-by-case basis whether or not a particular exemption claim is justified in the circumstances. In many cases, the courts will have to engage in a balancing of competing interests, some of which may support disclosure, and some of which may not support disclosure.

Litigation significance of the *Commission* decision: the *Commission* decision is fairly narrow in that it upheld disclosure of only the name of the police officer, the officer employing agency, the date of appointment and date of termination, but no other personal information such as a particular officers birth date and reasons for termination. The decision is significant in that it narrowly interpreted the scope of the peace officer personnel records exemption by focusing on the content of the information sought, not the format in which the information was kept. It also applied statutory interpretation principles to reach the most sensible result. The impact of the decision will be felt most directly by public agencies that employ police officers and therefore maintain personnel data on those officers. The most likely beneficiary of the decision will be media representatives who are researching police officer information to develop a media story on an investigation. However, the impact on public agencies will not be that great since the scope of disclosable data is fairly narrow. Within the world of public records act litigation, this decision is significant, but it

affects a narrow class of litigants and the scope of the information requested relates to a small percentage of the overall public employment workforce in the state of California.

Cross References

For further discussion of public records act issues, see California Forms of Pleading and Practice, Public Administrative Law, Volume 41, Ch. 470C, *Public Records Act*, generally, and specifically, see California Forms of Pleading and Practice, Public Administrative Law, Volume 41, Ch. 470C, *Public Records Act*, § 470C.13 (Exemptions from Disclosure).

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Bisceglie on Privilege Issues in E-discovery under New York Law

2008 Emerging Issues 2112

Bisceglie on Privilege Issues in E-discovery under New York Law in *Scott v. Beth Israel Medical Center Inc.*, 2007 NY Slip Op 27429

By Kyle C. Bisceglie

August 7, 2008

SUMMARY: On October 17, 2007, the NY Supreme Court (Comm. Part) held that a hospital administrator suing his employer had waived the attorney-client and work-product privileges because he and his lawyers regularly corresponded via email using the employers e-mail system. Kyle C. Bisceglie, a Partner at Olshan Grundman LLP in New York City, discusses *Scott v. Beth Israel* and its implications for privilege issues, employer-employee disputes & ediscovery.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: In *Scott v. Beth Israel Medical Center Inc.*, 2007 NY Slip Op 27429, 847 N.Y.S.2d 436, 2007 N.Y. Misc. LEXIS 7114, Justice Charles E. Ramos of the New York County Supreme Court, Commercial Division, denied the motion of a hospital administrator, Dr. W. Norman Scott (Dr. Scott), for a protective order that would have required Beth Israel Medical Center (Beth Israel) to return the e-mail correspondence between Dr. Scott and his attorneys that were sent through Beth Israel's e-mail system and presumably found on Beth Israel's server during discovery. The *Beth Israel* Court reasoned that sending the e-mails through the hospital's system with knowledge of its restrictive e-mail policy destroyed any reasonable expectation of confidentiality and, thereby, waived the attorney-client privilege.

Attorney-client privilege

The attorney-client privilege is the oldest recognized evidentiary privilege in Anglo-American jurisprudence, dating back to the 1600s, and fosters the open dialog between lawyer and client that is essential for effective representation. See *Delta Financial Corporation v. Morrison*, 13 Misc.3d 441, 444, 820 N.Y.S.2d 745, 748 (N.Y. Sup.Ct. 2006); *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998); *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991), *cert denied*, 502 U.S. 813, (1991). Its purpose is to encourage full and frank communication between an attorney and his client and thereby promote broader public interests in the observance of law and the administration of justice. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Thus, the burden of breaching the privilege is particularly onerous. *United States v. David*, 131 F.R.D. 391, 398 (S.D.N.Y. 1990). Nonetheless, privileges are not to be expansively construed, as they are in derogation of the search for truth," *United States v. Nixon*, 418 U.S. 683, 710, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974), and the attorney-client privilege in particular, "applies only where necessary to achieve its purpose." *Fisher v. United States*, 425 U.S. 391, 403, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976); see *In re Grand Jury*

Investigation, United States v. Doe, 399 F.3d 527, 531 (2d Cir. 2005).

In New York, CPLR 4503(a) states that a privilege exists for confidential communications made between attorney and client in the course of professional employment, and CPLR 3101(b) vests privileged matter with absolute immunity. *Spectrum Sys. Intl Corp. v. Chemical Bank*, 575 N.Y.S.2d 809, 814, N.E.2d 1055, 1060 (1991). For a definition of what is encompassed by the privilege, courts still must look to the common law. *Id.* The burden of establishing the attorney-client privilege, in all its elements, always rests upon the party asserting the privilege. *Untied States v. Schwimmer*, 892 F.2d 237, 244 (2d Cir. 1989). To this end, the party asserting the privilege must demonstrate that there was: (1) a communication between client and counsel, which (2) was intended to be and was in fact kept confidential, and (3) made for the purpose of obtaining or providing legal advice. *United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996); *See also Rossi v. Blue Shield*, 73 N.Y.2d 588, 593, 540 N.E.2d 703, 542 N.Y.S.2d 508 (1989).

Facts of Scott v. Beth Israel

Returning to *Beth Israel*, the extraordinary facts are a lesson for the wary practitioner to avoid. Dr. Scott and, seemingly, his attorneys sent emails over a seven-month period beginning in February of 2004 of such a sensitive legal nature that Dr. Scott and his attorneys later claimed they were all privileged and work-product. All were sent from or to Dr. Scott's employer-issued e-mail, and accordingly, over Beth Israel's e-mail server.

The e-mails were sent during a time when Beth Israel's e-mail policy was in effect. The policy was comprehensive and unambiguous, stating in relevant part:

. This policy applies to everyone who works for the Medical Center including employees

. All Medical Center computer systems Internet Access Systems, related technology systems, and the wired or wireless networks that connect them are the property of the Medical Center and should be used for business purpose only.

. Employees have no personal privacy right in any material created, received, saved or sent using Medical Center communication or computer systems. The Medical Center reserves the right to access and disclose such material at any time without prior notice.

At Beth Israel, Dr. Scott was the Chairman of the Orthopedics Department, worked closely with the Human Resources administrator responsible for disseminating the electronic communication and privacy policy, and, beginning in 2002, required newly hired doctors under his supervision to sign a written form acknowledging their review and familiarity with the policy. While Dr. Scott never signed such an acknowledgment, he received an employee handbook that contained a brief summary of the policy before enacting the written acknowledgment requirement for his subordinates.

Dr. Scott and his attorneys argued the e-mails in question remained confidential for at least two reasons. First, he claimed to be unaware of Beth Israel's email policy. Second, relying on N.Y. C.P.L.R. 4548 (McKinney 1999), he claimed that the emails were made in confidence.

Not surprisingly, the Court rejected both contentions. As an administrator and one who required written acknowledgment of the policy from his subordinates, he had constructive knowledge of the policy.

As to his confidentiality claim under CPLR 4548, that section provides: no communication under this article shall lose its privileged character for the sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication. The Court reminded us that the modest purpose and effect of CPLR 4548; it simply acknowledges the widespread use of e-mail and that use of e-mail by itself will not abrogate the privileged nature of a communication.

However, it also doesn't absolve an attorney of his or her responsibilities to assess the risk of communicating by e-mail with a client. The holder of the privilege and his or her attorney must protect the confidential communication if they expect it to remain privileged. Dr. Scott's attorneys simply failed to assess the risk of the employer's e-mail policy and, therefore, failed to adequately protect the privilege. In this case, the Court analogized the effect of the employer e-mail policy to having someone watching over its employees' shoulders as he typed.

Confidentiality

The most-critical question for applying the attorney-client privilege is whether a communication remains confidential. Because no New York state case had addressed e-mail confidentiality in the attorney-client context, the *Beth Israel* Court looked for guidance to a federal bankruptcy case, *In re Asia Global Crossing, Ltd.* 322 B.R. 247 (S.D.N.Y. 2005). The *Asia Global* court iterated four factors to determine whether an employee's e-mail communications with his or her attorney remain confidential: (1) does the corporation maintain a policy banning personal or other objectionable use, (2) does the company monitor the use of the employee's computer or email, (3) do third parties have a right of access to the computer or e-mails, and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies? *Id.*, at 257. If these four factors are met, the attorney-client privilege certainly does not apply. *Asia Global*, 322 B.R., at 258; *Beth Israel*, 847 N.Y.S.2d at 442. Both the *Asia Global* and *Beth Israel* courts characterized these factors as requirements but ultimately applied them like guidelines intended to determine whether the holder of the privilege intended to keep her communication private. As noted by the New York Court of Appeals, the determination of confidentiality requires an inquiry that is necessarily fact-specific. *Rossi*, 73 N.Y.2d at 593.

Beth Israel suggests that waiver may be found where only some of the *Asia Global* factors are present. Indeed, the *Beth Israel* court focused primarily on the client's intent, finding that C.P.L.R. 4548 makes the third party right of access inapplicable in New York. Additionally, the *Beth Israel* Court devitalized the second *Asia Global* factor, a company's monitoring of its employee's computer use, by equating a policy allowing for monitoring with actual monitoring. 847 N.Y.S.2d at 442.

Analysis of Dr. Scott's and his attorneys' intent clearly shows failure to adequately safeguard their e-mails. Dr. Scott's awareness and administration of Beth Israel's e-mail policy and use of the company's e-mail server signify carelessness by the doctor and his attorney sufficiently extreme to vitiate any claim to privilege. Of note to the practitioner, the boilerplate notice included in each e-mail sent from the law firm -- that the message may contain information that is privileged and confidential will not save privilege. *Id.*, at 443. This language may preserve a privilege if one exists, but it will not regain privilege once it has been lost.

Analysis of Commonly Encountered Fact Patterns

Since C.P.L.R. 4548 makes third party access to e-mails or employee computers irrelevant in New York, only the remaining three *Asia Global* factors affect the attorney-client privilege. The presence of all three remaining factors to some degree evidences an intent to waive any privilege. 847 N.Y.S.2d at 447. This may not be true outside New York. See, e.g., *Sims v. Lakeside School*, 2007 U.S. Dist. LEXIS 69568 (W.D.Wash. 2007) (holding that e-mails sent from an employer-provided computer and an employer-provided e-mail account were privileged on public policy grounds). In order to provide guidance to practitioners applying New York, consider the following common scenarios.

Company e-mail policy forbids personal use of company e-mail and computers, but the company does not actively monitor its employees.

Beth Israel overlooked any distinction between policy and action, perhaps because the policy was so clear and unambiguous. A court may be more vigilant in this distinction with an ambiguous or halfhearted policy. Under such circumstance, employees may rightly claim a legitimate expectation of maintaining the confidentiality of e-mails. In *Curto v. Medical World Communications, Inc.*, 388 F. Supp. 2d 101, 2005 U.S. Dist. LEXIS 27088 (E.D.N.Y. 2006), the court upheld the privilege because the company failed to actively monitor. *Curto* involved a tepid employee e-mail

policy where employees understand that [the employer] may use human or automated means to monitor use of computer resources, and an employer that only enforced the policy four times in very limited circumstances. The court noted that the lack of monitoring created a false sense of security which lulled employees into believing that the policy would not be enforced. *Id.*, at 3 (internal quotations omitted). This lull created a reasonable expectation of privacy that allowed for the maintenance of the attorney-client privilege.

E-mails are sent using a personal e-mail account while using a company computer.

In *Curto*, the employee also took reasonable steps to safe guard the communications, including sending the e-mails through her personal AOL account. *Id.* Although the court considered other factors, sending e-mails through a web-based e-mail may protect attorney-client communications in New York, as web-based emails are not typically routed through an employer owned e-mail system. Sending e-mails through a personal e-mail account that is not web-based, such as using Microsoft Exchange to access a personal account, diminishes arguments for privilege.

This result is consistent with other jurisdictions. See, e.g., *National Economic Research Associates, Inc. v. Evans*, 2006 Mass. Super. LEXIS 371 (Mass. Supr. 2006), the employee communicated with his attorney while using a company computer and his personal, web-based and password-protected Yahoo account. The companys internet and e-mail policy that noted that a log may be kept of users network activities to monitor network usage did not put the employee on notice that screen shots of his e-mails would be logged and accessible by the company.

The policy exists but an employee claims that they were unaware of the email policy.

As shown in *Beth Israel*, this is in most circumstances a desperation argument at best. If the employee claims ignorance, the court will perform a fact-based analysis and impute actual or constructive knowledge as appropriate. In *Long v. Marubeni America Corp.*, 2006 U.S. Dist. LEXIS 76594 (S.D.N.Y. 2006), the employee claimed that he did not violate the companys Electronic Communications Policy (ECP) when he sent e-mails to his attorney from a password-protected and employer-provided e-mail account. The court rejected the employees claim of ignorance, when he helped prepare the Employee Handbook that contained it. The Court found the e-mails were not privileged. *Id.*, at 3.

Another claim of ignorance made by employees that has been rejected by courts is that the employee ignored flash-screen notices that required them to click yes on a screen displaying the ECP and a warning that the computer was subject to monitoring. See *United States v. Etkin*, 2008 U.S. Dist. LEXIS 12834 (S.D.N.Y. 2008) (rejecting assertion of marital privilege for e-mails).

Attorney communicates with their client using encrypted e-mails and a companys e-mail system.

Encrypting e-mails enhances the arguments for the attorney-client privilege. Simply put, it is strong evidence of an employees desire to maintain confidentiality even if he is at the same time demonstrating his intent to contravene company policy. The confidentiality test focuses on the clients intent to impede their employers access. See *Baptiste v. Cushman Wakefield, Inc.* 2004 U.S. Dist. LEXIS 2579 (S.D.N.Y. 2004) (finding that e-mail was maintained where the party came into possession of the communication as the result of improper conduct of another). Taking this additional affirmative step shows the intent of both attorney and client to maintain the confidentiality of the communication. Encrypting communications will not stop an employer from hacking the encrypted file, but this additional step would put the employer on par with a thief or eavesdropper, which does not destroy the privilege. *Prink v. Rockefeller Center, Inc.*, 48 N.Y.2d 309, 315 n. 2, 398 N.E.2d 517, 520, 422 N.Y.S.2d 911, 915 (1979). Additionally, adding encryption protects the practitioner by conforming to the opinion of the New York Bar Committee on Professional and Judicial Ethics, which noted that:

it would be advisable for [practitioners] to advice its clients and prospective clients that the security of communications over the Internet is not equal to that of other forms of communication that are generally accepted as secure, such as the U.S. Mail, express delivery, or the telephone. This technologically developing area has attracted the attention of professional snoopers who can exploit sniffer software and powerful search engines to find messages of

interest.

N.Y. Comm. Prof. & Judicial Eth., Formal Op. 1998-2 (1998); *see also* ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 99-413 (1999).

No ruling in New York has directly addressed the issue of an employee who encrypts communications and sends them using his employers e-mail system in derogation of an express and unambiguous policy preventing such encryption, but *People v. Jiang*, 131 Cal.App.4th 1027, 33 Cal.Rptr.3d 184 (Cal. Ct. App. 2005) provides the most germane law to analyze this issue. In *Jiang*, the prosecution attempted to discover files prepared by the defendant for his lawyer that pertained to a criminal trial and were protected by individual passwords created by the defendant. The companys computer policy stated: I have no expectation of privacy in any property owned by the company. . . . I further understand that such property, including voicemail and electronic mail, is subject to inspection by Company personnel at any time. *Id.*, at 197-98. This policy is not iron-clad and the court noted that the policy did not bar employees from using company computers for personal matters. Accordingly, the courts analysis turned on whether the employee took best efforts to preserve the privilege and not on the specific wording of the policy. The court found that creating password-protection and placing the data in a folder called Attorney for the explicit purpose of protecting it from disclosure satisfied the burden imposed on the privilege claimant. *Id.*, at 203. Adding this additional level of security does not guarantee the privilege, but it is recommended if e-mails are to be sent using a companys e-mail system.

A client communicates with his attorney via a password-protected, employer-provided e-mail account.

Using a password-protected, employer-provided e-mail will not protect privileged information from disclosure. In *Long v. Marubeni America Corporation*, 2006 U.S. Dist. LEXIS 76594 (S.D.N.Y. 2006), the Court found that that employees did not maintain confidentiality when they elected to use work computers to communicate with their attorney. The employees were aware of their employers electronic communications policy that allowed monitoring of all e-mails and prohibited the use of the system for personal purposes. The court rejected the employees claim that using private password-protected e-mail accounts to communicate with their attorney was sufficient to maintain confidentiality. *Id.*, at 3.

If none of the Asia Global Factors are satisfied:

If none of the factors can be satisfied, the communications are privileged. *See In re Asia Global*, 322 B.R. at 259-61. In *Global*, the record before the court was insufficient to conclude that Asia Global employees use of the e-mail system waived the attorney-client privilege. *Id.*, at 261. The Court was unable to determine if the company had an electronic communications policy or if the company monitored its employees computer use. Since the court was only able to determine that the employees sent e-mails and they were stored on the company server, the court could not find waiver of the attorney-client privilege. *Id.*, at 253.

Recommendations

The consequences of waiver can be far-reaching extending not only to disputes between employer and employee but to all litigants who use their employers e-mail system improperly to communicate with their attorney for non-work related matters.

Practitioners should counsel employers to:

- (1) establish or review their electronic communications and computer usage policies to ensure they clearly notify employees that their private use of the employer provided system is monitored;
- (2) introduce click-through screens that display their electronic communications policy whenever an employee logs in;

(3) include an electronic communication policy in all employee handbooks distributed to employees and require all employees to give written notification that they are aware of, and will comply with, the policy;

(4) enforce electronic communications policies by actually monitoring employee Internet usage and e-mails on a regular basis.

Practitioners should counsel their clients to:

(1) never communicate with personal attorneys over an employer provided e-mail address;

(2) use a web-based, password-protected e-mail, such as g-mail or yahoo, if they must communicate with personal attorneys while using a company issued computer;

(3) employ encryption software if forced to communicate with their clients to their work e-mails. (Preferably, an employee should never communicate with their attorney while at work.)

Practitioners should consider the following for themselves:

(1) train junior attorneys at your firm about the perils of communicating with a client by e-mail;

(2) avoid use of e-mail all-together for certain peculiarly sensitive communications;

(3) insert in the subject line Privileged attorney client privilege and confidential work product or facsimile. This wont save a privilege but might ensure the document is not inadvertently turned over during document production;

(4) demand disclosure of the domain name addresses for e-mails identified on a privilege log. Where the litigant uses a work e-mail address to litigate a non-work matter including personal and unrelated business claims, seek discovery (including subpoena to the employer if applicable) of the litigants employers e-mail policy and practices to undertake the *Beth Israel* analysis.

For additional discussion of Privilege Issues in E-discovery under New York Law, see Marjorie A. Shields, *Application of Attorney-Client Privilege to Electronic Documents*, 26 A.L.R. 287 (2007); John Gergacz, *Employees Use of Employer Computers to Communicate with Their Own Attorneys and the Attorney-Client Privilege*, 10 *Comp. L. Rev. & Tech. J.* 269, 276 (2007) (most thorough analysis of e-mail and attorney-client privilege); Elise M. Bloom, *Ownership of E-mail is Not Clear Employees Retain Some Rights Over Confidential Writing Sent From Work*, 30 *Nat'l L.J.* 18, S1 (2008) (Analysis of *In re Asia Global* factors); Paul H. Aloe, *Scott Is Dire Warning About E-mail Communications*, 238 *N.Y. L.J.* 4 (2007) (criticism of and arguments against *Beth Israel*); John K. Villa, *Emails Between Employees and Their Attorneys Using Company Computers: Are They Still Privileged?*, 26 *NO. 3 ACC Docket* 102 (2008) (additional counter arguments against *Beth Israel* and practice suggestions); Audrey Jordan, Note, *Does Unencrypted E-mail Protect Client Confidentiality?*, 27 *Am. J. Trial Advoc.* 623 (Spring 2004) (discussion of encryption).

For application of Privilege Issues in E-discovery outside of New York, see *City of Reno v. Reno Police Protective Assn*, 118 *Nev. 889*, 59 *P.3d* 1212 (Nev., 2002) (government documents sent over e-mail are still privileged because the disclosure policy was not meant to effect them); *Geer v. Gilman Corp*, 2007 *U.S. Dist. LEXIS* 38852 (*D.Conn.* 2007) (attorney-client communications remained privileged when reviewed by boyfriend because plaintiff requested they remain confidential and took active steps to ensure confidentiality); *Ball v. Versar, Inc.*, 2005 *U.S. Dist. LEXIS* 24351 (*S.D.Ind.* 2005) (finding waiver of privilege extended to all work and home computer systems known to have been used by plaintiff).

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Dismissal Under Rule 19(b): Vairo on Republic of the Philippines v. Pimentel

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Dismissal Under Rule 19(b): Vairo on Republic of the Philippines v. Pimentel

By Georgene Vairo

August 7, 2008

SUMMARY: In *Republic of Philippines v. Pimentel*, the United States Supreme Court faced the question of whether under Civil Rule 19 (Required Joinder of Parties), a court must dismiss an interpleader action involving a foreign country that has successfully claimed sovereign immunity. This commentary, by Moores Federal Practice Editorial Board member Georgene Vairo, analyzes the Supreme Courts decision to direct a dismissal under Rule 19.

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Federal Rule of Civil Procedure 19 (Required Joinder of Parties") is dense and difficult to apply. I see a sense of dread in my students faces when I begin to cover it in my Civil Procedure class. I tell them to relax because Rule 19, though not infrequently invoked in motions to dismiss, rarely results in dismissal. After *Republic of the Philippines v. Pimentel*, -- U.S. --, 128 S. Ct. 2180, 171 L. Ed. 2d 131, 2008 U.S. LEXIS 4889, 76 U.S.L.W. 4445 (June 12, 2008), that may no longer be true. *Pimentel* is the United States Supreme Courts first major explication of the workings of *Federal Rule of Civil Procedure 19* since its 40 year old seminal decision on that rule in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968), and its almost 20 year old decision in *Temple v. Synthes Corp.*, 498 U.S. 5, 111 S. Ct. 315, 112 L. Ed. 2d 263 (1990).

Pimentel is important for several reasons. First, unlike *Provident Tradesmens* and *Temple*, where the Supreme Court vacated a dismissal under Rule 19, the Court in *Pimentel* directed a dismissal based on Rule 19. Second, because the action involved the question whether a lawsuit could proceed with absent required foreign sovereign parties, and the operation of the Alien Tort Claims Statute, the decision is significant apart from the Rule 19 analysis. Third, *Pimentel* is significant because the Rule 19 issue arose in the context of an interpleader action under 28 U.S.C. § 1335.

In *Pimentel*, the Supreme Court held that the Ninth Circuit gave insufficient weight to the foreign sovereign status of two claimants in an interpleader action who had been joined but then asserted their sovereign immunity and were dismissed from the action. The Court reversed the Ninth Circuits holding that the interpleader action could proceed without the sovereign claimants.

Background. The case before the Court was an interpleader action that arose out of the Ferdinand E. Marcos Human Rights Litigation. It concerned an attempt by the class of human rights victims in the litigation (the Pimentel class) to collect a portion of an almost \$2 billion judgment awarded in 1995 to the class and affirmed as a final judgment on appeal in 1996. The class victims were tortured, disappeared, or summarily executed during the 1972-86 martial law regime of former President Marcos in the Philippines. The case was brought pursuant to the Alien Tort Statute, 28 U.S.C. § 1350, and the Torture Victim Protection Act, 28 U.S.C. § 1350 (note). The judgment collection process proved to be difficult. In the interpleader action, the class was awarded the assets from a Merrill Lynch Account (Arelma assets) established by Marcos in 1972.

Merrill Lynch commenced the interpleader action to determine the ownership of the Arelma assets that were allegedly stolen by Marcos when he was the President of the Republic of the Philippines. Facing claims from various Marcos creditors, including the Pimentel class, Merrill Lynch filed the interpleader action, under 28 U.S.C. § 1335, naming, among the defendants, the Republic, the Philippine Presidential Commission on Good Governance, Arelma, the Philippine National Bank (PNB), and the Pimentel class. The Philippine Presidential Commission was created to recover any property wrongfully taken by Marcos. The Philippine National Bank (PNB) held some of the disputed assets in escrow, awaiting the outcome of pending litigation in the Sandiganbayan, a Philippine court determining whether Marcos' property should be forfeited to the Republic.

Two entities interpleaded by Merrill Lynch invoked sovereign immunity: the Republic and the Commission. They were dismissed, and the interpleader action proceeded to judgment over their objection that they were Rule 19(b) indispensable parties" in whose absence the litigation could not proceed. The district court held that the action could proceed in the absence of the two entities, and the Ninth Circuit agreed, stating, among other reasons, that the two entities could not prevail on the merits of their claims. The Supreme Court granted certiorari.

Appealability and Standing Issues. The Court began by dealing with the questions it asked the parties to address when it granted certiorari: whether the Republic and the Commission, having been dismissed from the interpleader action, had the right to appeal the District Court's determination under Rule 19 that the action could proceed in their absence, and whether they had the right to seek the Court's review of the Court of Appeals' judgment affirming the District Court.

The Pimentel class -- beneficiaries of the interpleader judgment that they owned the assets in issue -- had contended that the Republic and the Commission, having been dismissed from the action on sovereign immunity grounds, were not proper parties in the Court of Appeals or in the Supreme Court. However, the Court ended up not ruling on that issue because it found that other parties before it, Arelma and PNB, also had sought review of the Ninth Circuit's decision. They, too, moved to dismiss the action under Rule 19(b), had appealed from the denial of their motion, and were petitioners before the Court. The Court reiterated the general rule that any party may move to dismiss an action under Rule 19(b). Additionally, any court with proper jurisdiction may consider *sua sponte* the absence of a required person and dismiss for failure to join.

The Court rejected the Pimentel class's argument that Arelma and PNB lacked standing to raise the issue whether the action could proceed in the absence of the Republic and the Commission. The Pimentel class argued that because Arelma and PNB lost on the merits of their underlying claims to the interpleaded assets, and failed to petition for certiorari on that merits ruling, they abandoned any entitlement to the interpleaded assets and therefore lacked a concrete stake in the outcome of further proceedings. The Court rejected the argument because dismissal of the action under Rule 19(b) would have benefited Arelma and PNB by vacating the judgment denying them the interpleaded assets. The Court stated that a party that seeks to have a judgment vacated in its entirety on procedural grounds does not lose standing simply because the party does not petition for certiorari on the substance of the order."

Comment. It is interesting that the Court did not resolve the question it presented to the parties. It would seem that the very parties who would be prejudiced if they were not able to appeal the Rule 19 determination should have the right to appeal. However, because they could not be bound by the interpleader action, arguably they ought not have the

right to appeal. This is an important issue because it is not always true that the existing parties will have an incentive to pursue a Rule 19 issue. *See Moores Federal Practice* § 19.02[4][d].

Persons Required To Be Joined Under Rule 19. The Court then turned to the question whether Merrill Lynchs interpleader action could proceed in the district court without the Republic and the Commission. The Court articulated the three-step process called for under Rule 19. First, under Rule 19(a), a court must determine whether certain persons are required to be joined if feasible." None of the parties disputed that the Republic and the Commission were required to be joined -- so-called necessary parties." They were required to be joined if feasible because without them as parties, their interests in the interpleader action were not protected [*see Fed. R. Civ. P. 19(a)(1)(B)(i)*].

Second, and the problem in Merrill Lynchs action, was that such parties could be joined only if feasible. Here, Merrill Lynch did join them, but they were dismissed on sovereign immunity grounds. In other words, had they not been joined initially as parties, it would not have been feasible to join them if they raised the sovereign immunity defense. Third, however, nonjoinder even of a required person does not necessarily result in dismissal under Rule 19. When joinder is not feasible, under Rule 19(b), the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed because such parties are so-called indispensable" parties. Rule 19(b) sets out four non-exclusive factors that govern this determination. The design of the rule, the Court said, indicates that the determination whether to proceed will turn on factors that are case-specific, which is consistent with a rule based on equitable considerations.

Comment. Before Rule 19 was amended in 1966, the rule used the terms necessary" and indispensable." The Court therefore was correct to point out that earlier versions of the rule, particularly the use of the word indispensable," could imply a rigidity that would be in tension with this case-specific approach." Also, as the Court put it, the use of the word indispensable" in the rule created a verbal anomaly of an indispensable person who turns out to be dispensable after all. (*See Provident Tradesmens, 390 U.S. at 117.*) However, the three-step process envisioned even after the 1966 amendments leaves a similar anomaly -- Required persons may turn out not to be required for the action to proceed after all." To put it another way, required" or indispensable" is a conclusion reached only after the three-step process is completed.

Ninth Circuit Improperly Decided the Merits And Did Not Give Proper Weight to The Assertion of Sovereign Immunity. Before working its way through the Rule 19 analysis, the Supreme Court emphasized the importance of sovereign immunity in the context of the interpleader action. In affirming the district courts refusal to dismiss the case under Rule 19, the Ninth Circuit had in effect decided the merits of the two sovereign entities' claims to the disputed assets. According to the Supreme Court, however, once it was recognized that those claims were not frivolous, it was error for the Ninth Circuit to address the claims on their merits when the entities had been granted sovereign immunity. The consideration of the merits was itself an infringement on foreign sovereign immunity. The bottom line of the Supreme Courts decision is that the Ninth Circuit thus erred in not giving the necessary weight to the absent entities' assertion of sovereign immunity in its Rule 19 analysis.

The doctrine of foreign sovereign immunity, the Court stated, has been recognized since early in the history of our nation, and is designed to give foreign states and their instrumentalities some protection from the inconvenience of suit. The privilege is codified in the Foreign Sovereign Immunities Act (28 U.S.C. §§ 1330, 16021611). Immunity in the present case was uncontested, and the district court had correctly dismissed the two entities on this ground.

The Court continued that giving full effect to sovereign immunity promotes comity interests. Comity and dignity interests take concrete form in this case. The claims of the Republic and the Commission arise from events of historical and political significance for the Republic and its people. The Republic and the Commission have a unique interest in resolving the ownership of or claims to the Arelma assets and in determining if, and how, the assets should be used to compensate those persons who suffered grievous injury under Marcos. There is a comity interest in allowing a foreign state to use its own courts for a dispute if it has a right to do so. The dignity of a foreign state is not enhanced if other nations bypass its courts without right or good cause. Then, too, there is the more specific affront that could result to the

Republic and the Commission if property they claim is seized by the decree of a foreign court."

Accordingly, when sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action *must* be ordered when there is a potential for injury to the interests of the absent sovereign. In a case in which a person asserts frivolous claims, a court may have leeway under both Rule 19(a)(1), defining required parties, and Rule 19(b), addressing when a suit may go forward nonetheless, to disregard the frivolous claim. Here, however, the claims of the absent entities were not frivolous, and the Ninth Circuit should not have proceeded on the premise that those claims would be determined against the sovereign entities that asserted immunity.

Comment. The Court is undoubtedly correct about the importance of protecting the interests underlying the doctrine of sovereign immunity. What is curious, however, and as the partial dissent of Justice Stevens points out, the Court has elevated its importance to the detriment of a proper Rule 19 analysis. When Rule 19 was amended in 1966, the point was to allow for a more flexible and case-specific analysis rather than pigeon-hole certain types of cases as more or less requiring the joinder of absent parties, the 1966 amendments were designed to allow the district court to balance all relevant factors in its determination. The elevation of sovereign immunity as above all other factors is not consistent with that approach.

Justice Stevens, concurring in part and dissenting in part, agreed with Justice Kennedy who wrote the majority opinion, that the Court had jurisdiction and agreed that the Court should not affirm the Ninth Circuit's judgment on the merits of its Rule 19 analysis. He agreed that the courts below erred by concluding that the New York statute of limitations provided a virtually insuperable obstacle to petitioners' recovery of the Arelma, S. A., assets. He therefore agreed that the Court should reverse. But, he wrote that the appropriate disposition of this case would have been to reverse and remand for further proceedings. He was troubled by the majority opinion which in effect gave near-dispositive effect" to the Republics and the Commissions status as sovereign entities, as the Court did by ordering outright dismissal of the case.

He then explained how the Court could engage in flexible, case-specific Rule 19 analysis. For example, he stated that the Ninth Circuit could either order the district court to stay further proceedings pending a reasonably prompt decision of the a related Philippine proceeding, or order the case reassigned to a different district judge to conduct further proceedings. He noted the risk of unfairness in conducting any proceedings without the participation of the Republic and the Commission, but that they could avoid any risk by waiving their sovereign immunity. Indeed, the record provided a basis for believing that they would do so if the case proceeded before a different judge.

First, the Republic did not invoke its sovereign immunity until after the District Court denied its motion seeking dismissal or transfer for improper venue, dismissal on act of state grounds, or recusal of the district judge. The Republic advanced a factual basis for suspecting that the district judge would likely have substantial difficulty in putting out of his or her mind previously-expressed views." For example, the district judge summoned an attorney representing Merrill Lynch to a meeting in chambers after learning that the Republic and the Commission sought to obtain the Arelma funds from Merrill Lynch. At this meeting, the district judge directed Merrill Lynch to file an interpleader action before him in the District of Hawaii and to deposit the Arelma funds with the court, despite the attorney's argument that New York would likely be the more appropriate forum. After Merrill Lynch filed the interpleader action, the district judge sealed the file, making it difficult for other parties to determine the status of the proceedings. According to Justice Stevens, these actions bespeak a level of personal involvement and desire to control the Marcos proceedings" that supported the Republic and the Commission's concern about the district judge's impartiality.

Further, Justice Stevens noted several case-specific facts suggesting that the Republic and the Commission's sovereign interests should be given less weight than in the ordinary case. First, the Republic and the Commission at some point would have to take steps in United States courts (or possibly invoke the assistance of the Attorney General) to recover the assets held in the United States. In other words, the sovereign interest implicated in the Marcos litigation is not of the same magnitude as when a sovereign faces liability: the Republic's interest is in choosing the most convenient venue and time for the suit to proceed."

Second, for decades, the Republic had participated in other proceedings involving Marcos' assets in United States courts without invoking sovereign immunity. Indeed, in 1987 the Republic had filed an *amicus* brief with the Ninth Circuit in the underlying consolidated class action that led to the entry of respondents' judgment against Marcos urging the Ninth Circuit to reverse the district judge's dismissal of two of the cases and to allow the Plaintiffs in those two cases to present their evidence of gross human rights violations against Ferdinand Marcos and to pursue justice in U.S. District Court." Thus, either the Republic was encouraging futile and purely symbolic litigation, or the Republic believed that other creditors would have access to at least a portion of Marcos' vast assets."

How Merits Might Matter. Rule 19 cannot be applied in a vacuum, the Court also stated, and it may require some preliminary assessment of the merits of certain claims. For example, Rule 19 directs a court, in determining who is a required person, to consider whether complete relief can be afforded in that person's absence (*see Fed. R. Civ. P. 19(a)(1)(A)*). Similarly, in the Rule 19(b) inquiry, a court must examine, to some extent, the claims presented and the interests likely to be asserted both by the joined parties and the absent entities or persons. Here, however, it was improper to issue a definitive holding regarding a nonfrivolous, substantive claim made by an absent, required entity that was entitled by its sovereign status to immunity from suit. That privilege, the Court said, is much diminished if an important and consequential ruling affecting the sovereign's substantial interest is determined, or at least assumed, by a federal court in the sovereign's absence and over its objection.

Comment. There seems to be a trend toward conflating the merits of a litigation with procedure. In the class action context, for example, over the last several years, courts have begun to incorporate a merits analysis into their decision whether a class may be certified. (*See 5 Moores Federal Practice* § 23.84.) Here, however, we see the opposite result the merits are not to matter so long as they are non-frivolous.

Application of Rule 19(b) Factors. Once a court has determined that a party is required to be joined, but it is not feasible to join the party, the court must look to the factors in Rule 19(b) to determine whether the action may proceed in the absence of the party or be dismissed. According to the Court, the Ninth Circuit's failure to give proper weight to the two entities' sovereign immunity most directly implicated Rule 19(b)'s first factor, which directs a court to consider the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties. As to the second Rule 19(b) factor -- the extent to which any prejudice could be lessened or avoided by relief or measures other than dismissal -- there was no substantial argument to allow the action to proceed. No alternative remedies or forms of relief had been proposed.

As to the third Rule 19(b) factor -- whether a judgment rendered without the absent party would be adequate -- the Ninth Circuit had understood adequacy "to refer to satisfaction of the remaining parties' claims. However, according to the Court, adequacy refers to the social interest in the efficient administration of justice and the avoidance of multiple litigation. This interest has traditionally been thought to support compulsory joinder of absent and potentially adverse claimants. Going forward with the action without the Republic and the Commission would not further the public interest in settling the dispute as a whole because the Republic and the Commission would not be bound by the judgment.

Finally, with respect to the fourth Rule 19(b) factor -- whether the plaintiff would have an adequate remedy if the action were dismissed -- the Ninth Circuit considered the lack of an alternative forum for some of the other claimants should the action be dismissed. However, in an interpleader action the plaintiff is the stakeholder. As a practical matter, dismissal could protect the stakeholder in some respects. While it would not receive a judgment determining the party entitled to the assets, it was likely that in any later suit it could seek to join the Republic and the Commission and have the action dismissed (again) under Rule 19(b) should they again assert sovereign immunity. Dismissal for nonjoinder to some extent would serve the purpose of interpleader, which is to prevent a stakeholder from having to pay two or more parties for one claim.

The Court concluded by noting that any prejudice to the stakeholder was outweighed by prejudice to the absent

entities invoking sovereign immunity. Dismissal under Rule 19(b) may mean, in some instances, that plaintiffs will be left without a forum, but that result is contemplated under the doctrine of foreign sovereign immunity.

Comment. This analysis, of course, puts Merrill Lynch between the proverbial rock and the hard place. The purpose of interpleader is to put to rest any claim to the property in question. If the interpleader action cannot go forward because some parties cannot be joined, then Merrill Lynch could be open to multiple litigation over the same property and the possibility of inconsistent judgments C giving the property to the Pimentel class or to the Republic and Commission. There is no certainty that there ever would be one forum for resolution of the property dispute. Merrill Lynch would be subject to the possibility of perpetual litigation. The Courts ruling under Rule 19 is therefore at odds with the purpose of interpleader under 28 U.S.C. § 1335. Congress enacted § 1335 to solve the jurisdictional problems -- subject matter and personal -- that often made it difficult for a stakeholder to resolve all claims to particular property. The interpleader statute allows for nationwide service of process and minimal diversity and a small amount in controversy (\$500) to provide a federal forum for resolving property disputes such as the one confronting Merrill Lynch.

Finally, the Courts opinion shows its ambivalence to human rights litigation. The Alien Tort Claims statute continues to be used against governments, corporations and individuals. Many such cases are dismissed on forum non conveniens grounds; others because the plaintiffs fail to state a cognizable claim against one or more defendants. Yet, sometimes, as in this case, a plaintiff or plaintiff class is successful in obtaining a judgment. *Pimentel* shows that obtaining a judgment is not the same as collecting on it. Maybe there is something to Justice Stevens comment that human rights litigation is simply symbolic.

RELATED LINKS: See Moore's Federal Practice for additional discussion:

- 4 Moore's Federal Practice (3d Ed.) § 19.05;
- 4 Moore's Federal Practice (3d Ed.) § 22.04

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Virtual Representation Theory: Georgene Vairo on Taylor v. Sturgell

2008 Emerging Issues 2106

Virtual Representation Theory: Georgene Vairo on Taylor v. Sturgell

By Georgene Vairo

August 6, 2008

SUMMARY: In *Taylor v. Sturgell*, the United States Supreme Court rejected the emerging use of the virtual representation theory as a basis for applying claim preclusion or issue preclusion against a litigant who was not a party to the earlier judgment. This commentary, by Moores Federal Practice Editorial Board member Georgene Vairo, analyzes the *Taylor* opinion in the context of the Courts historic protection of the day-in-court principle.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Cite as: Vairo, Georgene. "*Taylor v. Sturgell*" LexisNexis Expert Commentary, (*Insert date you accessed the document online*).

In *Taylor v. Sturgell*, -- U.S. --, 128 S. Ct. 2161, 76 L. Ed. 2d 155, 2008 U.S. LEXIS 4885, 76 U.S.L.W. 4453 (June 12, 2008), the Supreme Court unanimously interred the emerging use of the virtual representation" theory as a basis for applying claim preclusion or issue preclusion against a litigant who was not a party to the earlier judgment. The Court reversed the D.C. Circuit Court of Appeals decision articulating the theory and setting out the factors and analysis to be used when relying on the virtual representation exception. Justice Ginsburgs opinion is a mini-treatise on preclusion that thoroughly explores the general rule against binding nonparties and the evolution of various theories creating exceptions to that rule. The opinion seeks to draw a bright line that clarifies the limited situations when a nonparty is bound by an earlier judgment.

Facts. Greg Herrick, an antique aircraft enthusiast seeking to restore a vintage airplane manufactured by the Fairchild Engine and Airplane Corporation (FEAC), filed a Freedom of Information Act (FOIA) request seeking copies of technical documents related to the airplane from the Federal Aviation Administration (FAA). The FAA denied his request based on FOIA's exemption for trade secrets, see 5 U.S.C. § 552(b)(4). Herrick took an administrative appeal, but when respondent Fairchild, FEAC's successor, objected to the documents' release, the FAA again denied the request. Herrick then filed an unsuccessful FOIA lawsuit to secure the documents.

Less than a month later, Taylor, Herrick's friend and also an antique aircraft enthusiast, made a FOIA request for the same documents Herrick had unsuccessfully sued to obtain. When the FAA failed to respond, Taylor filed suit in the U.S. District Court for the District of Columbia. Holding the suit barred by claim preclusion, the district court granted

summary judgment to the FAA and to Fairchild, as intervenor in Taylor's action. The court acknowledged that although Taylor was not a party to Herrick's suit, a nonparty may be bound by a judgment if she was virtually represented" by a party. The D.C. Circuit affirmed, announcing a five-factor test for virtual representation." The first two factors of the D.C. Circuit's test "identity of interests" and "adequate representation" -- are necessary but not sufficient for virtual representation. In addition, at least one of three other factors must be established: a close relationship between the present party and his putative representative," substantial participation by the present party in the first case," or tactical maneuvering on the part of the present party to avoid preclusion by the prior judgment."

The D.C. Circuit acknowledged the absence of any indication that Taylor participated in, or even had notice of, Herrick's suit. It nonetheless found the "identity of interests," "adequate representation," and "close relationship" factors satisfied because the two men sought release of the same documents, were close associates," had discussed working together to restore Herrick's plane, and had used the same lawyer to pursue their suits. Because these conditions sufficed to establish virtual representation, the court left open the question whether Taylor had engaged in tactical maneuvering to avoid preclusion.

General Rule Against Nonparty Preclusion. Justice Ginsburg began by reiterating that the application of claim and issue preclusion to nonparties runs up against the deep-rooted historic tradition that everyone should have his own day in court." Thus, she began her opinion by quoting the general rule: It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." [Quoting *Hansberry v. Lee*, 311 U.S. 32, 40, 61 S. Ct. 115, 85 L. Ed. 22 (1940)].

Comment. The manner in which Justice Ginsburg began the opinion was a wonderful predictor of what the Court would do with the virtual representation doctrine. The Supreme Court has closely guarded the idea that everyone should have his or her own day in court. Indeed, Justices to the left on the Court, such as Justice Ginsburg herself, and to the right, such as Justice Scalia, have been equally firm in protecting the day-in-court principle despite concerns about finality and efficiency. In this sense, the *Taylor* opinion can be seen as a twin to Justice Ginsburg's opinion in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997), in which she, joined by Chief Justice Rehnquist, and Justices Scalia, Thomas, Kennedy and Souter, vacated the class action settlement that could have largely ended the asbestos litigation chiefly because of conflicts among class members that resulted in inadequate representation of the class. Similarly, in *Dow Chemical Co. v. Stephenson*, 539 U.S. 111, 123 S. Ct. 2161, 156 L. Ed. 2d 106 (2003), an equally divided court affirmed a Second Circuit case overturning a district court opinion in the Agent Orange litigation that would have barred non-military class members from collaterally attacking the Agent Orange Settlement, also on the grounds of inadequate representation. From these cases, it is clear that the Court will continue to adhere to a formalistic protection of the right to a day in court.

Preclusion Doctrines. The Court began its analysis by noting that the preclusive effect of a federal court judgment is determined by federal common law [*Semtek Intl Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507508, 121 S. Ct. 1021, 149 L. Ed. 2d 32 (2001)], discussed in Apr. 2001 **MOORES FEDERAL PRACTICE UPDATE**, p. 43]. A judgment may result in claim preclusion or issue preclusion, alternatively referred to as *res judicata* and collateral estoppel." Under the doctrine of claim preclusion, a final judgment forecloses successive litigation of the same claim, whether or not relitigation of the claim raises the same issues as the earlier suit. Issue preclusion, in contrast, bars successive litigation of an issue actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim. Together, these doctrines preclude parties from contesting matters that they have had a full and fair opportunity to litigate. But, as stated above, the general rule is that *parties*, not *nonparties*, are precluded. However, the Court noted that there are limited exceptions to the general rule.

Exceptions to General Rule. The Court grouped the exceptions into six categories:

. First, a person who agrees to be bound by the determination of issues in an action between others is bound in accordance with the terms of his or her agreement [see Restatement (Second) of Judgments § 40].

. Second, nonparty preclusion may be justified based on a pre-existing substantive legal relationship between the person to be bound and a party to the judgment. Qualifying relationships include: preceding and succeeding owners of property, bailee and bailor, and assignee and assignor [see Restatement (Second) of Judgments §§ 43-44, 52, 55].

. Third, in certain limited circumstances, a nonparty may be bound by a judgment because he or she was adequately represented by someone with the same interests who was a party to the suit. Representative suits with preclusive effect on nonparties include properly conducted class actions, and suits brought by trustees, guardians, and other fiduciaries.

. Fourth, a nonparty is bound by a judgment if he or she assumed control over the litigation in which that judgment was rendered; because such a person has had the opportunity to present proofs and argument, he or she has already had his or her day in court, despite not being a formal party to the litigation.

. Fifth, preclusion is applicable when a person who did not participate in a litigation later brings suit as the designated representative of a person who was a party to the prior adjudication. A party bound by a judgment may not avoid its preclusive force by relitigating through a proxy. Similarly, the Supreme Court in this case noted that preclusion is appropriate when a nonparty later brings suit as an agent for a party who is bound by a judgment.

. Sixth, in certain circumstances a special statutory scheme may expressly foreclose successive litigation by nonlitigants if the scheme is otherwise consistent with due process. Examples of such schemes include bankruptcy and probate proceedings, and *quo warranto* actions or other suits that may be brought only on behalf of the public at large.

Supreme Court Rejects Virtual Representation. In addition to the six foregoing exceptions to the general rule against nonparty preclusion, some lower courts, including the District of Columbia Circuit in this case, have recognized a virtual representation" exception [see *Taylor v. Blakey*, 490 F.3d 965 (D.C. Cir. 2007); see also *Tyus v. Schoemehl*, 93 F.3d 449 (8th Cir. 1996); *Kourtis v. Cameron*, 419 F.3d 989 (9th Cir. 2005)]. The Supreme Court in *Taylor* unanimously rejected the use of the virtual representation doctrine to bind a nonparty to a judgment in circumstances that do not fit within one of the six established categories of exceptions to the general rule against nonparty preclusion.

The Court expressly rejected an argument that preclusion is appropriate as a result of virtual representation" whenever an equitable and fact-intensive balancing test establishes that the relationship between a party and a nonparty is close enough to bring the nonparty within the judgment. The Court explained that, because of the fundamental nature of the general rule against nonparty preclusion, it has delineated only a few discrete exceptions that apply in limited circumstances.

The Court also explained that a broad doctrine of virtual representation should be rejected because of the limitations on nonparty preclusion based on adequate representation (the third established exception to the general rule against nonparty preclusion). A party's representation of a nonparty is adequate for preclusion purposes only if, at a minimum: (1) the interests of the nonparty and his or her representative are aligned; and (2) either the party understood himself or herself to be acting in a representative capacity, or the original court took care to protect the interests of the nonparty. In addition, adequate representation sometimes requires (3) notice of the original suit to the persons alleged to have been represented. In the class-action context, these limitations are implemented by the procedural safeguards contained in *Federal Rule of Civil Procedure 23*.

The Court was concerned that an expansive doctrine of virtual representation would effectively recognize a common-law class action, with preclusion based on identity of interests and some kind of relationship between parties and nonparties, but without the procedural protections provided by Rule 23. These protections, grounded in due process, could be circumvented if the Court were to approve a virtual representation doctrine that allowed courts to create such *de facto* class actions.

The Court also noted that a broad balancing test under a doctrine of virtual representation would significantly complicate the task of district courts faced with preclusion issues. Given that preclusion doctrine is intended to reduce the burden on courts and litigants, the Court's clear, specific criteria for preclusion are preferable to the all-things-considered balancing approach that would be required under the virtual representation doctrine.

Finally, the Court rejected a contention that nonparty preclusion should apply more broadly in public-law" litigation than in private-law" litigation. The Supreme Court acknowledged that Congress could adopt procedures limiting repetitive litigation of claims that can be brought on behalf of the public at large. However, Congress had not done so in the statutory scheme involved in this case, the Freedom of Information Act [*see* 5 U.S.C. § 552], and the Court found that the absence of statutory constraints on successive actions weighed against the imposition of such constraints through extraordinary application of the common law of preclusion. The Court also noted that, to the extent that there is a risk of repetitive lawsuits under legislation like the Freedom of Information Act, *stare decisis* will allow courts swiftly to dispose of such suits brought in the same circuit. The Court also stated that the human tendency not to waste money will deter the bringing of suits based on claims or issues that have already been adversely determined against others [quoting D. Shapiro, *Civil Procedure: Preclusion in Civil Actions* 97 (2001)].

Comment. The amorphous balancing test required by the D.C. Circuits virtual representation doctrine clearly is at odds with the Courts protection of due process and day-in-court values in general, and with its constrained approach to nonparty preclusion, in particular. Darwinian evolution of preclusion doctrine is dead. The Court adhered to a formalistic approach despite knowing that it was sacrificing the competing finality principle. A purist will agree that protecting constitutional rights is more important than achieving peace. However, the Court did leave a crack in the door that is likely to result in contentious litigation in the future.

Although the Court disapproved the theory of virtual representation, and held that the preclusive effects of a judgment in a federal question case decided by a federal court should instead be determined according to the six established grounds for nonparty preclusion, the Court opined that its decision is unlikely to cause a great shift in actual practice. It noted that many lower-court opinions that appeared to be decided on virtual representation grounds are at least arguably defensible on one of the six established grounds. Indeed, the Court found that preclusion might have been appropriate under the fifth established ground --that a nonparty to the prior litigation brought the present suit as a representative or agent of a party who is bound by the prior adjudication. Because this question had not been adjudicated below, the Court remanded for the lower courts to consider whether the present plaintiff was acting as the agent of the plaintiff in the previous suit. The Court instructed that on remand, the defendant would bear the burden of proving the agency relationship, because preclusion is an affirmative defense.

The problem here is that an inquiry into whether there has been tactical maneuvering is at odds with the Courts overall approach of looking at the exceptions to the general rule rigidly and formalistically. Fortunately the Court has set the bar for such a finding rather high, stating that the lower courts should be cautious about finding preclusion on the basis of agency. The Court states that a mere whiff of tactical maneuvering" will not suffice; instead, principles of agency law indicate that preclusion is appropriate only if the putative agent's conduct of the suit is subject to the control of the party who is bound by the prior adjudication. Despite this admonition, it will be interesting to see how the caselaw on this point evolves.

References. 18 *Moore's Federal Practice* (3d Ed.) §§ 131.40[3][e][i][B], 132.04[1][b][vi].

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Joe McDonnell on Petraski v. Thedos

2008 Emerging Issues 2859

Joe McDonnell on Petraski v. Thedos, 2008 Ill. App. LEXIS 169 (Ill. App. Ct. 2008)

By Joseph B. McDonnell

August 4, 2008

SUMMARY: The admissibility of evidence of intoxication has troubled Illinois trial lawyers and judges for years. If a pharmacist testifies as an expert witness that plaintiffs blood-alcohol level was over the presumptive limit of intoxication at the time of the accident, but cant state that she was intoxicated -- is the evidence admissible? This commentary, written by Joe McDonnell, explores Petraski v. Thedos, and the answer to that question.

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ARTICLE: Background. The admissibility of evidence of intoxication has troubled Illinois trial lawyers and judges for years. The general rule is that a partys consumption of alcohol prior to the occurrence in question is inadmissible in the absence of evidence, lay or expert, that the person was intoxicated. Thus, innuendos of intoxication, or evidence of drinking unsupported by evidence of actual intoxication, are impermissible. *Benuska v. Dahl*, 87 Ill.App.3d 911 (1980). There must be a showing that the alcohol impaired the partys mental and physical faculties. *Clay v. McCarthy*, 73 Ill.App.3d 462, 466 (1979). It must be shown that the intoxication resulted in an impairment of mental or physical abilities and a corresponding diminution in the ability to act with ordinary care. *Marshall v. Osborn*, 213 Ill.App.3d 134 (1991). Unless such intoxication evidence is presented, the prejudice that might result to a party based solely on evidence of drinking was deemed too strong to warrant any reference to it. *Sandberg-Schiller v. Rosello*, 119 Il.App.3d 318, 331 (1983). (Evidence of drinking in a criminal case appears to have been treated somewhat differently by the courts. For an analysis, see *People v. Gosse*, 119 Ill.App.3d 733 (2nd Dist. 1983)).

Governing Principles. It has long been established that a lay person (assuming a proper foundation) may express an opinion as to a persons intoxication or sobriety where relevant to the issues in the case. *Vandever v. Preston*, 13 Ill.App.2d 29 (1957)(lay witness competent to testify as to whether an individual is intoxicated). An emergency medical technician was properly allowed to testify that the defendant was intoxicated at the time of the accident, based on a strong odor of alcohol on his breath and his belligerency while being treated. *Lindsay v. Appleby*, 91 Ill.App.3d 705 (1980). Similar testimony by three paramedics who attended the defendant driver at the accident scene was held properly admitted. *Buczynia v. Cuomo & Son Cartage*, 146 Ill.App.3d 404 (1st Dist. 1986).

Bearing on Duty of Care. Intoxication neither bars recovery nor relieves the intoxicated party from the duty of exercising the same degree of care as a sober person. *Countryman v. Winnebago County*, 135 Ill.App.3d 384, 393 (2d Dist.1985).

Expert Testimony. Where lay opinion evidence is unavailable, a party may attempt to prove intoxication through an expert witness. The evidence will be admissible, so long as there is an appropriate foundation upon which the experts opinion may be based and the evidence meets the relevancy test. This was the problem which confronted the court in *Petraski v. Thedos*, 2008 Ill. App. LEXIS 169 (Ill. App. Ct. 2008), recently decided by the First District Appellate Court.

The trial judge had granted plaintiffs motion *in limine* to bar the testimony of defendants expert, who had opined in discovery that the plaintiff, who had made a left-turn (with the arrow in her favor) in front of a deputy sheriffs vehicle on an emergency run, had had a blood-alcohol level greater than .08 (the level of presumptive intoxication under the statute) at the time of the accident. The testimony was based on an examination of medical records, including a blood test result which revealed a blood serum reading of .116 grams per deciliter approximately an hour and a half after the accident. The witness was unable to state what the plaintiff had drunk, when she had stopped, or what she had eaten. He did testify at his deposition, however, that with a blood alcohol level of .116, the overwhelming majority of the population would be impaired in their ability to operate a motor vehicle safely.

The appellate court held that the testimony should have been admitted. Any questions as to the appropriate application of the recognized method of calculating the BAC at the time of the accident were appropriate to test the witness opinion, but were not of such a nature as to bar the testimony. The Court seemed particularly persuaded by the fact that, even without hearing any evidence of drinking (let alone intoxication), the jury found the plaintiff to have been 25% contributorily negligent, even though she admittedly had the left-turn arrow in her favor at the time of the accident. By reason of the trial courts ruling barring the expert testimony, defense counsel was unable to respond to plaintiffs challenge in closing argument that the defense could not demonstrate any reason why the plaintiff would have turned in front of the police vehicle unless she had the green arrow. Hearing the defense witness testimony might have provided an explanation.

The Significance of *Petraski*. This is a case in which a very substantial verdict for the plaintiff (over \$35,000,000) was overturned because of what the appellate court perceived to be an unduly rigid adherence to the *no intoxication ergo no evidence of drinking* rule. Without emasculating the rule, the decision makes it clear compliance is possible where there is a sufficient evidentiary foundation and a qualified expert to interpret the evidence.

Tips for Practitioners. Evidence of intoxication entitles a party to an instruction on intoxication as an element to be considered by the jury in determining whether a partys conduct conformed to the standard of ordinary care. *Brown v. Decatur Memorial Hosp.*, 74 Ill.App.3d 436, (4th Dist. 1979), *aff'd*, 83 Ill.2d 344, 415 N.E.2d 337, 47 Ill.Dec. 332 (1980). The instruction is found at IPI 12.01 (Intoxication as Negligence); *see also* 2-39 Illinois Forms of Jury Instruction § 39.40.

The first priority, however, in establishing intoxication of a party, is to develop as much evidence as possible concerning the partys behavior (odor of alcohol, slurred speech, glassy eyes, disheveled appearance, confused, unruly or obnoxious conduct, inappropriate responses, refusal to follow directions, etc.) Where a blood alcohol test is performed and the result is above the presumptive level of intoxication (625 ILCS 5/11-501.2(b)(3)), expert testimony must tie up the test with the time of the accident by extrapolation of the results to the critical time. This may be established through accepted standards of admissibility applied to evidence of blood alcohol tests. *See Cuellar v. Hout*, 168 Ill.App.3d 416, 420-21 (1988). Keep in mind that, where a blood test is in evidence, you start with a statutory presumption of intoxication, and the task, then, of proving intoxication is made easier with evidence that nails down that presumption and makes it, for purposes of argument, conclusive.

When opposing admission of evidence of intoxication based on lay opinion testimony, foundational evidence should be challenged if it is even questionably relevant, i.e., where the proposed conclusion is as easily explained by circumstances having nothing to do with intoxication, such as excitement, feelings of intimidation, accusatory conduct by others, illness or disease, the effects of prescription medication, etc. Where expert testimony is offered, again the

adequacy of the foundation must be challenged if at all possible, e.g., whether procedural requirements were complied with, propriety of the conversion factor (the higher the better for the challenger), challenging the chain of evidence, and other appropriate factors.

For Further Discussion on Evidence of Intoxication and Negligence, see 1-701 Illinois Evidence Courtroom Manual 1 (discussing opinion testimony on intoxication); 2-39 Illinois Forms of Jury Instruction § 39.40 (discussing the proper use and authority for the *Intoxication As Negligence* jury instruction); and 1-14 Illinois Tort Law § 14.03 (discussing the evidence of intoxication and the determination contributory negligence).

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Aloe on Charles v. Long Is. Coll. Hosp., 2008 N.Y. App. Div. LEXIS 176 (2008)

2008 Emerging Issues 2860

Paul H. Aloe on Charles v. Long Is. Coll. Hosp., 2008 N.Y. App. Div. LEXIS 176 (N.Y. App. Div. 2d Dep't Jan. 15, 2008)

By Paul H. Aloe

August 4, 2008

SUMMARY: Charles v. Long Is. Coll. Hosp., a Second Department opinion, raises a concern for third party practice. This decision has the potential for mischief and underscores some analytical flaws in recent case law treatment of CPLR 1008. This commentary, written by Paul Aloe, discusses the implications of this important decision.

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ARTICLE: *Charles v. Long Is. Coll. Hosp.*, a recent memorandum opinion in the Second Department, raises a concern for third party practice. *Charles* holds that because the plaintiffs service on the defendant/third party plaintiff was defective, the third party complaint served by the defendant/third party plaintiff against the third party defendant had to be dismissed, even though the defendant did not raise the issue of defective service, and even though the service made by the defendant/third party plaintiff on the third party defendant appears to have been good. This decision has the potential for mischief and underscores some analytical flaws in recent case law treatment of CPLR 1008.

CPLR Provisions Discouraging Technical Objections. A variety of provisions in the CPLR are designed to discourage defendants from raising a technical service objection where the defendant nevertheless received process and was otherwise subject to New York jurisdiction. These provisions include the following:

CPLR 304, after the commencement by filing amendments enacted in 1992, makes commencement of the action the filing, rather than the service, of the summons and complaint.

CPLR 306-b permits the court to extend the time for service if service is not properly made within the requisite time frame.

CPLR 3211(e) requires that a defendant who wishes to avail himself or herself of a technical service defect do so by motion, either brought before answering the complaint, or, if the defendant answers the complaint, within sixty days of the answer.

CPLR 320(b) provides that if the service defect is not raised as provided in CPLR 3211, then the appearance by the defendant is the equivalent of service of process.

These provisions combine to discourage the defendant from raising technical service issues by forcing the defendant to raise the issue early by motion and giving the defendant little reward for the effort since, even if the defendant succeeds on the motion, the plaintiff can simply seek to extend the time for service, obviate the objection, and make new service on the defendant. Unlike the old commencement-by-service system, where an invalidation of service led to the dismissal of the action without the opportunity to re-commence it if the statute of limitations had run, under the commencement-by-filing system, the plaintiff can simply cause the service to be made anew in the same action.

The dilemma for the improperly served defendant. *Charles* presents a dilemma for the improperly served defendant who wishes to serve a third party defendant. If the defendant fails to move to dismiss the main complaint for improper service, the third party defendant can move to dismiss the third party complaint because of the improper service of the main summons and complaint. By the time this motion has been interposed, the time for the main defendant to interpose his or her own motion against the plaintiff under CPLR 3211 will likely have run out.

Background for *Charles* decision. *Charles* appears to be predicated on an earlier First Department decision, *Prigent v. Friedman*.ⁿ¹ *Prigent* involved a slightly different situation. CPLR 306-b, in effect at the time of *Prigent*, required that the plaintiff file an affidavit of service with the County Clerk within 120 days of the filing of the summons and complaint.ⁿ² The plaintiff in *Prigent* failed to timely file the affidavit of service. One of the defendants successfully moved to dismiss on that basis and the other answered the complaint and thereafter served a third party complaint on the defendant who had been dismissed, seeking to interpose a claim for indemnification and recovery of costs and attorneys' fees in defending the main action. The First Department held that the third party defendant was entitled to be dismissed pursuant to CPLR 1008, which permits the third party defendant to interpose against the main plaintiff any defense that the defendant would have, even one that was waived. According to the First Department, it was of no moment that the third party complaint sought relief different from the main complaint, or that the objection had been waived by the main defendant. Had the defendant properly moved to dismiss, the indemnification claim would be academic, and attorneys' fees would not have been incurred.ⁿ³

To make sense of this it is necessary to review CPLR 1008. CPLR 1008 allows the third party defendant to assert against the plaintiff in his answer any defenses which the third-party plaintiff has to the plaintiff's claim. This has been interpreted to mean that the third party defendant can defeat the third party complaint by any defense that the third party plaintiff has against the main plaintiff but has waived.ⁿ⁴ The third party defendant is not bound by a determination made in the case before the third party defendant was joined in the action.ⁿ⁵ Where the defense is one that would absolve the main defendant of any liability, this principle makes sense. But it makes less sense where the objection is a service objection since, in that situation, the defendant would not necessarily be absolved of liability even if the motion were successful. A defense should not be confused with a procedural objection, even one that might lead to a dismissal. If the defendant remains liable on a properly commenced action, then the objection is not truly a defense.

Confusion between objections and defenses. A careful reading of the CPLR reveals a distinction between an objection and a defense. CPLR 3211(e), which governs the time period for interposing a motion based on a technical defect as to service, refers to the issue as an objection rather than a defense. CPLR 3018, which contains a list of affirmative defenses that must be pled in an answer, does not include a service defect among them. Apart from the linguistic distinction, there is a substantive difference between objections and the kinds of defenses set forth in CPLR 3018(b). Those defenses all relate to items which, if sustained, completely defeat plaintiffs claim against the defendant. See CPLR 3018(b) (listing arbitration and award, collateral estoppel, culpable conduct claimed in diminution of damages as set forth in article fourteen-A, discharge in bankruptcy, facts showing illegality either by statute or common law, fraud, infancy or other disability of the party defending, payment, release, res judicata, statute of frauds, or statute of limitation). On the other hand, a technical defect in the service of process, or in the commencement process, does not defeat the plaintiffs claim, it defeats the action, leaving the plaintiff to start over, or, in the situation of service, to obtain

leave from the court to extend the time for service under CPLR 306-b.

CPLR 1008 is founded on sound principal where it allows the third party defendant to defend on a defense that would defeat the plaintiffs claim in its entirety. But where the issue is a procedural objection, one that the plaintiff can cure by re-service or commencing an entirely new action, it makes less sense. The defendant in that situation remains liable to the plaintiff, and the third party defendant, even if dismissed, is subject to an entirely new action for contribution or indemnity after the judgment is paid in the main action, the only difference being that the policy behind joining the main action with the third party action is undermined.

Another problem: Defendants appearance. *Charles* is problematic for yet another reason. The Court in *Charles* failed to consider CPLR 320(b). Under that provision, the failure of the main defendant to interpose a motion for a service defect makes the defendants appearance equivalent of the personal service of the summons. n6 At that point, there is service, and there is no personal jurisdiction issue, whether it is an objection or a defense.

The Trap. *Charles*, however, represents a trap for the defendant who wishes to employ third party practice. If the defendant suspects any procedural defect that can lead to dismissal and fails to raise it by motion, the defendant can then find that defect used against it. It does not matter how trivial or technical if dismissal is possible, the defendant can lose its third party rights if the defendant fails to pursue the issue. Of course, if the defendant raises the issue before the third party defendant is joined and loses, the third party defendant still has a second chance to raise the issue against the main defendant if the ruling was made before the third party defendant was joined. Presumably, it would be difficult to make the same argument to the same judge who decided the issue, but it is possible under the rule that a third party defendant is not bound by the determination if the third party defendant was not joined at the time the determination was made.

The Committee on Civil Practice Law and Rules of the New York State Bar Association has proposed a statutory amendment that would overrule *Charles*. But until that happens, defense counsel needs to take some care when contemplating third party practice.

For additional discussion of the issues raised in this commentary, see New York Civil Practice: CPLR (Weinstein, Korn & Miller) P 304.01 (Action or Proceeding Commenced by Filing), P 306-b.03 (Court May Dismiss for Failure to Timely Serve or it May Extend Time for Service), P 1008.02 (Third-Party Defendant May Raise Defenses Against Plaintiff or Third-Party Plaintiff), P 3211.49 (CPLR 3211(e) Generally Requires Single Motion to Dismiss, Although Certain Objections Are Not Waived), P 320.10 (Objection May Be Raised by Motion or Pleading), P 3018.13 (Affirmative Defenses Must Be Plead).

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n1 . 264 A.D.2d 568, 695 N.Y.S.2d 79 (1st Dept 1999)

n2

[2]. See L 1992, ch 216, § 7. This version of CPLR 306-b was replaced by L 1997, ch 476, § 1, eff Jan 1, 1998

n3

[3]. 264 A.D.2d at 569, 695 N.Y.S.2d at 80

n4

[4]. See *Cogan v. Madeira Associates*, 1 A.D.3d 1066, 766 N.Y.S.2d 475 (4 Dept. 2003). *Weitzner v. New York City Dep't of Social Services*, 212 A.D.2d 414, 622 N.Y.S.2d 688 (1st Dep't 1995); New York Civil Practice: CPLR (Weinstein, Korn & Miller) 1008.02.

n5

[5]. See *Nickerson v. City of New York*, 309 A.D.2d 588, 765 N.Y.S.2d 510 (1st Dep't 2003)

n6

[6]. CPLR 320(b) (subject to the provisions of subdivision (c), an appearance of the defendant is equivalent to personal service of the summons upon him, unless an objection to jurisdiction under paragraph eight of subdivision (a) of rule 3211 is asserted by motion or in the answer as provided in rule 3211.)

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Mr. Aloe served as chair of the New York State Bar Association Committee on Civil Practice Law and Rules from 1992 to 1998. He continues to be actively involved in the crafting of legislation affecting the Civil Practice Law and Rules, and has authored the annual civil practice review for the Syracuse Law Review from 1999 through 2004. He has also authored numerous other articles on civil practice.



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Joe McDonnell on the Illinois Insurance Placement Liability Act

2008 Emerging Issues 2861

Joe McDonnell on the Illinois Insurance Placement Liability Act (IPLA); 735 ILCS 5/2-2201: Fiduciary duty of insurance producers

By Joseph B. McDonnell

August 4, 2008

SUMMARY: Illinois Insurance Placement Liability Act (IPLA) 735 ILCS 5/2-2201 concerns the liabilities of insurance brokers and agents: How much protection does it give to these insurance producers for breach of their fiduciary duty to the insured? Is this fair? Is it constitutional? This commentary, written by Joe McDonnell explores the intricacies of this statute.

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ARTICLE: Consequences of a fiduciary relationship. The existence of a fiduciary relationship imposes upon the fiduciary a duty not present in the usual contractual arms-length undertaking. While in every contract in Illinois there is an implicit obligation of each party to act in good faith in carrying out the terms of the agreement, the existence of a fiduciary relationship adds an important element: the element of *trust* placed in the fiduciary by the other party.

There are many examples of a fiduciary relationship: guardian and ward, administrator and heirs, trustee and beneficiary, principal and agent, lawyer and client. In general, the term describes any relationship wherein trust and confidence are reposed in the fiduciary by the other party.

In a lawyer-client relationship, for example, the lawyer is under a duty to the client to exercise that degree of professional care and skill which reasonably qualified lawyers would exercise under the same or similar circumstances. But there is also inherent in the lawyer-client relationship a fiduciary duty on the part of the lawyer. Depending upon the facts of the case, the fiduciary duty may constitute an additional basis for relief in a legal malpractice case, for example, if the lawyer fails to account for the clients funds which come into the lawyers possession.

Historically, Illinois has recognized a fiduciary relationship between an insured and the insureds broker, acting as the insureds agent. *Perelman v. Fisher*, 298 Ill.App.3d 1007, 1011 (1st Dist. 1998)(The relationship between and insured and his broker, acting as the insureds agent, is a fiduciary one); *Cincinnati Insurance Co. v. Guccione*, 308 Ill.App.3d 220 (2nd Dist. 1999)(the relationship between and insured and his broker is fiduciary); *Economy Fire & Casualty Co. v. Bassett*, 170 Ill.App.3d 765, 771 (5th Dist. 1988)(Illinois law places a particular burden on insurance producer to exercise competence and skill when procuring coverage).

The existence of a fiduciary duty is particularly important in cases where the insured may not have read the policy procured at his or her request, or has read it incompletely. Under Illinois law, the insured's failure to read the contract and point out errors is not considered contributory negligence as a matter of law and, therefore, is not an absolute bar to recovery based on breach of fiduciary duty. *Black v. Illinois Fair Plan Assn.*, 87 Ill.App.3d 1106, 111 (5th Dist. 1980); *Economy Fire & Casualty Co. v. Bassett*, 170 Ill.App.3d 765, 771 (5th Dist. 1988).

Immunity from breach of fiduciary duty under the statute. The advantage of asserting breach of fiduciary duty in an action against an insurance producer has been compromised to some extent, at least, by statute. In 1996, the Illinois legislature enacted Public Act 89-638, which added *Section 2-2201 to the Code of Civil Procedure* (735 ILCS 5/2-2201), effective Jan. 1, 1997. Section (a) of the statute provides that an insurance producer shall exercise ordinary care and skill in renewing or placing coverage for an insured or prospective insured, but Section (b) of the statute states that no cause of action concerning the sale, placement, procurement, renewal, binding, cancellation of, or failure to procure a policy

shall subject the insurance producer to civil liability under standards governing the conduct of a fiduciary or a fiduciary relationship except when the conduct upon which the cause of action is based involves the wrongful retention or misappropriation by the insurance producer of any money that was received as premiums, as a premium deposit, or as payment of a claim.

735 ILCS 5/2-2201(b).

Section (d) reiterates that claims based on negligence concerning the sale, placement, procurement, renewal, binding, cancellation of or failure to procure any policy of insurance, are not affected. 735 ILCS 5/2-2201(d).

Section (b) of the statute, therefore, grants an exemption from liability for breaches of fiduciary duty by insurance producers and brokers. See *Mizuho Corp. Bank (USA) vs. Cory & Associates, Inc.*, 341 F.3d 644 (7th Cir. 2003).

How the courts are applying the immunity. There is considerable doubt, however, that the Illinois courts are applying the exemption in quite the fashion that the legislature intended. In a recent case, the exception for claims based on retention or misappropriation of money received as a premium deposit was broadly construed to recognize a claim for breach of fiduciary duty by an insurance broker.

In *Dodd Technologies vs. Mesirow Insurance Services, Inc.*, Illinois Appellate Court, First District, No. 1-06-3300 (filed Feb. 14, 2008), 2008 Ill. App. LEXIS 100, a class action suit, the plaintiff's broker had received contingent commissions from certain insurance companies, conditioned upon his placing insurance with the company for the plaintiff and other putative class members. The commissions were not disclosed to the plaintiff or any other member of the class. In its complaint, the plaintiff alleged in Count I a breach of fiduciary duty on the part of the broker. On defendant's motion, and in reliance on Section (b) of the statute, the claim for breach of fiduciary duty was dismissed. On plaintiff's appeal, the trial court's decision was reversed. Notwithstanding the fact that the contingent commissions (characterized by the court as kickbacks) were not premiums in the strict sense of the word, the court found that the facts fit within the exception to the immunity conferred by Section (b) of the statute and that the breach of fiduciary duty allegations stated a cause of action. The court based its decision in part on the maxim that a court interpreting a statute will assume that the legislature did not intend an unjust result (citing *In re Marriage of Beyer*, 324 Ill.App.3d 305, 309) and that the placement of policies that are not the most advantageous for the consumer is most certainly unjust. *Dodd Technologies, supra*, slip op. at 9. The court accordingly held that the placement of policies with companies that were not the most advantageous for the consumers constitutes the wrongful misappropriation of money received as premiums within the meaning of that language in the exception clause of Section (b) of the statute. Slip op. at 9.

What is the practical effect of the statute? In its effort to reach a just result, the appellate court in *Dodd Technologies* may have engaged in an unduly strained interpretation of the statutory language. However, in view of the

long-established judicial treatment of the broker-insured relationship as creating a fiduciary duty on the part of the broker, it is understandable that the courts may construe the statute in such a manner as to recognize claims based on breach of that duty wherever possible. (One caveat: At this writing, the *Dodd Technologies* case is not final).

Another problem which has apparently not been raised to this point is whether the statute constitutes special legislation, or whether it represents a denial of equal protection in violation of federal and state constitutional guarantees. There is no comparable protection afforded other fiduciaries, including lawyers, trustees of an express trust, or persons acting as agents in other recognized fiduciary relationships. Why are insurance producers protected from claims based on their breach of fiduciary duty, particularly where the same statute that immunizes them from liability for such claims recognizes their traditional duty to use ordinary care and skill in serving their customers?

Implications for Practitioners. It is essential to recognize the difference between an insurance agent and an insurance broker. The term insurance producer is defined in the Illinois Insurance Code as a person required to be licensed under the law of [Illinois] to sell, solicit or negotiate insurance. 215 ILCS 5/500-10. This definition would cover either an agent, traditionally considered in the industry as an independent contractor who represents the insurance company, and a broker, who is identified as one who represents insureds and prospective insureds in dealing with insurance companies. Generally, the Illinois courts have accepted this distinction, holding that an agent is one who represents the insurer, while a broker represents the insured. It will be difficult if not impossible to successfully assert a breach of fiduciary duty claim if the producer is in fact an agent (or an independent contractor) who holds himself out and acts only on behalf of the insurance company. A breach of fiduciary duty claim is accordingly restricted to the broker-insured relationship.

Defense counsel should certainly assert the statutory defense available under 735 ILCS 5/2-2201(b) where the claim is based on breach of fiduciary duty and should resist any attempt to bring the claim within the exception in the last clause of Section (b). The plain language of the exception, the argument should be, limits its reach to the wrongful retention or misappropriation by the insurance producer of any money that was received as premiums, as a premium deposit, or as payment of a claim. 735 ILCS 5/2-2201(b).

Plaintiffs counsel may consider challenging the constitutionality of the statute as suggested above.

For additional discussion of duties of insurance contracts, premiums, agents and brokers, see Illinois Jurisprudence, Personal Injury and Torts § 29:110 (Insurance brokers); Illinois Jurisprudence, Insurance § 1:10 et seq. (Illinois Insurance Code); Illinois Jurisprudence, Insurance § 4:1 et seq. (insurance contract and policy generally); Illinois Jurisprudence, Insurance § 6:1 et seq. (insurance premiums).

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Joe McDonnell on Williams v. City of Evanston

2008 Emerging Issues 2862

Joe McDonnell on Williams v. City of Evanston

By Joseph B. McDonnell

August 4, 2008

SUMMARY: Competing public policy concerns embodied in legislation such as the Tort Immunity Act make doing battle against governmental entities a challenging enterprise, as the plaintiffs in *Williams v. City of Evanston* learned. This commentary, written by Joe McDonnell, explores the implications of this important decision.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: In *Williams v. City of Evanston*, 2007 Ill. App. LEXIS 1369 (Ill. App. 1st Dist 2007) the plaintiff faced the daunting challenge of establishing that the conduct of the municipality through its employee was sufficiently blameworthy to satisfy the statutory willful and wanton requirement so as to hold the municipality liable.

Background for the challenge. The doctrine of sovereign immunity, based on the theory that the King can do no wrong, was abolished in Illinois by judicial decision in 1959. *Molitor v. Kaneland Community Unit School Dis. No. 302*, 18 Ill.2d 11 (Ill. 1959). Quoting from a Florida case, the Illinois Supreme Court said that in preserving the sovereign immunity theory, the courts have overlooked the fact that the Revolutionary War was fought to abolish that divine right of kings on which the theory is based. *Molitor*, 18 Ill.2d at 21-22.

It didn't take long, however, for the Illinois legislature to resuscitate the doctrine, at least in part. In 1965, the Tort Immunity Act was passed to protect local public entities and their employees from liability resulting from the operation of government. *DeSmet v. County of Rock Island*, 219 Ill.2d 497 (Ill. 2006). Its purpose was to ensure that public funds were not dissipated by private damage awards. Thereafter, the Illinois Constitution of 1970 reserved to the legislature the ultimate responsibility of determining whether local units of government were immune from liability in tort. *Ware v. City of Chicago*, 375 Ill.App.3d 574 (1st Dist. 2007).

Immunity May Be Partial or Total. Two important principles have emerged from the courts construction of the Act. The first concerns the reach of an immunity provided in the Act, either with respect to the entity involved or the type of conduct immunized by the statute. Where the statute, for example, states that neither a local public entity nor its employee shall be liable for failure to provide police protection, the immunity is total, and without exception for willful or wanton conduct. *Village of Bloomington v. CDG Enterprises, Inc.*, 196 Ill.2d 484 (Ill. 2001). The second arises

where the legislature chooses to limit immunity to cover only negligence. It has unambiguously done so (*DeSmet v. County of Rock Island*, 219 Ill.2d 497, 514 (Ill. 2006)), generally by specifying that certain conduct on the part of public entities is not actionable, or that certain municipal entities and/or their employees shall not be liable except for willful and wanton conduct. It is this second principle that was involved in *Williams v. City of Evanston*.

The First Hurdle: Satisfying the Statutory Definition. In *Williams*, the plaintiffs, driver and passenger, sustained injuries when struck at an intersection by an Evanston city ambulance. The ambulance driver admitted that he had not stopped for the red light, but had slowed his vehicle to 15-20 mph upon entering the intersection and was going 5 mph when the collision occurred. The speed of plaintiffs vehicle was estimated at 20-25 mph by both of its occupants. And, although neither of them saw the ambulance before the collision, they estimated its speed at the time of the collision as between 40 and 50 mph, based upon the impact. The speed limit for traffic in the ambulances lane was 25 mph. Plaintiffs also produced photographs which they contended demonstrated a high-speed collision, but they did not produce expert testimony interpreting the photographs.

The statute governing the case stated that, [e]xcept for willful and wanton conduct, neither a local public entity, nor a public employee acting within the scope of his employment, is liable for an injury caused by the negligent operation of a motor vehicle when responding to an emergency call 745 ILCS 10/5-106. It was undisputed that the ambulance was responding to an emergency call, so plaintiffs were required to make a submissible case of willful and wanton conduct in compliance with the statute.

The defense moved for summary judgment, contending that the evidence taken as a whole was insufficient to warrant a finding of willful and wanton conduct. The trial court agreed, and entered judgment in defendants favor. On plaintiffs appeal, the First District affirmed.

The Decision. The court noted initially that the Tort Immunity Act defines willful and wanton conduct as a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property. 745 ILCS 10/1-210. This is essentially the definition which has been approved by the Illinois Supreme Court. See *Pfister v. Shusta*, 167 Ill.2d 417 (1995).

Acknowledging a split of authority on comparable factual situations considered by Illinois courts of review, the first district determined that, giving plaintiffs the benefit of every doubt, the testimony was insufficient to create a factual issue for a jury's determination. A driver of an emergency vehicle is not required to stop for a traffic signal (*Illinois Vehicle Code*, 625 ILCS 5/11-205), so the admitted fact that the ambulance driver had not stopped for the red light was insufficient to raise a question of willful and wanton conduct. Neither was the driver's alleged failure to activate his emergency signals sufficient to raise the issue (citing *Shuttlesworth v. City of Chicago*, slip op. at 11, decided Nov. 5, 2007). Finally, the requirement of the City of Evanston that drivers of emergency vehicles slow down or stop at traffic signs during an emergency run was unavailing to the plaintiffs. Previous authority has held that violation of a self-imposed rule does not normally impose a legal duty, let alone constitute evidence of either negligence or willful and wanton conduct. *Wade v. City of Chicago*, 364 Ill.App.3d 773 (2006). Moreover, the evidence did not support the assertion that the driver was operating the ambulance at a high rate of speed. Since the plaintiffs' testimony was clear that they did not see the ambulance prior to impact, their respective estimates of speed based on impact were of little or no worth.

The court also noted that the photographs in the record were insufficient, in the absence of expert testimony, to raise an issue of excessive speed, citing *DiCosola v. Bowman*, 342 Ill.App.3d 530 (2003). The summary judgment in favor of the city and its employee was affirmed.

Tips for Practitioners. The restrictions set forth in the Tort Immunity Act with respect to limiting the liability of a public entity and its employee to actions demonstrating willful and wanton conduct present a serious hurdle to plaintiffs in accidents resulting from collisions with an authorized emergency vehicle. The bar is high, and, while one need not show an intentional harm, many times the circumstances are such that the necessary proof may be only degrees less than

intentional wrongdoing. *Pfister v. Shusta*, 167 Ill.2d 417, 422 (1995). Counsel must emphasize that driving an emergency vehicle is not a license to ignore other vehicles, cross-traffic, obstructions to view, and speed limits.

From the defense standpoint, in most cases presenting a serious question as to the nature of the alleged wrongdoing, a motion for summary judgment should be filed. It then becomes a matter of persuasion and good-lawyering on the part of plaintiffs counsel to overcome the motion.

Once the summary judgment motion is defeated, the real battle begins: convincing a jury that the circumstances (particularly if the emergency was questionable) did not justify the hazard to life and limb evidenced by the drivers conduct. It may be well to remind the jurors that conscious disregard for others is exhibited by conduct which puts others, as well as the actor himself, at peril; and that the prospect of giving aid to others, while commendable, does not justify putting oneself and innocent third parties at risk.

For additional discussion of the Tort Immunity Act, see See generally Illinois Municipal Tort Liability; Illinois Jurisprudence, Personal Injury and Torts § 3:32 (Tort Immunity Act); see also Illinois Municipal Tort Liability § 5.09 (Municipal Liability for Emergency Medical Services); § 1.11 (willful and wanton misconduct).

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William C. Bochet on Sensient Colors v. Allstate

2008 Emerging Issues 2863

William C. Bochet on Sensient Colors v. Allstate, 193 N.J. 373, 939 A.2d 767 (2008)

By William C. Bochet

August 4, 2008

SUMMARY: In *Sensient Colors v. Allstate*, 193 N.J. 373, 939 A.2d 767 (2008), the New Jersey Supreme Court cast aside established principles of comity in favor of public policy concerns. This commentary, written by William Bochet, examines this decision and its potentially destabilizing effects.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: In a case that seems to favor public policy over precedent, the Supreme Court of New Jersey upset the vintage doctrine of comity known as the "first-filed rule." In *Sensient Colors v. Allstate*, 193 N.J. 373, 939 A.2d 767 (2008), the court, in a unanimous opinion, held that "special equities" may trump the precept that if cases filed in different states have the same parties, issues and claims, the case that was the first to be filed will proceed before any others; the actions in the other state or states would be dismissed or stayed until the earlier case is concluded. The court's decision follows the earlier inroad on the rule by the Appellate Division in *American Home Products Corp. v. Adriatic Ins. Co.*, 286 N.J. Super. 24, 668 A.2d 67 (App. Div. 1995). Both cases involved the issue of insurance coverage for environmental tortfeasors.

Putrid Playground. A predecessor corporation of the plaintiff, Sensient Colors, Inc., had a factory in Camden, New Jersey at which the company manufactured chemical products. Their operations apparently contaminated the property where the factory was located. After the factory was abandoned, it became a place where children played and was also frequented by drug users and vandals. The pollution at the property allegedly leached into an adjacent residential project.

The housing project filed suit against Sensient for damages caused by the contamination of its property. Also named was the New Jersey Department of Environmental Protection, which, in turn, cross-claimed for its costs in remediating conditions on Sensient's property.

Sensient sought to have its insurance carriers defend the action and claims against it. One, Zurich, agreed to participate in the defense under a reservation of rights. Competing declaratory judgment filings followed.

No Comity Tonight. The United States Constitution, at Article IV §1, contains a mandate that each state must "give full faith and credit" to the legal judgments of other states. This mutual respect between states is called comity. A

part of comity is the recognition that one state must defer to the courts of another when the same parties are already engaged in the same controversy in another state. Thus, the state where the dispute is filed first has precedence over a state where an action is filed afterwards. As pointed out in *Sensient*, the doctrine "has its roots in our federal system," citing *Riggs v. Johnson County*, 73 U.S. 166, 196, 18 L.Ed. 768, 776 (1868). In 1898, the Court in *Riggs* referred to the rule as having been established long ago. *Riggs v. Johnson County*, 73 U.S. 166, 177 (1898).

After agreeing to defend *Sensient* in the action against it, albeit under a reservation of rights, Zurich filed a declaratory judgment action in New York. The action sought adjudication that its policy did not cover *Sensient* for claims deriving from environmental pollution. *Sensient* then filed its own case in New Jersey, seeking an opposite conclusion. Zurich successfully moved for dismissal of the New Jersey action, because Zurich's lawsuit in New York was the first filed.

Sensient appealed the dismissal. The Appellate Division reversed and reinstated the action. In a published opinion, the appellate panel found that there was no identity of claims in the two suits. The court also found that, even if there were a substantial identity of parties and claims, equitable principles mitigated against application of the first-filed rule. See *Sensient Colors, Inc., v. Allstate Ins. Co.*, 388 N.J. Super. 374, 908 A.2d 826 (App. Div. 2006).

Special Equities. Zurich petitioned the New Jersey Supreme Court for certification. Not surprisingly, certification was granted, and, one year later, a unanimous Supreme Court squelched any notion that it would endorse Zurich's effort to make an end run away from its responsibility to pay for remediation of the toxicity produced by its insured.

The Supreme Court paid scant heed to the appellate panel's view that the first-filed rule might not be applicable. It then went right on to "special equities." In an opinion notable for a dearth of cited precedent--it cites *Margarum v. Moon*, 63 N.J. Eq. 586, 53 A. 179 (Ch. 1902), an opinion only once before cited by an appellate court in this state through to its centennial--the Court relies primarily upon *American Home Products Corp. v. Adriatic Ins. Co.*, 286 N.J. Super. 24, 668 A.2d 67 (App. Div. 1996). That case similarly dealt with insurers seeking to avoid paying for environmental clean-up costs by filing a declaratory judgment action in New York. The Appellate Division there affirmed denial of dismissal for a later-filed action in New Jersey. The opinion asserted "special equities" which countermanded the long-standing first-filed rule of interstate comity.

The special equities applied to the benefit of alleged toxic polluter *Sensient* by the state's highest court are as follows:

1. Zurich's filing an action in another state after agreeing to a conditional defense of the underlying lawsuit;
2. The concern of the state for the toxic cesspools it had ignored for a century;
3. Anxiety that remediation may possibly be needed in the future; and
4. The location of the polluted soil being principally in New Jersey.

None of these reasons appear so extraordinary as to justify a vague exception to the first-filed rule. Rather, it seems that the real rationale behind the use of special equities analysis is this: The Supreme Court wants the insurance industry to fund environmental clean-ups. It fears other states, including New York in this case and in the *American Home Products Corp.*, will not follow this view, particularly when insurance policies have pollution exclusion clauses.

Guidance for the Future. The first-filed rule provided a compass for litigants and their counsel as to where a case would be decided when two or more actions with substantially identical parties and issues are filed in different jurisdictions. It is premised upon the constitutional mandate of comity.

In *Sensient*, this ancient concept is suspended for vague, result-oriented heterodoxy. This leaves counsel with no secure confidence in any result, regardless of precedent. So, while the short-term benefit of this decision may be

palpable, the long-term effect is that legal precedent is malleable in New Jersey if its courts imagine a temporary economic or social issue which should supersede it.

For additional discussion of comity and the first filed rule, see *Moore's Federal Practice* § 57.42[2][b][i] (discussing first filed rule and the courts discretion); *Moore's Federal Practice* § 111.13 (discussing first filed rule and interests of justice).

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Langsdorf on Treadwell v. J. D. Construction Co.

2008 Emerging Issues 2864

Stephen E. F. Langsdorf on Leah Treadwell et al. v. J. D. Construction Co., et al.

By Stephen E. F. Langsdorf

August 4, 2008

SUMMARY: When it comes to protecting a clients personal assets, it isnt enough to form a corporation. The client must be counseled to ensure that the corporation not only acts like a corporation, but also calls itself by its proper name. The consequences of failing to adhere to these requirements are explored by Stephen E. F. Langsdorf in his commentary on Leah Treadwell et al. v. J. D. Construction Co., et al.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Cautionary Notes for Doing Business in the Corporate Form

Not a rose by any other name. One of the first things we lawyers learned in law school was that it is wise to do business as a corporation to avoid personal liability. That way if you make a mistake, or things just go wrong, the potential exposure is the corporate assets and not your personal resources. Historically, the Maine Supreme Judicial Court has made it very difficult to pierce the corporate veil and hold an individual shareholder liable when doing business as a corporation. *Leah Treadwell et al vs. J. D. Construction Co., et al.*, however, signals that personal liability may be found much more readily: this business owner used his corporations trade name on a contract and had not filed an assumed name form with the Secretary of State.

Actual knowledge is not enough. The Treadwells knew that they were contracting with a corporation to build their home. The contract stated that they were contracting with J. D. Construction Co., Inc., and it was signed by the corporations owner, Jesse Derr. Mr. Derr did not work on the job himself and was usually nowhere to be found. Eventually, he abandoned the job completely because it was not profitable. The Treadwells sued J. D. Construction Co., Inc. and Derr in Superior Court, and won a damages award of \$66,783.89 to repair defective work, and complete unfinished work under the contract. The Superior Court did not hold Mr. Derr personally liable because the evidence was clear that the Plaintiffs knew they were contracting with a corporation.

That should have been enough, but it wasnt. The problem was that the corporations actual name, as filed with the Secretary of State, was JCDER, Inc., not J. D. Construction Co., Inc. as set forth in the contract. Derr never filed a statement intending to transact business under an assumed name as allowed pursuant to 13-C M.R.S.A. §404 (2006).

Accordingly, on appeal, the Law Court analyzed the case under the Law of Agency. The Court cited the Restatement (Third) of Agency §1.04 cmt. b (2006) for the contention that an agent may avoid personal liability on a contract negotiated on a principals behalf only if he discloses not only that he is an agent, but also the identity of the principal. In other words, the Court saw JCDER, Inc. as the principal on whose behalf Jesse Derr negotiated a contract. By misnaming the corporation on the document, the Court concluded that he had not revealed the principals identity. Since the Treadwells knew nothing about JCDER, Inc., the agent was personally liable. *Saco Dairy Co. v. Norton* 140 Me. 204, 207, 35 A.2d 857, 858 (1944).

The more traditional approach. Misnaming corporations has not historically been treated as a cardinal sin under Maine law. There have been numerous cases where the Court has treated the misnaming of a corporation as nothing more than a clerical error. See *Christian Fellowship and Renewal Center v. Town of Limington, et al.*, 769 A.2d 834 (Me. 2001); *Brogan v. McEachern* 103 Me. 198, 68 A.2d 822 (Me. 1907).

One also would have thought that this case would have been analyzed under the well established line of case law that allows the corporate veil to be pierced only under unusual circumstances where the defendant abused the privilege of separate corporate identity leading to an unjust and inequitable result. *Johnson v. Exclusive Properties Unlimited*, 1998 Me. 244 6, 720 A.2d 568, 571; *State v. Weinschank*, 2005 Me. 28 19, 868 A.2d 200, 207. Typically, the court looks at such issues as whether the corporation is under capitalized, insolvent, bankrupt or whether the shareholder has maintained the proper separate corporate existence. It appears that the facts in *Treadwell* might have lead to liability if this standard where applied.

Lessons learned. *Treadwell* suggests that lawyers must give scrupulous advice to clients as to how to protect their personal assets and avoid personal liability. Not only is it necessary to advise clients to properly maintain corporate records, all necessary annual filings, separate bank accounts and to provide and maintain sufficient capitalization within the corporation, but it is also critical to identify the corporation exactly as set forth either in the Articles of Incorporation or as provided to the Secretary of State under an assumed name form. While this case could be an aberration and is consistent with the Law Courts long history of reaching the practical result, it does require lawyers to be very exact in their advice to clients.

For additional discussion of the requirements for doing business in the corporate form, see Liability of Corporate Officers and Directors § 6.01 (liability for corporate debts); *Construction Law P 1.01*[2] (Types of Business Associations and the Attendant Exposure to Liability).

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Stephen E. F. Langsdorf concentrates in the representation of businesses and municipalities. He specializes in civil litigation and employment law before administrative agencies, in arbitrations and in court. He appears often before the Maine Human Rights Commission and Federal and State courts on employment matters and civil rights laws. He graduated from Texas A&M University with a degree in philosophy and history and earned his law degree from the University of Texas. He joined Preti Flaherty in 1986, became a Member in 1996, and an Equity Member in 1997. He is a member of the Kennebec County, Maine State and American Bar Associations and the Maine Trial Lawyers Association. He serves on the Board of Directors of the University of Maine at Augusta Foundation and is a former board member of FORUM-A, an Augusta based arts organization. He is a former chairman of the Town of Sidney Board of Tax Appeals.



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Russ Bensing on Hayes v. Oakridge Home

2008 Emerging Issues 2865

Russ Bensing on Hayes v. Oakridge Home, 2008 Ohio 787 (Ohio Ct. App. 2008) and Enforcement of Contractual Arbitration Provisions

By Russell Bensing

August 4, 2008

SUMMARY: As Hayes v. Oakridge Home makes clear, arbitration is no longer the sole province of attorneys dealing with commercial leases or franchise agreements. An understanding of how to invoke that, or avoid it, is becoming increasingly essential for attorneys practicing in those areas. This commentary, written by Russ Bensing, discusses the implications of this important decision.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: The lawyer who took in Florence Hayes medical malpractice claim against her nursing home probably never thought he'd need a crash course in arbitration law. As *Hayes v. Oakridge Home* makes clear, that area of law is no longer the sole province of attorneys dealing with commercial leases or franchise agreements. Lawyers handling not only consumer cases, but also personal injury or employment discrimination suits, may find that ordinary purchase agreements, contracts for nursing home care, or employment agreements require any disputes to be submitted to arbitration, rather than to the normal court process. An understanding of how to invoke that, or avoid it, is becoming increasingly essential for attorneys practicing in those areas.

The Basics. Lawyers new to this area should be aware that the strong public policy in favor of arbitration, reiterated by the Ohio Supreme Court just five years ago in *Ignazio v. Clear Channel Broad., Inc.*, 113 Ohio St.3d 276 (2007) is of limited value here. That public policy was developed in contemplation of agreements between parties of relatively equal bargaining power and skill. Trial and appellate courts have expressed much more unease about applying them when the parties are a corporation and an ordinary consumer.

That unease has led to a broad application of the concept of unconscionability to arbitration provisions in such contracts: a party may avoid arbitration if he presents a quantum of evidence that the arbitration provision is both substantively and procedurally unconscionable. Substantive unconscionability concerns the fairness of the terms, while procedural unconscionability relates to the fairness of the bargaining process.

Felix v. Ganley Chevrolet, Inc., 2006 Ohio App. LEXIS 4410 (8th Dist. 2006).

Counsel should be aware that the rationale for this analysis is not well developed: no explanation is offered as to why both substantive and procedural unconscionability need be shown, nor is the quantum of evidence which must be produced ever defined. Thus, counsel entering this arena will encounter a bewildering array of conflicting decisions. While the *Hayes* court invalidated the arbitration provision of a nursing home contract, just three months before in *Fortune v. Castle Nursing Homes, Inc.*, 2007 Ohio App. LEXIS 5652 (5th Dist. 2007) (*Fortune II*), the court affirmed a decision enforcing an arbitration provision in a similar contract, finding it procedurally conscionable despite having determined that it was substantively unconscionable in a prior appeal. *Fortune v. Castle Nursing Homes, Inc.*, 164 Ohio App. 3d 689 (5th Dist. 2005) (*Fortune I*). Indeed, the reasoning process in these cases often works in reverse: a court reacts instinctively to the fairness of the situation and then applies the rationale necessary to produce the desired result, rather than the other way around. With that in mind, some guidance for lawyers is:

Invoking the clause. As one court put it in another context, Actions speak louder than words, and motions speak loudest of all. Failure to raise the clause as a defense in an answer, or to file a motion seeking to invoke it at the earliest opportunity, may be deemed a waiver. *Land v. J.D. Byrider, Inc.*, 2007 Ohio App. LEXIS 1148 (12th Dist. 2007).

Counsel representing a party asserting an arbitration provision can either file a motion to stay proceedings under R.C. 2711.02, or a motion to compel arbitration under R.C. 2711.03, or both.

Responding. Note that a motion under R.C. 2711.03 requires a hearing, while a motion under R.C. 2711.02 does not. *Maestle v. Best Buy Co.*, 100 Ohio St. 3d 330 (2003). Regardless of what type of motion is filed, the better practice for counsel representing the party seeking to avoid arbitration is to file a brief in opposition arguing that the clause is unconscionable. Such a claim places the validity of the arbitration provision in dispute, and a trial court errs by granting arbitration without conducting a hearing. *Bencivenni v. Dietz*, 2007 Ohio App. LEXIS 571 (8th Dist. 2007).

Framing the issues. Counsel for both sides should be aggressive here, and resist the urge to file simple *pro forma* motions and briefs. Remember that the result will often depend more upon the trial courts initial impression of the fairness of the arbitration provision than upon the case law. Both sides should accompany their pleadings with arguments and affidavits supporting their contentions as to why the provision is fair, or why it is not. Counsel should also note that the facts of the underlying case may alter a judges perception of the fairness of arbitration; even though that wont be a factor in the hearing, if the facts are particularly outrageous, spend some time in the pleadings talking about them.

Substantive Unconscionability. Although by no means an exhaustive list, the following factors have been important in determining that a particular arbitration provision is substantively unconscionable:

- . It does not provide remedies that normal legal avenues do. For example, in a consumer suit, arbitration doesnt provide for class actions, attorney fees, or treble damages, as does the Consumer Sales Practice Act. *Schwartz v. Alltel Corp.*, 2006 Ohio App. LEXIS 3280 (8th Dist. 2006).

- . The arbitration is more costly, with fees for the arbitrators and charges for pleadings, hearings, etc. *Eagle v. Fred Martin Motor Co.*, 157 Ohio App. 3d 150 (9th Dist. 2004).

. The arbitration process does not provide the ample discovery that is often essential in fact-dependent cases such as negligence suits. *Manley v. Personacare of Ohio*, 2007 Ohio App. LEXIS 303 (11th Dist. 2007).

. The agreement is basically unfair. In *Fortune I*, for example, the court found that a provision requiring the loser in arbitration to pay the winners attorney fees could have a chilling effect on the willingness of people to make claims.

Procedural Unconscionability. The factors here are equally broad, but two are key:

. There is a gross disparity in bargaining power, for example, large corporation v. consumer, and the contract is for a consumer necessity. *Olah v. Ganley Chevrolet, Inc.*, 2006 Ohio App. LEXIS 618 (8th Dist. 2006).

. The contract is adhesionary, that is, the consumer has no opportunity to modify or reject the arbitration provision. *Maestle v. Best Buy Co.*, 2005 Ohio App. LEXIS 3759 (8th Dist. 2005).

Hayes and *Fortune II* highlight the conflicting results in determining procedural unconscionability. In *Fortune II*, the court found the agreement procedurally conscionable because the plaintiff had demonstrated business acumen by performing such mundane activities as buying a home and two cars; in *Hayes*, the court found the agreement procedurally unconscionable despite the fact that the arbitration provision was separately marked, was modifiable, was not required to be signed as a condition of admission to the home, and could be revoked within 90 days of the resident leaving the home. One gets the impression that the overriding factor in *Hayes* was the plaintiffs age of 94.

The hearing. Counsel must remember that the hearing will not be merely for argument, but for evidence. This is especially crucial on the issue of procedural unconscionability. Counsel should have witnesses present to testify as to details of the bargaining process involved in producing the agreement, focusing on discussions about the arbitration provision. Plaintiffs should also be prepared to answer questions about their business acumen and prior business dealings.

Some final thoughts. The lack of a rigorous analytical framework for the law in this area offers opportunities for a creative attorney. Plaintiffs counsel, for example, might argue that the quantum of evidence necessary to establish both substantive and procedural unconscionability imposes a burden of presenting a *prima facie* case, at which point the evidentiary burden shifts to the defendant to prove that the agreement is conscionable in both respects.

Keep in mind, too, that arbitration isnt necessarily the sanctuary from the excesses of the civil process that some defendants think it to be. A few years ago, a local auto dealer forced arbitration on a claim involving a \$6,260 truck purchase. Last year in *Samber v. Mullinax Ford East*, 173 Ohio App. 3d 585 (11th Dist. 2007), the court affirmed an arbitration award of \$105,000, including punitive damages, treble damages, and attorney fees, against the dealer on that claim.

Cross-references. See generally Leonard J. Nelson III, 1-9 Medical Malpractice § 9.08 (LexisNexis 2007); A.J. Stephani and Glen Weissenberger, 1-16 OH Civil Procedure Litigation Manual (LexisNexis 2007).

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William C. Bochet on Dolan v. Sea Transfer Corp.

2008 Emerging Issues 2866

William C. Bochet on Dolan v. Sea Transfer Corp., 2008 N.J. Super. LEXIS 37 (App. Div. 2008)

By William C. Bochet

August 4, 2008

SUMMARY: In *Dolan v. Sea Transfer Corp.*, 2008 N.J. Super. LEXIS 37 (App. Div. 2008), the Appellate Division has issued another choice of law decision concerning motor vehicle accidents between residents of different states. This commentary, written by William C. Bochet, discusses the implications of this important decision.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: The Appellate Division has issued another choice of law decision concerning motor vehicle accidents between residents of different states. In *Dolan v. Sea Transfer Corp.*, 2008 N.J. Super. LEXIS 37 (App. Div. 2008), the Court adds more sediment to the already murky stream of opinions which followed the introduction of "governmental interest analysis" in place of the historical doctrine that the location of the accident determined the applicable law.

The case involved a New Jersey resident who suffered personal injuries in an accident that occurred on Route 46 in New Jersey. The collision occurred when a shipping container broke free from a tractor-trailer and was struck head-on by the injured plaintiff's vehicle. The tractor was owned by the employer of the New York resident who was driving it. The trailer, or chassis, was owned by Hapag-Lloyd, a shipping company that had its principal office in New Jersey. The container dislodged because it was not properly fastened by the driver at a terminal in New York. The accident happened after the tractor-trailer briefly entered New Jersey en route to a destination in New York.

The issue was whether or not New York law should be used to attach liability to Hapag-Lloyd, the owner of the container and the trailer to which the load was not properly secured. Under New Jersey law, Hapag-Lloyd would not be responsible. Under New York law, there is a statute imposed vicarious liability. The Appellate Division favored New York.

Stare, Stare, Naught. *Stare decisis* is a judicial doctrine that exists to keep "the stability of the law." *Lawrence v. Texas*, 539 U.S. 558, 577, 123 S. Ct. 2472, 2483, 156 L. Ed. 508, 525 (2003). It calls for adherence to precedent, so as to show respect for the conclusions of judges in the past. It "has at its core the predictability in cases." *J & M Land Co. v. First Union Nat'l Bank ex rel. Meyer*, 166 N.J. 493, 521, 766 A.2d, 110 (2001). Courts follow the principles applied by the courts of the past, as they are set forth in case law. The concept is not inviolable. Obsolete or badly reasoned decisions need not be followed. *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 2609, 115 L. Ed. 720 (1991). A court on the same level always has the power to modify or overrule itself.

In tort litigation, the historical norm as to choice of law was *lex loci delicti*. It was a relatively hard-and-fast rule that applied the law of the place where the accident happened to the litigation that ensued. Thus, if the accident happened in New York, a New Jersey court would apply New York law. The concept met its demise in *Mellk v. Sarahson*, 49 N.J. 226, 229 A.2d 625 (1967). The case involved a suit in New Jersey by an automobile passenger against the driver of the car in which he was a passenger during an accident in Ohio. The defendant asserted the defense of a host-guest statute that barred recovery from the host-driver for acts of ordinary negligence. The Supreme Court of New Jersey refused to apply the Ohio statute, despite *lex loci delicti* and principles of comity. Instead, the court adopted New Jersey law, which had no such statute. The rationale was that Ohio could hardly care if New Jersey residents collect damages from each other, while New Jersey had "a strong public interest" in seeing that happen. So began the application of "governmental interest analysis" as the yardstick for deciding choice of law issues in interstate automobile accident cases.

And A Weighing We Go. The *Dolan* courts, both at the trial and appellate levels, applied the now forty-year-old *Mellk* analysis. The appellate opinion cites other progeny of the concept, accepting some, distinguishing others. The common thread for most is the N.Y. Vehicle and Traffic Law § 388(1), the statute that imposes liability upon motor vehicle owners for the negligent operation of their vehicles by others. A scoreboard would be helpful:

Case Name

Plaintiffs Residence

Defendant Drivers Residence

Defendant Owners Residence

Place of Accident

Law Applied

Dolan v. Sea Transfer

N.J.

N.Y.

N.J./N.Y.

N.J.

N.Y.

Fu v. Fu, 160 N.J. 108 (1999)

N.J.

N.J.

PA

N.Y.

N.Y.

Haggerty v. Cedeno, 279 N.J. 607 (App. Div. 1995)

N.J.

FL

DE/N.Y.

N.J.

N.Y.

Erny v. Estate of Merola, 171 N.J. 86 (2002)

N.J.

N.Y. and N.Y.

N.Y. and N.Y.

N.J.

N.Y.

Kim v. Paccar Financial Corp., 385 N.J. Super 142 (App. Div. 2006)

N.J.

N.J.

N.J. and N.Y. (leased to N.Y.)

N.J. and WA

N.J.

Arias v. Figueroa, 395 N.J. Super. 623 (App. Div. 2007)

N.J.

N.Y.

CA/N.J. (leased to N.Y.)

N.J.

N.J.

A search for a pattern here will not necessarily be fruitful for counsel seeking to advise clients of their probable fate in litigation. Rather, "governmental interest analysis" is by definition a "case-by-case" determination of which state's "strong public policy" -- a ubiquitous phrase in appellate opinions of this genre -- should dominate the other.

In *Dolan*, the court praises New York's redoubtable interest in public safety as a factor in its decision to apply that state's statute, implying that New Jersey has no such interest. Left unsaid is the fact that New Jersey's legislative scheme contemplates first party insurance, uninsured/underinsured motorist coverage (NJS 39:6A-14, 17:28-1.1), to protect its citizens from being under compensated for injuries arising from motor vehicle accidents. New York's legislature seeks to advance that goal by imposing vicarious liability upon vehicle owners regardless of there being no agency or other

culpability. New Jersey's legislature has not made that its public policy.

A part of the reasoning the *Dolan* court uses to apply the New York statute was that the happening of the accident in New Jersey was "fortuitous". The negligent party dropped into New Jersey for no reason other than to avoid Manhattan traffic. Given the result, though, it would seem the fortuity was that the tortfeasor and vehicle owner came from New York, and had plenty of insurance.

Missed Mistrial. The defendants appealed the result on a second ground. The plaintiffs' attorney apparently made obstreperous comments to the jury in opening and closing statements which could have influenced the very successful result for plaintiffs. The Appellate Division declined to overrule the trial court's denial of a new trial motion, citing the, for now, precedent of *Baxter v. Fairmount Foods*, 74 N.J. 588 (1977). At the conclusion of the opinion, the court pointed out that defense counsel failed to request a mistrial. The message is that it is not enough to object to egregious conduct. A motion for a mistrial should also be made. Otherwise, there is a risk that the appellate court may refuse to address the issue.

Cross References. For more information, see Restat 2d of Conflict of Laws, Chapter 7: Wrongs.

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Rabiej on Native File Format and Metadata

2008 Emerging Issues 2857

Rabiej on Native File Format and Metadata

By John K. Rabiej

August 4, 2008

SUMMARY: This commentary, written by John Rabiej, Chief of the Rules Committee Support Office that staffs the Judicial Conference's Standing and Advisory Rules Committees, analyzes cases and legal periodicals explaining native file format and metadata, the risks of disclosing privileged and confidential information when producing ESI in native file format, and precautions that can be taken to mitigate inadvertent disclosures.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: The 2006 amendments to the Federal Rules of Civil Procedure answer many questions about the discovery of electronically stored information (ESI). But the amendments provide less guidance on issues arising from the discovery and production of ESI in native file format with original metadata intact. The rulemakers deliberately left definitive answers to these issues to case-law development. What lessons has the caselaw taught us about native file formats and metadata?

Definitions. Metadata is commonly defined as data about data (*see Williams v. Sprint/United Management Co.*, 230 F.R.D. 640, 646 (D. Kan. 2005)(description of metadata); *see also The Sedona Conference, The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age*, at 94 (Sept. 2005); *see also* 7 Moore's Federal Practice, Ch. 37A, *Discovery of Electronically Stored Information*, § 37A.43[2]). Metadata is generated by the computer software program operating a particular application. Most metadata is not visible on the computer screen, does not appear on the electronic file when a copy is printed, and is often completely unknown to the person who generates the file (*see Autotech Tech. Lmt. v. Automationdirect.com, Inc.*, 2008 U.S. Dist LEXIS 27962, at *n.1 (N.D. Ill. Apr. 2, 2008)(detailed description of metadata); Committee Note to *Fed. R. Civ. P.* 26(f) (2006)). Basic types of similar metadata are generated by most software programs. But there can be significant differences in the metadata, depending on the program application (*see Williams v. Sprint/United Management Co.*, 230 F.R.D. 640, 647 (D. Kan. 2005)(metadata varies with different applications).

There are two general types of metadata: (1) file-system metadata, which is automatically generated by the computer to identify, track, and manage an electronic file; and (2) substantive metadata, which is added by the user or vendor to an electronic file.

File-system metadata is information about a particular data set or document which describes how, when, and by whom it was collected, created, accessed, modified, and how it is formatted (see *Williams v. Sprint/United Management*, 230 F.R.D. 640, 646 (D. Kan. 2005) (quoting App. F to *The Sedona Guidelines: Best Practice Guidelines and Commentary for Managing Information & Records in Electronic Age*). It can contain a list of authors, modification dates, the time spent on edits, name of the network server or hard disk where the file is saved, other file properties and summary information, and hyper links to other documents (see *How to Minimize Metadata in Word 2002*, <<http://support.microsoft.com/kb/290945>> (Mar. 3, 2005)). Software applications that are very interactive, like those creating spreadsheets, generate more extensive file-system metadata that may be essential to understand the application's output (see *Williams v. Sprint/United Management Co.*, 230 F.R.D. 640, 647 (D. Kan. 2005) (metadata concerning relationships between data essential to understand undifferentiated mass of tables of data)).

Substantive metadata can include previous document revisions, document versions, hidden text, and comments. Microsoft Word, for example, generates two popular substantive types of metadata, including features that save all versions of a document and track all edits to a document (see Donna Payne, *Metadata: the Good, the Bad, and the Ugly*, <http://www.payneconsulting.com/pub_books/articles/>; Corel WordPerfect metadata records the last 300 actions made to a document).

Native file format is the file structure of ESI created by the original software application. It is the way ESI is stored and used in the normal course of business (see *Autotech Tech. Lmt. v. Automationdirect.com, Inc.*, 2008 U.S. Dist. LEXIS 27962, at *3 (N.D. Ill. Apr. 2, 2008)). Viewing or searching electronic files in the native file format usually requires the original software application, e.g., Word documents require Microsoft software to use it. Native file format includes metadata.

Producing ESI in its native file format in response to a discovery request is often a matter of convenience. Many lawyers are familiar with word-processing documents generated by Microsoft Word (and Excel and PowerPoint) and Corel WordPerfect. Exchanging electronic files containing Word or WordPerfect documents in their native file formats is a common practice. But lawyers may be unaware that they may be disclosing privileged, confidential, or embarrassing information when they exchange ESI in native file format with metadata intact.

Relevance of Metadata. The relevance of file-system metadata is usually limited, pertinent only when the authenticity or reliability of a particular electronic file is at issue (see § 37A.43[2]). For example, metadata showing the date a file has been generated and the date of edits made to it can be critical in establishing a fraudulent document (see *Hagenbuch v. 3B6 Sistemi Elettronici Indus. S.R.L.*, 2006 U.S. Dist. LEXIS 10838, at *9-10 (N.D. Ill. Mar. 8, 2006) (metadata relevant to prove identity of persons receiving disputed information). But if the authenticity or reliability of a certain document is not at issue, file-system metadata that describes the history, tracking, or management of an electronic file is usually not relevant. There is a major exception to this general rule of thumb. File-system metadata that explains how information in an electronic file was compiled, like a spreadsheet containing a table showing the results of a specific formula, can be significant (see 7 Moore's Federal Practice, Ch. 37A, *Discovery of Electronically Stored Information*, § 37A.43[2]).

A good example of how file-system metadata can be important in a case is shown in *Williams v. Sprint/United Management Co.*. In this case, the file-system metadata for an Excel spreadsheet contained critical data, i.e., the formula that was used to compute results in a table, which was omitted from the printed TIFF image produced in response to a discovery request. The printed TIFF image obscured spreadsheet columns, hid the applicable formulas, and prevented the party from performing any calculations. The court held that the metadata was essential and relevant to the requesting party's claim (*Williams v. Sprint/United Management Co.*, 230 F.R.D. 640, 647 (D. Kan. 2005) (to understand the spreadsheet, the user must be able to ascertain the formula within the cell)).

The potential relevance of substantive metadata can be very significant. It can show edits to a document that reveal

the deletion of key information relevant to a case, *e.g.*, results of a study showing higher risk of severe reactions associated with a new drug.

Concerns About Producing ESI with Metadata Intact. A practitioner should be wary of producing ESI in its native file format without knowing exactly what metadata is being disclosed when responding to a discovery request. Metadata, especially substantive metadata, may contain privileged or protected information.

Some jurisdictions impose an ethical duty on lawyers to review documents for metadata to prevent the disclosure of privileged information, and others prohibit an attorney from searching or mining metadata in ESI inadvertently disclosed in discovery (see Opinion 2007-02, Alabama State Bar Association (March 14, 2007) and Formal Opinion 782, New York State Bar (2001), requiring lawyers to exercise reasonable care to prevent disclosure of privileged metadata, and New York State Bar Opinion 749, concluding that it is unethical for an attorney to mine metadata; *but see* Formal Opinion 06-442 (Aug. 5, 2006), in which the American Bar Association states that the Model Rules of Professional Conduct do not contain any specific prohibition against a lawyers reviewing and using embedded information in electronic documents, whether received from opposing counsel, an adverse party, or an agent of an adverse party.; *see also* Marcia Coyle, *Where Do the Footprints of Metadata Lead?*, The National Law Journal (Feb. 20, 2007), and Donna Payne, *Metadata Are You Protected?* <http://www.payneconsulting.com/pub_books/articles/> (2004), for a list of other jurisdictions imposing ethical duties, including Texas, New Jersey, Arkansas, California, District of Columbia, Maryland, Pennsylvania, Florida, and Arizona). Reviewing metadata for privilege purposes can be burdensome. The 2006 Committee Note to Rule 26(f) recognizes the burden, reminding lawyers to review metadata to ensure that no privileged information is included, further complicating the task of privilege review.

Unlike file-system metadata, which usually gives a historical account of a document, substantive metadata may reveal a much wider range of privileged, confidential, or embarrassing information. Unless certain computer functions are turned off, substantive metadata revealing edits and changes to a file and other information can be retrieved from the file. Producing documents in native file format has resulted in some well-publicized unintended disclosures of confidential or embarrassing information. Metadata has revealed that the text of a supposed government report was actually based on a document drafted by a student (metadata in British dossier on Iraqs security infrastructure revealed that document was prepared by post-graduate student attending Monterey Institute of International Studies, *see* <<http://tinyurl.com/frqt>>). Other examples of embarrassing inadvertent disclosures of confidential information include revelations of internal trade secrets (*see* Verne Kopytoff, *Googles Gaffe Reveals Internal Secrets: Notes Inadvertently Offer a Look at Financial Plans, Future Product*, S.F. Chron., Mar. 8, 2006, available at <<http://www.sfgate.com/cgi-bin/article.cgi?f/c/a/2006/03/08/GOOGLE.TMP>>), deletion of relevant data linking drug to heart failure (*see* David M. Ewalt, *When Words Come Back From the Dead*, Forbes.com, Dec. 13, 2005, <http://forbes.com/2005/12/13/microsoft-word-merck_cx_de_1214word.html>), and information implicating high-ranking Syrian officials in the murder of a former Lebanese prime minister (*see* James Bone & Nicholas Blanford, *UN Office Doctored Report on Murder of Hariri*, Times (London), Oct. 22, 2005, available at <http://www.timesonline.co.uk/tol/news/world/middle_east/article581486.ece>). In addition to concerns about inadvertently disclosing confidential information, producing ESI in its native file format raises practical and evidentiary problems. Opening or searching an electronic file in its native file format requires access to the software program that created the file. Popular software programs that generate word-processed documents are readily available, *e.g.*, WordPerfect and Microsoft Word. In large-scale discovery, however, ESI may be generated using many different software applications. Opening the various files produced in discovery may require access to many different software programs (*see* 7 Moore's Federal Practice, Ch. 37A, *Discovery of Electronically Stored Information*, § 37A.43[2]). For example, a search of e-mails produced by one software program will not reveal information contained in the attachments created by another software program. A separate software application must be used to search and open the attachment. If an electronic file was created by a customized software application, moreover, opening or searching it

may be subject to a separate licensing agreement that charges expensive license user fees (*see Northern Natural Gas Co. v. Teksystems Global Applications, Outsourcing, L.L.C.*, 2006 U.S. Dist. LEXIS 64149, at *5 (D. Neb. Sept. 6, 2006)(license for software cost \$50,000); *see also* 7 Moore's Federal Practice, Ch. 37A, *Discovery of Electronically Stored Information*, § 37A.43[2]).

On the other hand, ESI in its native file format can be convenient to run calculations, test different formulae, or evaluate the reliability of statistical or other data, especially spreadsheets and other data involving tables. But this same feature raises authentication issues. Unless proper precautions are promptly taken to assure authenticity, detecting subsequent changes made to ESI produced in native file format can be difficult. Unlike static image documents, like TIFF or PDF images that cannot be altered and that can be stamped with the common Bates numbering system to assure reliability (*see Hagenbuch v. 3B6 Sistemi Elettronici Indus. S.R.L.*, 2006 U.S. Dist. LEXIS 10838, at *9-10 (N.D. Ill. Mar. 8, 2006)), ESI created in native file formats requires some other method of identification to ensure authenticity and reliability.

Parties Obligation to Preserve and Produce ESI in Native File Format with Metadata. Metadata is ESI (*Bar v. Lowe's Ctrs., Inc.*, 2007 U.S. Dist. LEXIS 32497, at *22 (May 2, 2007)). Though metadata is not mentioned explicitly in the Civil Rules (*see Michigan First Credit Union v. Cumis Ins. Soc.*, 2007 U.S. Dist. LEXIS 84842, at *4-5 (E.D. Mich. Nov. 16, 2007)), the definition of ESI in Rule 34 is expansive and clearly applies to metadata. The rulemakers considered metadata to be ESI (Minutes of April 15-16, 2004, Civil Rules Committee meeting, at 13, available at <<http://www.uscourts.gov/rules/Minutes/CRAC0404.pdf>>). The 2006 Committee Note to Rule 26(f) implicitly recognizes metadata as ESI, recommending that parties discuss in the Rule 26(f) conference whether metadata should be produced in discovery.

Because metadata is part of the file structure of ESI, it may be subject to preservation obligations if it is relevant (*see Williams v. Sprint/United Management*, 230 F.R.D. 640, 651 (D. Kan. 2005) (if a party knows or should know that metadata is relevant and not available from other sources, it must be preserved)). But metadata usually is not relevant, and a party is not subject to sanctions for failing to preserve irrelevant metadata (*see Inventory Locator Serv., LLC v. Partsbase, Inc.*, 2005 U.S. Dist. LEXIS 46252, at *39 (W.D. Tenn. Oct. 19, 2005) (metadata including The Last Creation Date and Last Access Date was destroyed, but destruction was not sanctionable because metadata was not relevant)).

The Civil Rules do not specify whether a party is obligated to produce ESI with metadata intact (*Williams v. Sprint/United Management*, 230 F.R.D. 640, 649 (D. Kan. 2005)). The rules establish procedures, however, designed to identify and resolve any disagreement among the parties as to the form of production, including whether metadata should be produced. To this end, the rules require parties to discuss the form of ESI production early in the case at the Rule 26(f) conference. The discovery plan required under Rule 26(f) must state the parties views and proposals on: ... any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced (*see Kentucky Speedway, LLC v. Nat. Assoc. Stock Car Auto Racing, Inc.*, 2006 U.S. Dist. LEXIS 92028, at *23 (E.D. Ken. Dec. 18, 2006)). Practitioners should address the issues arising from producing ESI in native file format with metadata intact promptly at the conference to prevent problems from later developing.

If a party fails to specify the form of production or if the parties disagree about the manner of ESI production, the Civil Rules provide a procedural framework to resolve form-of-production issues. Under Rule 34(b)(1)(C), the requesting party may specify the form or forms in which ESI, including metadata, is to be produced. The request for metadata must be specific (*see Pace v. Int'l Mill Service, Inc.*, 2007 U.S. Dist. LEXIS 34104, at *6-7 (N.D. Ind. May 7, 2007); *see also D'Onofrio v. SFX Sports Group, Inc.*, 247 F.R.D. 43, 48 (D.D.C. 2008)). Courts ordinarily will not compel a party to produce metadata unless the request is specific (*see The Ponca Tribe of Indians of Oklahoma v. Continental Carbon Co.*, 2006 U.S. Dist. LEXIS 74225, at *6-7 (W.D. Okla. Oct. 11, 2006) (metadata not required to be produced in response to original discovery request, which failed to specify manner of ESI production)). Making the party

responsible for clearly and specifically requesting metadata is consistent with the weight of the caselaw, which maintains a modest presumption that the producing party need not take special efforts to preserve or produce metadata (see *Autotech Tech. Lmt. v. Automationdirect.com, Inc.*, 2008 U.S. Dist LEXIS 27962, at *12-14 (N.D. Ill. Apr. 2, 2008) (quoting *The Sedona Principles*); *Kentucky Speedway, LLC v. Nat. Assoc. Stock Car Auto Racing, Inc.*, 2006 U.S. Dist. LEXIS 92028, at *23 (E.D. Ken. Dec. 18, 2006)).

A direct request for metadata is clear. But must metadata be produced if a party requests ESI in its native file format? The inference in cases and in the minutes of the Civil Rules Committee meetings indicate that such a request also calls for the production of the original metadata intact. As noted, metadata is physically part of the native file format structure of an electronic file and can be eliminated only if steps are taken deliberately to remove it (Minutes of April 14-15, 2005, Civil Rules Committee meeting, at 17, available at <<http://www.uscourts.gov/rules/Minutes/CRAC0405.pdf>>). Accordingly, a request for ESI in native file format should be interpreted to include metadata. (As a practical matter, most requests for ESI in native file format also include specific requests for the metadata in the reported caselaw.) At least one prominent commentator disagrees and believes that metadata is not part of an electronic file produced in its native file format (see Thomas Y. Allman, *The Impact of the Proposed Federal E-Discovery Rules*, 12 Rich. J.L. & Tech. 13, 15 (2006) (Neither default form is intended to mandate production of metadata or embedded data. The Advisory Committee discussed the competing concerns at some length but ultimately decided that the best course of action was to remain silent and leave the issue to individual case law development.)).

If the requesting party fails to specify the format of production, the producing party has the option to produce it: (1) as it is ordinarily maintained, or (2) in a reasonably usable form or forms.

If the responding party selects to produce ESI in a form or forms in which it is ordinarily maintained, as that term is used in Rule 34(b)(1)(C), must ESI be produced in its native file format with metadata intact? The Civil Rules Committee recognized that technically adept lawyers and experts assume that production in the form ordinarily maintained includes embedded data and metadata (see *In Re Verisign, Inc. Sec. Litig.*, 2004 U.S. Dist. LEXIS 22467, at 8-12 (N.D. Cal. Mar. 10, 2004) (request for ESI in original format, as it was kept in the usual course of business meant production in native file format); see also 7 Moore's Federal Practice, Ch. 37A, *Discovery of Electronically Stored Information*, § 37A.43[2]). But the Committee ultimately decided not to take a position on whether metadata must be included when ESI is produced in the form that it is ordinarily maintained (Minutes, October 2-3, 2003, Civil Rules Committee meeting, at 28, available at <<http://www.uscourts.gov/rules/Minutes/CRAC1003.pdf>>). The Committee concluded that it was not necessary to decide the issue, as a practical matter, because issues as to embedded data and metadata arise only if the responding party opts to produce [ESI] in the form ordinarily maintained (Minutes, April 14-15, 2005, Civil Rules Committee meeting, at 19, available at <<http://www.uscourts.gov/rules/Minutes/CRAC0405.pdf>>; see also Minutes, April 15-16, 2004, Civil Rules Committee meeting, at 15, available at <<http://www.uscourts.gov/rules/Minutes/CRAC0404.pdf>>). The Committee recognized that parties would simply remove the metadata and produce the ESI under the reasonably usable option.

But what if the party directly requests production of ESI in the form that it is ordinarily maintained without also specifically requesting metadata? Whether metadata must be produced in response to such a direct request is not clear (see *Williams v. Sprint/United Management Co.*, 230 F.R.D. 640, 652, n.69 (D. Kan. 2005) (Court holds that when a party is ordered to produce electronic documents as they are maintained in the ordinary course of business, the producing party should produce the electronic documents with their metadata intact, unless the party timely objects); see *In Re Payment Interchange Fee and Merchant Discount Antitrust Litig.*, 2007 U.S. Dist. LEXIS 2650, at *14-17 (E.D.N.Y. Jan.12, 2007) (metadata must be produced in response to request for ESI in form ordinarily maintained). Under a conservative reading of the present caselaw, a practitioner should interpret a request for ESI as it is ordinarily maintained to include metadata.

Alternatively, the responding party may produce ESI in a reasonably usable form, as that term is used in Rule 34(b)(1)(C). If the responding party selects this option, must ESI be produced in its native file format with metadata

intact? In determining whether a specific form of production is a reasonably usable form, the rulemakers excluded any production form of ESI that removes or significantly degrades the ability to electronically search the file (Committee Note to Rule 34(b) (2006)).

Can a party extract metadata from the ESI without violating the prohibition against degrading the file? The rulemakers thought so, frequently acknowledging the use of TIFF and PDF images, which do not include metadata, as alternative, reasonably usable forms of production. Under most circumstances, extracting metadata will not degrade the capability to search ESI. In fact, the Civil Rules Committee expressly noted that an electronic file with its metadata stripped out would remain reasonably usable for purposes of Rule 34(b)(2)(E)(ii) (see Minutes of April 14-15, 2005, Civil Rules Committee meeting, at 17, available at <<http://www.uscourts.gov/rules/Minutes/CRAC0405.pdf>>). Caselaw is also replete with examples of ESI produced without metadata in TIFF and PDF images. In most cases, metadata is not essential to make the file searchable by electronic means and extracting metadata would not degrade its searchability (see *Wyeth v. Impax Labor., Inc.*, 2006 U.S. Dist. LEXIS 79761, at *4 (D. Del. Oct. 26, 2006) (metadata is often of limited evidentiary value and reviewing it can be wasteful); but see *In Re Payment Interchange Fee and Merchant Discount Antitrust Litig.*, 2007 U.S. Dist. LEXIS 2650, at *14 (E.D.N.Y. Jan.12, 2007) (court concludes that deleting metadata from ESI significantly degrades searchability of documents).

If there is no agreement on the form of production, a producing party may object in writing to a request to produce ESI in its native file format or in the form that it is ordinarily maintained and offer an alternative, reasonably usable form of production. If the parties are unable to agree on the alternative form of production after meeting and conferring, they may raise the matter with the court, either filing a motion to compel production or a motion for a protective order. In evaluating such motions, courts have properly recognized that the evidentiary value of most metadata is marginal, while the cost and burden in reviewing and extracting metadata can be substantial (see *Michigan First Credit Union v. Cumis Ins. Soc.*, 2007 U.S. Dist. LEXIS 84842, at *5-6 (E.D. Mich. Nov. 16, 2007)(production of metadata would be extremely burdensome, with no countervailing discovery or evidentiary benefit). The prevailing view among courts is that the requesting party must show a particularized need for the metadata sufficient to offset the cost and burden in reviewing and producing the metadata (see *CP Solution PTE, Ltd. v. Gen. Elec. Co.*, 2006 U.S. Dist. LEXIS 27053, at *14 (D. Conn. Feb. 6, 2006)(party must show need for metadata); see *Kentucky Speedway, LLC v. Nat. Assoc. Stock Car Auto Racing, Inc.*, 2006 U.S. Dist. LEXIS 92028, at *23 (E.D. Ken. Dec.18, 2006)(party failed to make showing of particularized need for metadata); *O'Bar v. Lowe's Home Ctr.*, 2007 U.S. Dist. LEXIS 32497, at *13-14 (W.D.N.C. May 2, 2007) (pretrial order requiring showing of particularized need); see *Wyeth v. Impax Labor., Inc.*, 2006 U.S. Dist. LEXIS 79761, at *4-5 (D. Del. Oct. 26, 2006) (metadata not required when party failed to show particularized need for native file format). Courts have consistently required a party who objects to producing metadata to produce metadata only when it is relevant, has evidentiary value, is not available from other sources, and is not unreasonably burdensome to produce.

Best Practices. Parties should discuss the form of production of ESI early in the litigation at the Rule 26(f) conference. Parties should make clear their preferences on the specific form of ESI production at the conference. A request for metadata should be specific and preferably limited to certain documents or data (see *Kentucky Speedway, LLC v. Nat. Assoc. Stock Car Auto Racing, Inc.*, 2006 U.S. Dist. LEXIS 92028, at *24-24 (E.D. Ken. Dec.18, 2006) (court encourages party to limit the number of documents for which it requests metadata).

The requesting party should be prepared to make a showing of particularized need for ESI in its native file format with metadata intact. A request for metadata may be justified if reasonable suspicion is shown that a particular document or data has been altered or if the requested metadata provides information essential to understanding the electronic file, e.g., spreadsheet. A request for ESI in its native file format may be justified if the party needs to run computations using the software application to verify its contents. The requesting party should ensure that it has access to the software programs that generated the ESI in native file format, taking into account any applicable licensing agreements or customized software. Moreover, the party should take prompt steps to ensure that ESI in its native file format is authenticated for future evidentiary purposes.

The producing party should be wary of producing ESI in native file format because it may inadvertently disclose privileged or confidential information. When faced with a request to produce ESI in its native file format, the producing party should be prepared to make a showing of the cost and burden in reviewing metadata for privilege purposes and extracting privileged or protected metadata that would offset the benefit of producing metadata.

If the requesting party fails to specify the form of ESI production, the producing party can select a reasonably usable form, but it must first state the form or forms it intends to use, subject to objection from the requesting party. Copies of ESI produced in hard-copy (paper) or as electronic TIFF images may be reasonably usable and will ensure that no metadata will be revealed. A photocopy or a TIFF image is an exact copy of the electronic file, but the requesting party may object to these forms because it may be difficult to conduct electronic word searches or to link attachments to its original document. Producing ESI in PDF appears to be the prevalent practice. PDF is also an exact copy of ESI and can be searched electronically. But PDF copies can contain substantial metadata, including a list of authors, creation date, modification dates, title, subject, and many others. As numerous people have learned to their chagrin, merely converting a Microsoft Word document to PDF does not remove all metadata automatically (*Redacting with Confidence: How to Safely Publish Sanitized Reports Converted from Word to PDF*, National Security Agency, at 2 (December 13, 2005)). Despite the risk that some metadata may be revealed, the convenience in producing ESI in PDF may offset the risk in many situations. In other instances, however, greater scrutiny may be required. In these cases, the practitioner should consider producing the least revealing electronic file, which can be produced by printing the file to paper and then scanning it into PDF (see *In Re Payment Interchange Fee and Merchant Discount Antitrust Litig.*, 2007 U.S. Dist. LEXIS 2650, at *7 (E.D.N.Y. Jan.12, 2007); see also Donna Payne, *Metadata Are You Protected?* <http://www.payneconsulting.com/pub_books/articles/>(2004)).

There may be situations in which ESI must be produced in its native file format in order to run calculations, e.g., spreadsheets. In these cases, there are ways to extract metadata, and some government entities have provided practical guidance on how to scrub documents to remove metadata (see *Redacting with Confidence: How to Safely Publish Sanitized Reports Converted from Word to PDF*, National Security Agency, at 4-5 (December 13, 2005)). Special software programs are also designed to extract metadata (see *Williams v. Sprint/United Management Co.*, 230 F.R.D. 640, 644 (D. Kan. 2005)(defendant used software to scrub spreadsheets to remove metadata). In fact, both Microsoft (Word documents) and Corel (WordPerfect documents) offer guidance and on-line utilities to minimize and extract metadata (see *How to Minimize Metadata in Word 2002*, <<http://support.microsoft.com/kb/290945>> (Mar. 3, 2005); see also Donna Payne, *Metadata: the Good, the Bad, and the Ugly*, <http://www.payneconsulting.com/pub_books/articles/>). But the burden and cost in extracting metadata of individual documents or data can be significant. The responding party should be prepared to make a showing to the court of the burdens in extracting metadata, requesting the court to limit the extraction of metadata to a specified number of documents or data (see *Redacting with Confidence: How to Safely Publish Sanitized Reports Converted from Word to PDF*, National Security Agency, at 4-5 (December 13, 2005); see also *Kentucky Speedway, LLC v. Nat. Assoc. Stock Car Auto Racing, Inc.*, 2006 U.S. Dist. LEXIS 92028, at *24-24 (E.D. Ken. Dec. 18, 2006) (request for metadata should be limited to specified documents)).

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Kyle C. Bisceglie on Ortega v. City of New York

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Kyle C. Bisceglie on Ortega v. City of New York, 9 N.Y.3d 69, 2007 N.Y. LEXIS 2715 (2007)

By Kyle C. Bisceglie

August 4, 2008

SUMMARY: In *Ortega v. City of New York*, 9 N.Y.3d 69, 2007 N.Y. LEXIS 2715 (2007), a unanimous New York Court of Appeals rejected a claim against a non-party for negligent spoliation of evidence under New York law. This commentary, written by Kyle C. Bisceglie, examines the Ortega decision in the context of other primary authority and outlines the remaining remedies available to a party in New York aggrieved by spoliated evidence.

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ARTICLE: In *Ortega v. City of New York*, 9 N.Y.3d 69, 2007 N.Y. LEXIS 2715 (2007), the Court of Appeals, by unanimous decision, held that New York does not recognize a tort claim of third-party negligent spoliation of evidence. A claim for third-party spoliation would arise when a party with custody of evidence crucial to a claim between two other parties destroys or loses it, thereby compromising one of the two parties' ability to prosecute its claim or defend itself against the other party's claim. This is in contrast to the more common circumstance in which a defendant fails to preserve evidence which the plaintiff needs to prosecute a claim against it.

Spoliation has been defined as "[t]he intentional destruction of evidence" and "[t]he destruction, or the significant and meaningful alteration of a document or instrument." Black's Law Dictionary 1401 (6th ed. 1990). Under the common-law doctrine of spoliation, "when a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading." *Ingoglia v. Barnes & Noble College Booksellers, Inc.*, __ A.D.3d __, 2008 N.Y. App. Div. LEXIS 1479 (2d Dep't 2008). Equivalent sanctions for intentional spoliation by a party are available to courts under CPLR 3126.

Given the availability of other remedies, most New York courts have declined to recognize an independent tort for spoliation against a party. See *Black Radio Network, Inc. v. NYNEX Corp.*, 44 F. Supp. 2d 565, 586, 1999 U.S. Dist. LEXIS 7072 (S.D.N.Y. 1999) (New York follows "the majority view and [does] not recognize spoliation of evidence as a cognizable tort action", quoting *Weigl v. Quincy Specialties Co.*, 158 Misc. 2d 753 (Sup. Ct. N.Y. Co. 1993) (discussed *infra*)). See, e.g., *Pharr v. Cortese*, 146 Misc. 2d 1078, 1990 N.Y. Misc. LEXIS 389 (Sup. Ct. N.Y. Co. 1990) (declining to recognize independent claim for intentional spoliation against physician who allegedly falsified medical records to avoid malpractice liability). The availability of an appropriate remedy may not be so clear, however, when the spoliator is not a party to the case in which the evidence is relevant.

The plaintiffs in *Ortega* claimed that the City's negligent destruction of a defective vehicle in which the plaintiffs were injured prevented them from even identifying the responsible parties to sue, and they instead sought to recover the entire amounts of their personal injury damages from the City. *See Ortega*, 9 N.Y.3d at 74. The *Ortega* Court refused to recognize such a claim, finding the essential elements of causation and damages claims inherently too hypothetical and speculative without the key evidence necessary to prove them. *See id.* at 81-82. Despite the Court's categorical rejection of a cause of action for third-party negligent spoliation, however, it did not explicitly rule out an equivalent cause of action in circumstances where the injury caused by the third party's spoliation is easier to determine.

The So-Called "Common-Law Claim for Intentional or Negligent Impairment of a Claim or Defense. New York courts have recognized an independent tort claim against an actor who is deemed to have some duty to another party to preserve evidence, usually characterizing it as a tort for impairment of another's right to sue a third party, or impairment of a defense against a third party's claim, rather than for spoliation. This claim has been recognized most commonly in the employer-employee context.

For example, in *Wiegl v. Quincy Specialties Co.*, 158 Misc. 2d 753, 1993 N.Y. Misc. LEXIS 339 (Sup. Ct. N.Y. Co. 1993), the plaintiff was a laboratory technician who was injured on the job when her lab coat caught fire. Her employer generally cooperated with pre-litigation discovery, but lost the lab coat. The plaintiff sued the party believed responsible for her injuries, and also asserted claims against her employer for negligent and intentional spoliation. On the employer's motion to dismiss, the Supreme Court concluded that New York courts do not recognize spoliation as a tort action, but nevertheless sustained the spoliation claims by construing them as claims for negligent and intentional impairment by an employer of its employee's right to sue a third-party. *See id.* at 757.

In *DiDomenico v. C&S Aeromatik Supplies, Inc.*, 252 A.D.2d 41, 1998 N.Y. App. Div. LEXIS 14050 (2d Dep't 1998), the plaintiff, an employee of United Parcel Service ("UPS"), was injured on the job by an allegedly defective package containing a caustic substance. UPS initially refused to cooperate with the plaintiff's attorney, violated a pre-litigation discovery order pursuant to CPLR 3102(c), and destroyed the defective package. The plaintiff sued various parties believed responsible for his injuries, and also sued UPS for deliberate impairment of his right to sue a third party. *See id.* at 46. UPS continued to violate discovery orders even after it was made a party to the lawsuit, and the Second Department sanctioned it by striking its answer and granting summary judgment to the plaintiff on its claims against UPS.

The Second Department found striking of the employer's answer warranted under CPLR 3126, but also noted "the evolving rule" that a spoliator of key evidence may be sanctioned by striking of pleadings even where the spoliation is not willful, and even if the spoliation occurred before the spoliator became a party, provided the spoliator was on notice that the evidence might be needed in future litigation. *Id.* at 53.

In *Fada Industries, Inc. v. Falchi Building Co., LP*, 189 Misc. 2d 1, 2001 N.Y. Misc. LEXIS 225 (Sup. Ct. Queens Co. 2001), the Supreme Court extended the cause of action for impairment of a claim or defense beyond the employee-employer relationship, to encompass a spoliation claim by an insured against its insurer. In that case, a defendant's leaking water heater damaged its own premises and the premises of a neighbor. During the inspection of the defendant's premises by its insurer, the insurer removed the water heater, and subsequently lost or destroyed it. The neighbor sued the defendant, and the defendant brought a third-party action for indemnification against its insurer, on the grounds that the insurer's negligent loss of the water heater impaired the insured's defense in the underlying action, and prevented it from identifying other potential third-party defendants. *See id.* at 3.

The *Fada Industries* court, relying on *DiDomenico* and *Wiegl*, sustained the insured's third-party complaint against its insurer, ruling that it stated valid causes of action "for negligent spoliation of evidence" and "for negligent impairment of the ability to sue a third party". *Id.* at 12-13. The Court expressly limited its decision to the facts of the case before it, noting that because the insured sought only indemnification for its liability in the underlying action, the damages were not speculative, and that the sanctions normally available to a party under the spoliation doctrine, such as striking of pleadings or preclusion of evidence, would be of little use. *See id.* at 9, 11. The Court acknowledged that it

was recognizing a previously unrecognized cause of action for negligent spoliation, but found it "fitting that a party should have a remedy against a nonparty, particularly when that nonparty is the party's insurer, for the nonparty's loss or destruction of key evidence." *Id.* at 12.

The Court of Appeals' Rejection of Negligent Third-Party Spoliation Claims. In *MetLife Auto & Home v. Joe Basil Chevrolet, Inc.*, 1 N.Y.3d 478, 2004 N.Y. LEXIS 228 (2004), the Court of Appeals declined to "recognize a cause of action for third-party negligent spoliation of evidence and impairment of a claim or defense as an independent tort" on the facts of that case, but stopped short of ruling out such a cause of action altogether. *Id.* at 480. That case involved an apparently spontaneous automobile fire, which damaged the home where the car was parked. The vehicle owner's insurance carrier, Royal, took possession of the vehicle and then mistakenly destroyed it. MetLife, as subrogee of the damaged homeowner, sued the vehicle's owner and other responsible parties for damages from the fire, and included a claim against Royal for reckless spoliation of evidence.

The Court of Appeals dismissed MetLife's spoliation claim against Royal, distinguishing the facts of that case from those of *DiDomenico* in that "there was no duty, court order, contract or special relationship" between Royal and MetLife that would have required Royal to preserve the vehicle. *Id.* at 484. In particular, the Court noted that although MetLife had received verbal assurance from Royal that it would preserve the vehicle, it had "made no effort to preserve the evidence by court order or written agreement." *Id.*

The take-away from *MetLife Auto* -- a cause of action for third-party spoliation of evidence would require, at least, a duty or other obligation on the part of the third party to the injured party to preserve the evidence. *See, e.g., Hennessy v. Restaurant Assoc., Inc.*, 25 A.D.2d 340, 341, 2006 N.Y. App. Div. LEXIS 71 (1st Dep't 2006) ("Absent some duty to preserve evidence, there is no cause of action for negligent spoliation", citing *MetLife Auto*). Three and one half years later, however, in *Ortega v. City of New York*, 9 N.Y.3d 69, 2007 N.Y. LEXIS 2715 (2007), the Court of Appeals ostensibly ruled out any cognizable tort claim for negligent spoliation by a third party.

Ortega v. City of New York involved yet another apparently spontaneous automobile fire, this time while the owner and a passenger were inside the vehicle, causing them both serious injury. The vehicle was subsequently towed and impounded by the City, and the passenger obtained a Court order directing the City to preserve the vehicle for inspection by her attorney. Instead, the City Pound inadvertently destroyed the vehicle in violation of the preservation order.

It would appear that the passenger, having attempted to preserve the vehicle by obtaining a court order just as the *MetLife Auto* Court seemed to prescribe, might have had a viable spoliation claim against the City. Both the owner and the passenger sued the City for negligent spoliation of evidence, claiming that the destruction of the vehicle prevented them from determining the cause of the fire or identifying responsible parties, and seeking damages comparable to what they believed they would have won had they sued the responsible parties. Neither plaintiff pursued a direct personal injury claim against any anyone that might have been identified responsible party.

On the City's summary judgment motion, the Supreme Court dismissed the owner's spoliation claim but sustained the passenger's, noting the City's obligation to the passenger to preserve the vehicle pursuant to the Court order, and relying on *MetLife Auto* and *DiDomenico*. *See Ortega v. City of New York*, 11 Misc. 3d 848, 853-55, 2006 N.Y. Misc. LEXIS 267 (Sup. Ct. Kings Co. 2006). On appeal, however, the Second Department dismissed the passenger's spoliation claim as well as the owner's, *see Ortega v. City of New York*, 35 A.D.3d 422, 2006 N.Y. App. Div. LEXIS 14547 (2d Dep't 2006), and the Court of Appeals affirmed.

The Court of Appeals expressly rejected what it viewed as the *Ortega* plaintiffs' attempt for "recognition of a new cause of action because they cannot meet the traditional proximate cause and actual damages standards at the foundation of our common-law tort jurisprudence." 9 N.Y.3d at 80. Citing its general reluctance "to embrace claims that reply on hypothetical theories or speculative assumptions about the nature of the harm incurred or the extent of plaintiff's damages", the Court refused to hold a negligent third party liable for all of the damages the plaintiff might have

recovered from a potential tortfeasor, "because the content of the lost evidence is unknown, there is no way of ascertaining to what extent the proof would have benefited either the plaintiff or defendant in the underlying lawsuit and it is therefore impossible to identify which party, if any, was actually harmed." *Id.* at 81. The Court also expressed concern about leaving municipalities vulnerable as attractive alternative defendants to actual tortfeasors. *See id.* at 82-83.

Instead, the party claiming injury as a result of the spoliation may be able to seek more limited recovery by other means. Had the *Ortega* plaintiffs pursued a claim against the City for contempt of the preservation order pursuant to Judiciary Law § 773, for example, they might have been able to recover the additional expenses incurred in attempting to prove their personal injury claims without the ability to inspect the vehicle which the City negligently destroyed. *See id.* at 80.

How Far Does Ortega Go? In *Ortega* the Court of Appeals did not reference the Second Department's decision in *DiDomenico*, even though the Supreme Court had expressly relied on that case in the decision appealed from, and the Court of Appeals itself in its *MetLife Auto* decision had been careful to distinguish *DiDomenico*. Nor did the Court of Appeals mention "impairment of a claim or defense" as it did in *MetLife Auto*, leaving open the question of whether a claim for negligent third-party spoliation might survive under a different guise within a limited scope.

The Court of Appeals' reasons for refusing to recognize the spoliation claims in *Ortega* do not apply to the same degree in all circumstances. For example, when the party claiming its interests were impaired by the spoliation is a defendant and seeks indemnification for its own potential liability as in *Fada Indus.*, uncertainty in the calculation of damages is not an issue. In fact, whenever the third-party spoliation claim is ancillary to a lawsuit against the parties deemed directly responsible for the underlying damages, as in *Fada Indus.*, *DiDomenico*, and *Weigl*, as well as in *MetLife Auto*, the hypothetical and speculative aspects of the spoliation claim should not be nearly as great as in *Ortega*, where the effects of the spoliation was the only matter being litigated.

Thus, the Court of Appeals may have left the door open, albeit only slightly, to a spoliation claim against a third party in the context of a special relationship giving rise to obligations beyond the mere duty to preserve evidence, such as the employer-employee relationship, or the relationship between an insurer and its insured. In addition, the Court of Appeals in *Ortega* addressed only *negligent* third-party spoliation, and has not yet ruled out an independent claim against a third party who intentionally destroys evidence despite a legally cognizable duty or obligation to preserve it. Likewise, if the party has agreed to produce certain evidence either because of a pre-existing relationship between the parties or a promise and allows it to be destroyed, the requesting party may have viable beach of contract or promissory estoppels claims. Finally, *Ortega* certainly does not preclude an aggrieved party from pursuing relief under NY CLS Jud §773, *FRCP45(e)*(USCS *Fed Rules Civ Proc R 45*), etc. if the evidence is destroyed after a subpoena has been issued or a preservation order entered.

For additional discussion of potential claims and remedies for third-party spoliation see Brian Warwick, *Smith v. Atkinson: The Supreme Court of Alabama Holds that Liability Can Be Imposed on a Third Party for Negligent Spoliation of Evidence*, 62 *Ala. Law.* 201 (May 2001); Benjamin Clark, *The License to Spoliate Must Be Revoked: Why Missouri Should Recognize a Tort for Third-Party Spoliation*, 59 *J. Mo. B* 308 (Nov./Dec. 2003); James Killelea, *Spoliation of Evidence: Proposals for New York State*, Note, 70 *Brooklyn L. Rev.* 1045 (2005).

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Bensing on B & T Distribs. v. CSK Constr., Inc., 2008 Ohio App. LEXIS 1583

2008 Emerging Issues 2629

Russ Bensing on Requests for Admissions and *B & T Distribs. v. CSK Constr., Inc., 2008 Ohio App. LEXIS 1583* (6th Dist. 2008)

By Russ Bensing

July 30, 2008

SUMMARY: Requests for admission can be a powerful tool for litigators. Failure to respond to such requests may have dire consequences. This commentary, written by Russ Bensing examines this tool in light of *B & T Distributors v. CSK Construction, Inc.*, from the perspectives of both the propounder and the responding counsel.

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ARTICLE: Responding to discovery requests is on every attorneys list of least favorite things to do. As the 6th Districts recent decision in *B & T Distribs. v. CSK Constr., Inc., 2008 Ohio App. LEXIS 1583* points out, however, a dilatory response to requests for admissions can engender more than a motion to compel it can result in losing the case entirely.

The consequences of not making a timely response can be dire. The time for responding to requests for admissions under Civ.R. 36 28 days is the same as that for responding to interrogatories and requests for production. The difference is what happens on the 29th day. Failure to timely produce documents or to timely answer interrogatories may lead to a prodding call from opposing counsel. Failure to respond to requests for admissions, though, has far more drastic repercussions: the rule provides that failure to answer within the time allotted means that [t]he matter is admitted. Given that a request can be used to establish a fact, even if it goes to the heart of the case, *Cleveland Trust Co. v. Willis*, 20 Ohio St. 3d 66, 67 (1985), and even if the fact must be proven by the requesting party at trial, *Youssef v. Jones*, 77 Ohio App. 3d 500, 509 (6th Dist. 1991), the unwary practitioner can find himself having admitted everything necessary for an opponent to obtain a judgment. Because of these drastic consequences, the Rule has been enforced unevenly by Ohio courts.

Tactics for capitalizing on failure to timely respond. To maximize the chance of having the matters not timely admitted deemed admitted, counsel intending to propound requests for admissions should keep the following in mind:

. In order to demand strict compliance with the rules, one must first comply with them. It is not unusual to combine requests for admission with interrogatories and requests for production. Because of the difference in effect of the failure to respond to request for admission, subparagraph (C) was added to Civ. R. 36 in 2005. That subparagraph mandates that the caption of a document containing requests for admission plainly state that it includes such requests. A general

Request for Discovery will not be sufficient.

. Although the Rule provides a 28-day period for response, it also provides that the requests must state the period designated for response. If the request does not specify a period for response, the response may be made anytime prior to trial. *McGreevy v. Bassler*, 2008 Ohio App. LEXIS 265 (10th Dist. 2008).

. The 2004 amendments to the Civil Rules required that discovery requests be served electronically as well as by mail, but did not specify the consequences of failure to make electronic service. Effective July 1, 2008, service of the discovery request, including requests for admissions, will not be deemed complete until the responding party receives both an electronic and a paper copy.

Once the opposing party has failed to timely respond, counsel for the propounding party can file a motion to have the requests be deemed admitted. The tactical wisdom of that option is questionable, however. Such a motion is not necessary, *Farah v. Chatman*, 2007 Ohio App. LEXIS 629 (10th Dist. 2007). The same effect can be achieved by filing a motion for summary judgment based on the admitted requests, or even by waiting until trial. As will be seen, one of the key factors in determining whether to permit a late filing is the prejudice to be suffered by the propounding party. Showing the prejudice suffered as a result of permitting a late filing on the eve of trial is obviously a much easier task than demonstrating the prejudice of permitting the responding party to file responses a week after they were due.

At some point, of course, the responding party will attempt a late filing. At that point, counsel for the propounding party should cite the case law indicating that late filing should be permitted only in compelling circumstances, *Sandler v. Gossick*, 87 Ohio App. 3d 372, 377 (8th Dist. 1993), and that mere inadvertence of counsel is not excusable neglect under Civ. R. 6(B). *Whitehouse v. Customer Is Everything!, Ltd.*, 2007 Ohio App. LEXIS 6086 (11th Dist. 2007).

Tactics for tardy counsel. Counsel for the party that has failed to respond is not bereft of options, either. Central to counsel's argument here is the Rule itself, specifically subparagraph (B), which provides that the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice the party in maintaining his action or defense on the merits. (Amendment, of course, includes a late filing.) The Supreme Court cited this language in *Balson v. Dodds*, 62 Ohio St. 2d 287, 290 (1980), upholding the trial court's decision to permit a tardy response to admissions because the opposing party could not demonstrate she would suffer any prejudice as a result.

With that in mind, some suggestions:

. Counsel should make sure that the opponent has strictly complied with the requirements for requests for admissions. As noted above, failure to specify in the caption that the discovery requests include admissions, failure to designate a period for response, or failure to make electronic service will relieve counsel of the obligation of making a timely, or in fact any, response.

. Counsel should act quickly: the faster the responses are filed, the more likely that the opposing party will be unable to demonstrate prejudice, especially if the case is still in the early stages. *See, for example, Kutscherousky v. Integrated Communs. Solutions, LLC*, 2005 Ohio App. LEXIS 3893 (5th Dist. 2005) (trial court abused discretion in denying leave to amend where responses filed only nine days after they were due), and *Vertex Constr., Inc. v. Setterlin Constr. Co.*, 1988 Ohio App. LEXIS 1499 (10th Dist. 1988) (leave should be granted where no pretrial conference or trial date had been set, and the parties had not yet completed discovery).

. Unless counsel has an especially valid excuse for a tardy response, little time should be spent in providing one. In *Kutscherousky*, *supra*, the court held that the two-prong test of Rule 36(B) directs the court to consider the effect upon the litigation and prejudice to the resisting party, rather than focusing on the moving party's excuses for an erroneous admission.

. A motion for leave to amend the responses is not absolutely necessary; simply contesting summary judgment can

suffice. *Jade Sterling Steel Co. v. Stacey*, 2007 Ohio App. LEXIS 480 (8th Dist. 2007). Needless to say, the preferred option is to file the motion for leave; use of *Jade* is a last resort, where counsels first realizes the failure to respond to requests upon the arrival of the opponents motion for summary judgment.

. Do not forget the first prong of the Rule 36(B) test for permitting amendment: that doing so would subserve presentation on the merits. There are innumerable decisions espousing the preference for resolving cases on their merits, rather than on technicalities. Resort to this line of argument is especially appropriate where the requests, if deemed admitted, would essentially determine the action. See *Albrecht, Inc. v. Hambones Corp.*, 2002 Ohio App. LEXIS 5745 (9th Dist. 2002).

Do not be afraid to cite federal cases. The federal counterpart to Rule 36 is virtually identical to it, and federal case law is far more forgiving. There are federal cases in which leave to amend was granted a year after the requests were due, and even on the day of trial. *Kutscherousky*, *supra*, contains an excellent summary of those cases.

For additional information about requests for admissions, see Ohio Civil Rules Practice 10.56 Requests for Admissions; Ohio Civil Rules Practice 10.57 Procedure for Request for Admissions.

RELATED LINKS: Bensing is a solo practitioner in Cleveland, Ohio, specializing in criminal, appellate, and general civil litigation. He graduated from Case Western Reserve University Law School in 1975, and was admitted to the Ohio Bar that year, to practice in the United States District Court for the Northern District of Ohio in 1976, and to the United States Sixth Circuit Court of Appeals in 1982. He is a member of the Ohio State Bar Association, the Cleveland Metropolitan Bar Association, the Ohio Association of Criminal Defense Attorneys, and the Cuyahoga Criminal Defense Lawyers Association. He is the author of The Briefcase, a blog devoted to Ohio law.



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Mack on License Drafting Practice: City of Hope Medical Center v. Genentech

2008 Emerging Issues 2622

Mack on Practical Implications on License Drafting Practice and Commercial Litigation of City of Hope Medical Center v. Genentech, Inc.

By Olga V. Mack

July 29, 2008

SUMMARY: In *City of Hope Medical Center v. Genentech, Inc.*, the Supreme Court of California reversed the punitive damage award for breach of fiduciary duty and upheld the actual damage award for breach of contract. This long-awaited decision, analyzed by Olga Mack, compels practitioners who draft license agreements to be more proactive to minimize their clients exposure to punitive damages.

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ARTICLE: In *City of Hope Medical Center v. Genentech, Inc.*, 43 Cal. 4th 375, 75 Cal. Rptr. 3d 333, 181 P.3d 142, City of Hope Medical Center (Hospital or plaintiff) asserted breach of fiduciary duty and breach of contract, including breach of the implied covenant of good faith and fair dealing against Genentech, Inc. (Genentech or defendant) related to a licensing agreement. In particular, the plaintiff asserted that the defendant failed to pay royalties on its third-party licenses.

The Court Set Aside The Punitive Damage Award. The Supreme Court of California reversed the punitive damage award of \$200,000,000 for breach of fiduciary duty. Punitive damages are not available in California for a breach contract. However, punitive damages are available in tort-related claims such as breach of fiduciary duty. Thus, the Court set aside the award for punitive damages because it found that no fiduciary relationship formed between the Hospital and Genentech for the following four reasons:

- First, referring to specific Genentech/Hospital contract provisions, the Court found that the parties entered into a contract to achieve mutually beneficial agreement. That is, the plaintiff did not enter into the contract with the view of acting primarily for the benefit of the defendant.
- Second, no facts indicate that Genentech, through its conduct, knowingly undertook the obligations of a fiduciary.
- Third, special circumstances such as a joint venture, partnership, or agency did not exist to impose fiduciary obligations as a matter of law. In fact, one of the Genentech/Hospital contract provisions expressly stated that the parties relationship is not a joint venture, partnership, or agency.
- Fourth, rejecting reliance on *Stevens v. Marco*, 147 Cal. App. 2d 357 (1956), the Court held that the fiduciary relationship does not necessarily form merely when the following four characteristics are present: (a) one party entrusts its affairs, interests, or property to another; (b) one party grants another a broad discretion because of knowledge disparity; (c) asymmetrical access to information exists; and (d) one party is vulnerable and dependent upon another. In

fact, the Court observed that these characteristics are common in many contractual agreements. That is, fiduciary obligations are not necessarily created when one party entrusts valuable intellectual property to another for commercial development in exchange for payment of compensation contingent on commercial success; the secrecy of information is a factor that may be considered at trial, but does not require the imposition of fiduciary duties. *See Wolf v. Superior Court*, 107 Cal. App. 4th 25 (2003). The Court observed that one party's vulnerability must be so substantial to impose a fiduciary duty. In this case, however, the Court did not impose a fiduciary duty because the contract was between two sophisticated parties, each party had a substantial bargaining power, and both parties were represented by counsel throughout the negotiations of the contract.

The Court Affirmed The Actual Damage Award. However, the California Supreme Court affirmed the actual damage award of \$300,164,030 to the Hospital for a breach of contract because Genentech failed to pay certain royalties. In its breach of contract discussion, the Court observed:

- First, the conduct (e.g., concealing certain information) between execution of the contract and a dispute about the meaning of the contract's terms is admissible to resolve the ambiguities in the contract's language.
- Second, the jury may interpret the agreement when the contract construction depends on the credibility of extrinsic evidence.
- Third, if uncertain language remains after considering the evidence, it must be interpreted against the party who caused the uncertainty to exist.
- Fourth, stipulations regarding the admission of evidence, absent express limitation, apply to a later trial of the same action, unless the court allows the stipulation to be withdrawn.

Implications of *Hope Medical Center v. Genentech, Inc.* on License Drafting Practices. In light of the Courts holding in *City of Hope Medical Center v. Genentech, Inc.*, the practitioners who draft license agreements are well advised to minimize their clients exposure to litigation in general, and punitive damages in particular. Thus, a practitioner may consider:

- Explicitly stating that the purpose of the contract is to achieve mutually beneficial agreement.
- Explicitly listing what each party gains from entering the license agreement, e.g., royalty payments, ability to manufacture certain products, ability to sell certain products, research funding, exclusive or joint ownership of a property (such as patent, trade secret, trademark, copyright, real property, etc.), right to assign, right to transfer, right to file patent applications, exclusive or non-exclusive ability to license, etc.
- Avoiding language in the contract that states or suggests that the client acts for the benefit of the other party.
- Scrutinizing the facts and circumstances of the prior relationship between the parties and the dynamics of the license negotiations suggesting that the client knowingly undertook the obligations of a fiduciary.
- Explicitly including a clause in the contract that the parties' relationship is not a joint venture, partnership, or agency.
- Explicitly and clearly stating that parties do not intend to enter a fiduciary relationship.
- Explicitly including mandatory alternative dispute resolution (e.g., arbitration).
- Explicitly and clearly limiting remedies in case license disputes arise (e.g., capping damages to a certain amount, prohibiting punitive damages, etc.).
- Advising clients that while, in general, licensing relationships do not establish a fiduciary relationship and, thus, do not expose clients to punitive damages, the Courts may consider various extrinsic facts in determining whether a fiduciary relationship was formed. Thus, the clients are well-advised to deal with the other party as fairly as possible, to communicate regularly, and to document their compliance with contractual obligations during the license negotiations and throughout the life of the license.
- Counseling clients that exposure to punitive damages increases (although is uncertain) when the other party is not sophisticated, a substantial bargaining power imbalance exists, and/or the other party is not represented by counsel.
- Counseling clients that exposure to punitive damages increases (although is uncertain) when the other party provides secret information as part of the bargain.
- Documenting all communications oral and written that suggest the parties did not intend to enter a fiduciary

relationship and to create a record of fair dealing.

- Including the other party in as many aspects of license drafting as practical to avoid uncertain language being interpreted against the client.
- Explicitly stating that the license should not be construed against either party.
- Defining key terms (e.g., royalty, license, profit, etc.) and the key license conditions (e.g., what constitutes use of the patent, what constitutes application of a certain method, etc.) as clearly and as precisely as practical to minimize exposure to expensive and time-consuming future litigation.

Implications of *Hope Medical Center v. Genentech, Inc.* on Extrinsic Evidence-Intensive Contract Litigation.

While the holding in *City of Hope Medical Center v. Genentech, Inc.*, primarily affects license drafting practices to minimize clients exposure to punitive damages, the case also provides some insight for attorneys who litigate disputes especially those that are extrinsic evidence-intensive. Thus, a litigator may consider:

- Counseling client that punitive damages exposure is minimal, absent an explicit contractual agreement or substantial facts that suggest a fiduciary relationship exists.
- Foreseeing the implications of entering into a stipulation regarding evidence admission, especially early in the case, because such stipulations generally apply to a later trial of the same action.
- Relying on the contract language as much as possible during the contract interpretation stage of trial.
- Assessing the risks and benefits of having a judge or jury interpret potentially ambiguous license language.
- Relying on written communications and well-documented evidence as much as practical to interpret ambiguous contract language, especially when witnesses are not available to testify and/or appear incredible.

Conclusion. In *City of Hope Medical Center v. Genentech, Inc.*, the Supreme Court of California reversed the punitive damage award for breach of fiduciary duty and upheld the actual damage award for breach of contract. This long-awaited decision compels practitioners, who draft license agreements, to be more proactive to minimize their clients exposure to punitive damages. The decision also encourages commercial litigators to be more careful in handling extrinsic evidence-intensive cases.

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Brazas on Hatchett v. Swanson, 2008 Ill. App. LEXIS 472

2008 Emerging Issues 2626

Susan M. Brazas on Hatchett v. Swanson, 2008 Ill. App. LEXIS 472, No. 2-07-0690 (May 20, 2008).

By Susan M. Brazas

July 29, 2008

SUMMARY: The Second District Appellate Court recently entered the fray of a topic popular among Illinois courts for the past several months: what are the risks of a voluntary dismissal when it comes time to re-file and then serve the summons and re-filed complaint? In *Hatchett v. Swanson*, the Second District points out that deadlines are a moving target that can easily prove a trap for the unwary.

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ARTICLE: Cite as: Brazas, Susan M. *Hatchett v. Swanson*. LexisNexis Expert Commentary, (*Insert date you accessed the document online*).

Second District Addresses Timely Service of Summons for a Re-Filed Complaint After Voluntary Dismissal

In the May 2008 court opinion of *Hatchett v. Swanson, 2008 Ill. App. LEXIS 472*, No. 2-07-0690 (May 20, 2008), the Second District Appellate Court tackled the topic of diligent service of a re-filed complaint following a voluntary dismissal. Recently, this has been the subject of much attention in Illinois courts. The ink was barely dry on the Illinois Supreme Court's decision in *Case v. Galesburg Cottage Hospital, 2007 Ill. LEXIS 1707* (Dec. 13, 2007), heralding the sanctity of a plaintiff's absolute right to re-file after a voluntary dismissal when the Court issued another decision addressing the subject, *Hudson v. City of Chicago*, No. 100466 (Jan. 25, 2008). In *Hudson*, the Supreme Court addressed the interplay of the voluntary dismissal statute, found at 735 ILCS 5/2-1009, and the doctrine of res judicata and identified a policy against claim-splitting.

What Happened in Hatchett. In *Hatchett*, a spectator injured during a race sued the race sponsor. The spectator voluntarily dismissed the first complaint and then refiled. The trial court granted the sponsors motion to dismiss with prejudice. The appellate court vacated and remanded, holding that although the trial court could determine if service was diligently made after the refiling in light of the entire history of the case, it should not have considered the length of time the spectator waited before refiling.

Recent Supreme Court Decisions on Similar Issues. In its *Case v. Galesburg* decision, *2007 Ill. LEXIS 1707* (Dec. 13, 2007), the Supreme Court held that the right to re-file a voluntarily dismissed complaint within the one-year window of time set forth in *Section 13-217 of the Code of Civil Procedure* is an absolute right that must be protected.

The *Case* court held, as did the *Hatchett* court, that the window of time between a voluntary dismissal and a re-filing must not be considered in assessing whether there was diligence in service under Supreme Court Rule 103(b).

In *Hudson v. City of Chicago*, No. 100466 (Jan. 25, 2008), the Illinois Supreme Court addressed the interplay of the voluntary dismissal statute and the doctrine of res judicata. In affirming the trial court and the appellate court, the Supreme Court applied its decision of twelve years earlier to find that the plaintiff's re-filed action was barred by res judicata, because plaintiff could have, but did not, pursue his case to conclusion in the trial court after one count of his original action was involuntarily dismissed with prejudice.

In *Hatchett*, the Second District applied the analysis and holding of *Case* to identify factors infringing upon the right to re-file within one year identified in the *Case* decision. Interestingly, the *Hatchett* court made an extensive analysis of the sequence of amendments to the Rule on diligence of service, Rule 103(b) of the Illinois Supreme Court Rules.

This focus on the chronology of amendments to the Supreme Court Rule highlights the importance of tracing the history of a rule, rather than assuming that it has always been in the familiar form. The opinion raises, but does not answer, the interesting question of whether the amendments to Supreme Court Rule should apply retroactively. This leaves open the possibility of creative argument by counsel as to whether diligence should be evaluated in historical context or according to current standards.

The *Hatchett* court also noted that a dismissal under Rule 103(b) for failure to timely serve a re-filed complaint would not serve the purposes of Rule 103. This is an example of the importance of arguing that the court should be guided by furtherance of policy considerations. Further, counsel should also make liberal use of the Committee Comments to the Rules in their arguments, as the *Hatchett* court cited the Comments in its analysis. Sources of this type may tip the scales on a close question.

Case Law Trends Persuasive. The *Hatchett* court also considered the Supreme Court's view of diligence over the course of eleven years, in five cases. In analysis the *Hatchett* court noted that cases decided during that period, although not directly on point, were instructive for an overarching policy that justice should be administered without delay. The *Hatchett* court determined that the often-repeated totality of the circumstances approach should be considered, as is specified in the most recent amendment to Rule 103(b). However, the interesting distinction made by the *Hatchett* court is that while the circumstances of the *initial* filing of the complaint may be scrutinized, the timing of the re-filing may not. Just as did the *Case* court, the *Hatchett* court found that the plaintiff has an absolute right to re-file within the one-year window and that a plaintiff who takes full advantage of that time must not be punished when an analysis of diligence of service is made.

Impact on Pleadings. The *Hatchett* opinion illustrates the importance of examining policy implications of the case law on a particular subject. Although counsel is often tempted to find *the* newest and best case on a topic, a consistent, well-established line of cases can be even more persuasive. Likewise, a historical review of the evolution of procedural rules or statutes can be offered as supporting evidence for a particular interpretation.

The *Hatchett* opinion also sheds light on the importance of not dismissing unconventional arguments out of hand. For example, if one were to presume that *only* a totality of the circumstances approach would be followed, then one might likely miss the opportunity to argue that one particular aspect of the factual background is so critical that it should be given far greater weight. Counsel should also seek out those phrases that define the message of case law on the subject, as did the *Hatchett* court when it identified the policy goal of Rule 103(b) as justice without delay.

For additional information, see Illinois Civil Procedure § 11.04, Voluntary Dismissals.

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Rabiej on Accessibility of ESI

2008 Emerging Issues 2627

Rabiej on Accessibility of ESI

By John K. Rabiej

July 29, 2008

SUMMARY: In dueling footnotes, Judge Francis and Judge Pitman reach opposite conclusions on whether converting relevant accessible ESI into inaccessible ESI pending litigation violates preservation obligations. John K. Rabiej, Chief of the Rules Committee Support Office, discusses the facts of each case and explains their rationales.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Cite as: Rabiej, John K. Whether Converting Accessible ESI into Inaccessible ESI Violates Preservation Obligations. LexisNexis Expert Commentary, (*Insert date you accessed the document online*).

In dueling footnotes, two noted jurists reach opposite conclusions on whether converting relevant accessible electronically stored information (ESI) into inaccessible ESI pending litigation violates preservation obligations (*see* 7 Moores Federal Practice, Ch. 37A, *Discovery of Electronically Stored Information*, § 37A.35[1], discussing what constitutes inaccessible ESI). In *Quinby v. WestLB*, 2005 U.S. Dist. LEXIS 35583, at *27 n.10 (S.D.N.Y. Dec. 15, 2005) (*Quinby I*), Judge Pitman concludes that a party is not obligated to preserve evidence in a particular form and may convert accessible ESI into inaccessible ESI pending litigation, though the party may be responsible to pay the added costs in reconverting and producing relevant ESI in discovery. In *Treppel v. Biovail Corp.*, 233 F.R.D. at 372 n. 4 (S.D.N.Y. 2006), Judge Francis expresses a contrary view. He concludes that converting ESI into an inaccessible form when litigation is anticipated violates the preservation obligation based on *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d at 110 (2d Cir. 2002). Judge Pitman disagrees with Judge Francis's analysis in *Quinby II* (*Quinby v. WestLB*, 245 F.R.D. 94, 103 n.12 (S.D.N.Y. 2006)). The outcome of this debate can have far-reaching implications.

Facts. In *Quinby I*, e-mails of employees were regularly deleted from a defendant's active database when the employee left the company. A record of the e-mails was retained solely on backup tapes, which compressed the data to save storage expense. In prior litigation, the defendant had hired a consultant to decompress and restore certain backup tapes containing former employee e-mails, which would later be relevant in *Quinby I*. The restored e-mails were easily accessible. After the action was filed in *Quinby I*, the defendant's consultant had recompressed the previously restored backup tapes in apparent ignorance of the new lawsuit, making the former employees' e-mail inaccessible again.

In *Treppel*, the plaintiff initiated the action on April 29, 2003. On December 13, 2003, the defendant created backup tapes of relevant ESI located on its computer servers. In March 2005, the defendant again made backup tapes

but at the same time it also created a mirror image of the ESI on the hard drives of certain employees. The ESI on the mirror image was easily accessible.

The plaintiff in *Treppel* filed a motion in late 2005 requesting the court to enter a order compelling the defendant to preserve all relevant ESI. Though preservation orders can be helpful to instruct parties on the parameters of discovery, courts should not routinely enter these orders (see Committee Note to Rule 26(f) (2006) (requirement that the parties discuss preservation does not imply that courts should routinely enter preservation orders; *but see Treppel supra at *16*, noting that such preservation orders are increasingly routine in cases involving electronic evidence). Judge Francis applied a three-factor balancing test regularly used by courts to determine whether a preservation order was appropriate (see *Treppel, supra at 370*; see also 7 Moores Federal Practice, Ch. 37A, *Discovery of Electronically Stored Information*, § 37A.10[3][b]). Under the first factor in the test, Judge Francis considered the potential destruction of the evidence absent a preservation order. Because the plaintiff failed to demonstrate that any evidence had been lost or that the defendant's actions in creating backup tapes and a mirror image of hard drives were inadequate to preserve the evidence, Judge Francis denied the preservation order request as premature.

In reaching his decision, Judge Francis noted that ESI would be effectively destroyed if it is converted from an accessible form into an inaccessible form. Judge Francis relied on *Residential Funding, supra*, concluding that permitting the downgrading of data to a less accessible form which systematically hinders future discovery by making the recovery of the information more costly and burdensome is a violation of the preservation obligation (*Treppel, supra at 372 n.4*). Judge Francis did not sanction the defendant because the converted ESI had not been downgraded and remained accessible. Judge Francis opined, however, that if the defendant had converted the ESI into an inaccessible backup tape, like the defendant had done in *Quinby I*, he would have found such action sanctionable. Presumably, the defendant in *Treppel* was not sanctioned because the ESI was retained on an accessible mirror image of the data. Why Judge Francis did not sanction the defendant for converting accessible ESI into inaccessible backup tapes in 2003 and 2004, and waiting until 2005, nearly two years after the litigation had commenced, before creating a mirror image of the ESI, is puzzling.

Judge Pitman was not persuaded by the *Treppel* analysis. He concluded that the preservation obligation does not require a party to retain ESI in a particular form, whether in an accessible or inaccessible form. He found no case holding that a party must retain ESI in a particular form as part of the preservation obligations. The lack of precedent was not surprising because a party is entitled to preserve ESI in whatever form it chooses (see *Zubulake v. UBS Warburg LLC*, 220 F.R.D. at 218 (S.D.N.Y. 2003)). If a party has the right to choose its ESI storage form, it has the right to alter it, so long as a complete and accurate duplicate of the ESI can be later produced and the requesting party's interests are not prejudiced. *Treppel* was not to the contrary because it dealt with the issuance of a preservation order, while *Residential Funding* concerned what evidence could be considered in determining whether to impose an adverse inference instruction sanction (*Quinby II, supra at 103 n.12*).

Judge Pitman ruled that the conversion of the ESI did not violate any preservation obligation but added that if a party creates its own burden or expense by converting into an inaccessible format data that it should have reasonably foreseen would be discoverable material at a time when it should have anticipated litigation, then it should not be entitled to shift costs of restoring and searching the data (*Quinby II, supra at 104*; see also *Best Buy Stores, L.P. v. Dev. Div. Realty Corp.*, 2007 U.S. Dist. LEXIS 88771, at *11 (D. Minn. Nov. 29, 2007) (downgrading database by converting ESI on active database into inaccessible ESI did not destroy the information it contained but rather removed it from a searchable format ... therefore, Best Buy did not have a duty to preserve the Odom database...)).

The issues arising from the conversion of ESI into an inaccessible form should not be confused with issues about whether a party may rely solely on backup tapes to fulfill preservation obligations. A backup tape is a snapshot of ESI created ordinarily at the end of a business day (see 7 Moores Federal Practice, Ch. 37A., *Discovery of Electronically Stored Information*, § 37A.05[2][b]). Absent a litigation hold, ESI that is created and deleted during the day before the snapshot is taken is lost (see *Wood Group Pressure Control, L.P. v. B & B Oilfield Serv., Inc.*, 2007 U.S. Dist. LEXIS 83708, at *32-34 (E.D. Lo. Apr. 27, 2007)). Accordingly, a party cannot rely exclusively on backup tapes to serve as a

substitute for a litigation hold or a preservation instruction. *Treppel* and *Quinby* only address the consequences of a conversion of the form of ESI.

Analysis. Preservation requirements are not directly addressed in the federal rules. But the concern that parties would convert accessible ESI into inaccessible ESI solely for tactical litigation purposes arose in three different rulemaking contexts. In each, the Civil Rules Committee decided that the better approach was to require the party to pay the costs of reconverting inaccessible ESI, rather than prohibiting a party from initially converting the form of ESI.

Under Rule 26(b)(2)(B), a party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. The Civil Rules Committee was concerned that the rule would encourage parties to convert accessible ESI into inaccessible ESI solely to make discovery more difficult. After careful consideration, however, the Committee declined to revise the language because it was persuaded that as a practical matter businesses would not change their record-keeping systems cavalierly and incur potentially significant costs solely for litigation purposes. Moreover, converting ESI into an inaccessible form would disrupt day-to-day business, which typically is dependent on quick and easy access to business records.

The Committee recognized that in a given case, however, a party might nonetheless consider altering its ESI storage practices solely for tactical litigation purposes. Instead of prohibiting a party from converting the form of ESI by establishing a new preservation obligation standard, the Committee addressed this potential problem by requiring a court to consider specifically the party's conversion of the form of ESI when deciding whether to compel the party to produce the inaccessible ESI (*see* Committee Note to Rule 26(b)(2) (2006) (failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources is a factor to be considered in deciding whether the party must produce inaccessible ESI)). If accessible relevant ESI is converted into an inaccessible form, the court would set the conditions for the discovery, including requiring the producing party to pay the costs to reconvert the ESI into an accessible form (*Fed. R. Civ. P. 26(b)(2)(B)*). Judge Pitman's analysis is consistent with the Committee's approach.

The preservation standard articulated by Judge Francis sounds similar to the Committee's admonition in Rule 34 cautioning parties not to convert the form of ESI to make it more difficult or burdensome for the requesting party to use the information efficiently in the litigation (*see* Committee Note to Rule 34 (2006)). Though the context is slightly different, the analysis is the same. Under Rule 34, a party is not required to produce ESI in the form in which it is ordinarily maintained, as long as it is produced in a reasonably usable form. The Committee was concerned that a party with the option to produce ESI in a reasonably usable form would convert accessible ESI and produce it in an inaccessible form. The Committee Note makes clear that the party may not convert the form of ESI and produce it in a form that significantly degrades its searchability, language that echoes Judge Francis's standard. If the party produces ESI in an inaccessible form, the questions whether a producing party should be required to convert such information to a more usable form, or should be required to produce it at all, should be addressed under Rule 26(b)(2)(B)" (*see* Committee Note to Rule 34 (2006)). Again, Judge Pitman's analysis is consistent with the Committee's approach.

The Civil Rules Committee had considered proposing a new Rule 34.1 that would explicitly set out a party's ESI preservation obligations. Ultimately it declined to propose the rule, concluding it might entrench on substantive law and would skirt too close to the limits of its rulemaking authority. However, the draft rule, which never went into effect, is instructive because it reflects the Committees preliminary views on the scope of the preservation obligation. Under the draft rule, a party converting accessible ESI into an inaccessible form would not be subject to sanctions for spoliation; however, the party would be required to arrange for the preservation of complete and accurate duplicates of ... data, if its routine practices involved the mutation of such data. On all three occasions, the Committee viewed finding a party responsible for paying costs to reconvert ESI a better solution than sanctioning the party.

Implications. The preservation standard articulated by Judge Francis in *Treppel* would impose significant restrictions. It is correct that sanctions for spoliation would be limited to situations in which the conversion of the form of ESI hindered discovery by making the recovery of the information more costly and burdensome. Thus, converting

data from an active database to a mirror image would not degrade its searchability. But other conversions routinely undertaken for business purposes, like storing ESI off-site or microfilming the data, would risk sanctions because it might increase retrieval burdens and costs. The *Treppel* standard, even as limited by Judge Francis, would inevitably lead to unnecessary satellite litigation about whether a particular form change actually increases retrieval burdens. Any change in the form of ESI would invite scrutiny and challenge. Even apparently innocuous conversions, including converting ESI from WordPerfect to Word, might be sanctionable because the search capabilities may be negatively affected; for example, differences in metadata might increase search costs. Because parties risk severe penalties if they violate their preservation obligations, such a preservation standard, though limited, would have the unfortunate effect of constraining a party in making business decisions that are entirely proper.

Conclusions. In promulgating the 2006 ESI discovery amendments, the Civil Rules Committee was sensitive to the possibility that a party might convert the form of ESI from an accessible form into an inaccessible one. In the first instance, the Committee observed that the problem should be infrequent. Parties typically will refrain from converting accessible ESI into an inaccessible form because the same data must be used for daily business purposes. Though infrequent, the Committee decided nonetheless to address this possibility by making the party responsible to reconvert the form of ESI and produce it in an accessible form incur the expense to do so. The Committee adopted this approach not only because it concluded that a change in the standards governing preservation obligations might be outside its authority, but also because it did not prejudice the interests of the requesting party and it was more consistent with the approach followed generally in the 2006 ESI discovery rule amendments.

The Committee's approach is consistent with the principle that a party may maintain ESI in any form it chooses and with Rule 34, which permits a party to produce relevant ESI in any reasonably usable form, unless the party requests a specific form of production. Both Judge Pitman and Judge Francis emphasize a party's responsibility to produce converted ESI in a form that does not degrade its integrity and searchability. Their different approaches are designed to achieve the same result, ensuring that ESI produced in discovery is not altered from its original state and its searchability is not impaired. But Judge Pitman's approach, which is consistent with the electronic discovery rules, reaches the result while allowing parties to retain their current flexibility in maintaining the form of ESI. The lesson for the practitioner is to discuss the form of ESI to be produced in discovery early in the litigation. If any relevant accessible ESI is converted into an inaccessible form during the litigation, the party will likely be responsible to reconvert it at its own expense. But the act of converting the ESI in the first place is not sanctionable as spoliation so long as the reconverted ESI is a complete and accurate duplicate of the original ESI.

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Rabiej on Production of ESI

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Rabiej on Production of ESI

By John K. Rabiej

July 29, 2008

SUMMARY: In *MGP Ingredients, Inc. v. Mars, Inc.* both parties assume that ESI must be produced as it is kept in the usual course of business or organized and labeled to correspond to the categories specified in the discovery request. John K. Rabiej, Chief of the Rules Committee Support Office, discusses the facts of the case and explains why the procedures governing production of hard-copy documents do not apply to the production of ESI.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Cite as: Rabiej, John K. Whether ESI Must Be Produced Either as Kept in Usual Course of Business or Organized to Correspond to Categories in the Discovery Request. LexisNexis Expert Commentary, (*Insert date you accessed the document online*).

Rule 34(b)(2)(E) sets out the procedures that apply to the production of documents and electronically stored information (ESI), unless the parties stipulate or the court orders otherwise. Under subparagraph (E)(i), a party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request. Under subparagraph (E)(ii), a party must produce ESI in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms if the discovery request does not specify a form for producing it.

In *MGP Ingredients, Inc. v. Mars, Inc.*, 2007 U.S. Dist. LEXIS 76853 (D. Kan. Oct. 15, 2007), the parties assumed that the production of ESI was governed by the separate procedures in both subparagraphs (E)(i) and (E)(ii). The plaintiff further contended, over the defendant's objections, that ESI must be organized and labeled in accordance with one of the options in subparagraph (E)(i). In fact, subparagraph (E)(i) applies only to the production of hard-copy documents, while subparagraph (E)(ii) exclusively governs the production of ESI (*see* 7 Moores Federal Practice, Ch. 37A, *Discovery of Electronically Stored Information*, § 37A.41[1]). The parties in *MGP Ingredients, Inc.*, incorrectly framed the issue, mistakenly applying subparagraph (E)(i) to the production of ESI. The procedures in subparagraph (E)(ii) should have been followed in the case. Though a correct analysis would not have changed the ultimate result in this case, adopting this flawed analysis could have a substantial and untoward impact in other cases.

Facts. In *MGP Ingredients, Inc.*, the defendant collected and scanned 38,000 pages of hard-copy documents. The defendant also collected 18.5 gigabytes of data, consisting of e-mail files and other electronic data. After reviewing the

documents for privilege, the defendant provided the plaintiff in single-page .tiff format 27,717 Bates-numbered pages as part of its initial disclosure obligations. An additional 10,000 pages in .tiff format were later produced. The production was sorted according to custodian, the source of the .tiff images was distinguished either as hard-copy documents or electronic documents, and the .tiff images were produced in the order kept by the respective document custodians.

The plaintiff filed 54 separate discovery requests. The defendant relied on its initial disclosures as a full response to the discovery requests. The plaintiff filed a motion to compel, contending that the defendant violated Rule 34(b)(2)(E)(i) by failing to produce the documents in an order that categorized them by topic or related to a specific request. The plaintiff asserted that the defendant's production unjustifiably created a burden on the party seeking the discovery to determine which documents are responsive to which request. *Id.* at *7. The defendant responded that because the plaintiff had failed to request a specific form of production, the defendant's production of the material as it was kept in the usual course of business under the optional alternative in subparagraph (E)(i) was proper. The court ruled that the defendant's production complied with Rule 34(b)(2)(E)(i) and denied the plaintiff's motion to compel.

Flawed Analysis. The two options set out in Rule 34(b)(2)(E)(i) for producing documents are intended to prevent a party from unnecessarily creating obstacles for the other party by dumping mountains of documents. The over-production of ESI could raise similar problems. The drafters of the e-discovery amendments to Rule 34 recognized that the procedures in subparagraph (E)(i), which were written to apply to hard-copy documents, did not neatly fit ESI and had to be modified to apply to ESI. In particular, though the procedures in subparagraph (E)(i) work well with paper documents, which generally can be produced in only one form, they are not as effective with ESI, which can exist in different forms. Accordingly, the rulemakers crafted alternative, mutually exclusive, procedures in subparagraph (E)(ii) that are designed to apply specifically to ESI, not to supplement the procedures in subparagraph (E)(i).

Subparagraph (E)(ii) was drafted to provide an ESI functional analogue to the procedures governing hard-copy documents (*see* 7 Moores Federal Practice, Ch. 37A, *Discovery of Electronically Stored Information*, § 37A.42). It was intended to provide requirements comparable, but not in addition, to those in subparagraph (E)(i) to protect against deliberate or inadvertent production in ways that raise unnecessary obstacles for the requesting party. *See* Committee Note to Rule 34(b) (2006); *see also* Report of Advisory Committee on Civil Rules to Committee on Rules of Practice and Procedure, July 25, 2005, found in House Document 109-105, at 159 (2006) (These alternatives [form ordinarily maintained or reasonably usable form] were intended to provide functional analogues to the existing rule language that provides choices for producing hard-copy documents....). The structure of subparagraph (E)(ii) was designed to track the structure in subparagraph (E)(i). Thus, the option in subparagraph (E)(ii) to produce ESI in a form or forms in which it is ordinarily maintained parallels the option to produce documents as they are kept in the usual course of business, while the second option to produce ESI in a reasonably usable form or forms parallels the option to produce documents in an order that categorizes the information by topic or related to a specific request.

Although the option to produce ESI in a reasonably usable form is not precisely the same as the option to produce hard-copy documents organized and labeled to correspond to the request, it is functionally analogous because it enables a party seeking production to locate the pertinent information on their own, regardless of any index or labeling provided by the responding party. *See Zakre v. Norddeutsche Landesbank Girozentrale*, 2004 U.S. Dist. LEXIS 6026, at *3 (S.D.N.Y. Apr. 9, 2004) (citing *The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Document Discovery*, Sedona Conference Working Group Series 2004 Principle 11)).

The distinction between the procedures in subparagraph (E)(i) and (E)(ii) is made plain in the language of the two pertinent provisions. By its terms, subparagraph (E)(i) applies only to documents, while subparagraph (E)(ii) applies to ESI. Though lawyers and judges have long interpreted documents to include ESI, Rule 34(a)(1)(A) and the accompanying Committee Note make clear that ESI is separate from and distinguishable from documents. The rule deliberately refers separately to designated documents and electronically stored information to highlight the differences between them (Rule 34(a)(1)(A)). Therefore, ESI is not a subset of documents; it is a new category in addition to documents. *See* Report of Advisory Committee on Civil Rules to Committee on Rules of Practice and Procedure, July 25, 2005, found in House Document 109-105, at 157-158 (2006) (The Committee decided to recommend making

electronically stored information separate from documents.) The distinction was drawn primarily to recognize the difficulty in fitting different forms of ESI, like dynamic databases that constantly change, within the traditional concept of document. *See* Committee Note to Rule 34(a) (2006).

Though conceptually distinct, documents often will include ESI. The Committee Note to Rule 34 tries to clarify the relationship of these two provisions by explaining that the term documents usually includes ESI but only in discovery rules that [were] not amended [in 2006], including Rules 30(f), 36(a), and 37(c)(2) and only in such rules as circumstances warrant. The limitation excludes Rule 34, which was amended. Thus, the parties in *MGP Ingredients, Inc.*, should have applied the procedures in subparagraph (E)(ii) to ESI in lieu of the procedures governing hard-copy documents in subparagraph (E)(i). The arguably too-subtle distinction drawn in Rule 34 between ESI and documents may explain the parties confusion with the interplay of subparagraph (E)(i) and subparagraph (E)(ii).

Substantial Practical Differences Between the Two Production Procedures. There can be significant practical differences between producing ESI in a reasonably usable form under subparagraph (E)(ii) or producing ESI in an organized fashion that corresponds to specific categories in the request under subparagraph (E)(i). Under the plaintiffs view in *MGP Ingredients, Inc.*, a party producing ESI in .tiff format would also be obligated to organize the electronic images to correspond to the categories in its request. Requesting that the images be segregated in this fashion may impose substantial burdens on the responding party. In its motion in opposition to the plaintiffs motion to compel, the defendants in *MGP Ingredients, Inc.*, characterized the burden as follows: As is increasingly common, the bulk of Defendants production in this case consists of ESI. If, when faced with a large production of electronic information, litigants [are compelled to comply with subparagraph (E)(i)], the time and expense associated with document discovery will dramatically increase. Indeed, it would be nothing short of a monumental task for Defendants to identify which of Plaintiffs fifty-four (54) separate requests for production each of the thousands of produced documents in this case [are] responsive to (if any).

Subparagraph (E)(ii) eliminates the unnecessary burdens that would have been imposed on a party producing ESI if subparagraph (E)(i) were to apply. Under subparagraph (E)(ii), absent a request for a specific form of production, a party may produce ESI in a form in which it is ordinarily maintained, which typically means production in its native file format (*see* 7 Moores Federal Practice, Ch. 37A, *Discovery of Electronically Stored Information*, § 37A.43[2]). Alternatively, the party may produce ESI in a reasonably usable form. Determining whether production of ESI in a form other than in its native file format represents a reasonably usable form will depend on the circumstances of each case. Parties often produce ESI in .pdf or .tiff format in response to discovery requests. Each format has its advantages (*see* 7 Moores Federal Practice, Ch. 37A, *Discovery of Electronically Stored Information*, § 37A.43[3]). Though electronic .tiff images are not word text-searchable, their metadata can be searched and sorted. Moreover, .tiff images can be converted to word text-searchable images using an Optical Character Recognition software program. Producing ESI in paper may also be reasonably usable, but in such a case the hard-copy documents might have to be indexed or organized to correspond to the categories in the discovery request; otherwise they may not be reasonably usable.

Advice to Practitioners. The judge in *MGP Ingredients, Inc.*, correctly noted that the plaintiff could have avoided the discovery production issue by simply requesting the defendant to produce the ESI in a specific form at an early stage in the litigation. The judges advice highlights the importance of the Rule 26(f) discovery-planning conference at which the parties must develop a discovery plan that addresses the form or forms in which [ESI] is to be produced. If the party fails to take advantage of this opportunity and request that ESI be produced in a specific form, the responding party has the option to produce it in its native file format or in a reasonably usable form. The responding party presumptively meets its production discovery obligations if it produces ESI in a word-searchable form, either text or metadata searchable, unless special circumstances demonstrate otherwise. There is no additional burden to produce ESI as it is kept in the usual course of business or organized and labeled to correspond to the categories in the discovery request.

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Eli Wald on Fee Arrangements Between Co-Counsel

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Eli Wald on Fee Arrangements Between Co-Counsel: Brown & Bain, P.A. v. OQuinn, 518 F.3d 1037 (9th Cir. 2008)

By Eli Wald

July 24, 2008

SUMMARY: In *Brown & Bain, P.A. v. OQuinn* the 9th Circuit Court of Appeals held that a law firm must pay a former co-counsel pursuant to the fee agreement between them, even if the law firm suffered a loss on the case. This Commentary, written by Professor Eli Wald, a legal ethics expert, summarizes the pertinent legal issues decided by the Court.

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ARTICLE: Overview

In *Brown & Bain, P.A. v. OQuinn* the 9th Circuit Court of Appeals held that a law firm must pay a former co-counsel pursuant to the fee agreement between them, even if the law firm suffered a loss on the case. This Commentary, written by Professor Eli Wald, a legal ethics expert and member of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct and the Colorado Bar Association Ethics Committee, summarizes the pertinent legal issues decided by the Court.

Factual Background

Attorney OQuinn engaged Brown & Bain to assist him in pursuing a class action suit. In relevant part, the engagement letter included two fee provisions. First, OQuinn was to pay Brown & Bain a discounted hourly rate (discounted relative to Brown & Bain standard hourly rate). Second, at the termination of the action by trial or settlement, OQuinn was to pay Brown & Bain additional payments. *Brown & Bain, P.A. v. OQuinn, 518 F.3d at 1038 (2008)*.

The engagement letter specified that these additional payments were not to be paid to Brown & Bain until OQuinn and other plaintiffs counsel working on the matter, in the aggregate, recovered from the proceeds of the litigation an

amount equal to the discount rate previously paid to Brown & Bain. Further, the engagement letter, drafted by Brown & Bain, stated that After [OQuinn] and the other plaintiffs counsel working on the case (in the aggregate) have recovered an amount equal to the discount rate payments the remainder of our respective recoveries will be divided one-half to [OQuinn] and the other plaintiffs counsel and one-half to Brown & Bain until our additional payments have been fully paid. Any recovery remaining after payment of Brown & Bains discount rate and additional payments in this action belongs to [OQuinn] and the other plaintiffs counsel Id.

In accordance with the first fee provision of the engagement letter, Brown & Bain billed OQuinn on a monthly basis and was paid the discount rate monthly to a total of \$2,920,975.17 for 26,000 hours of work. Id. After the case settled, pursuant to the contingent fee agreement with the plaintiffs, OQuinn retained roughly 40% of the settlement, \$10,106,988.61 (plus costs chargeable to its clients). Brown & Bain demanded payment of the additional payments pursuant to the second fee provision of the engagement letter. OQuinn refused. *Id.* at 10381039.

Procedural Background

Brown & Bain filed a breach of contract suit in Arizona state court. OQuinn removed the action to federal court and filed a counterclaim for repudiation of the contract based on Brown & Bains withdrawal from the class action. Both sides filed for summary judgment and the trial court gave summary judgment for Brown & Bain. OQuinn appealed. Id. at 1039.

Pertinent Legal Questions

(a) Must a law firm pay a former co-counsel pursuant to the fee agreement between them, even if the law firm suffered a loss on the case?

(b) Does Arizona Rule of Professional Conduct 1.5 govern the relationship between lawyer and lawyer and apply to a fee arrangement between co-counsel?

The Decision

(a) Must a law firm pay a former co-counsel pursuant to the fee agreement between them, even if the law firm suffered a loss on the case? The Court framed the two issues presented by OQuinn as follows:

(1) Whether the term recovery in the engagement letter is so clear that its meaning could be determined as a matter of law, and (2) whether Brown & Bain had abandoned the contract and so was not entitled to further compensation.

Id. at 1039.

OQuinn essentially argued that the term recovery in the engagement letter meant net recovery as opposed to gross recovery. Thus, his liability for the additional payments began only when OQuinn had recovered all the expenses it had absorbed. On the basis of its own accounting to itself, OQuinn absorbed expenses in excess of the \$10,106,988.61 it grossly recovered and consequently was not liable to Brown & Bain for additional payments per the engagement letter.

The Court rejected OQuinns interpretation of recovery. It held that [a]ccording to the plain language of this provision, costs reimbursements are not to be deducted in determining the amount equal to the discount rate payments.

OQuinns obligation is triggered when it has recovered an amount -- *not a net amount* -- equivalent to the payments already made. Unquestionably, when OQuinn received an amount of over \$10 million from the settlement, it had recovered several times the \$2.9 million it had disbursed in discount rate payments (emphasis added). *Id.* at 1040.

Reasoning that when interpreting a contract, Arizona courts attempt to ascertain and give effect to the intention of the parties at the time the contract was made, *Id.* (citation omitted), the Court concluded [i]t is the total gross amount received by the lawyers that acts as the trigger for the additional payments to Brown & Bain, not a net amount. *Id.*

The Court then turned to OQuinns second line of defense, Brown & Bains withdrawal from the class action. It reasoned that it was part of OQuinns defense to show that the withdrawal of Brown & Bain had burdened the clients [and constituted a breach of contract, but] OQuinn did not do so. *Id.* at 1042.

Having rejected both of OQuinns arguments, the Court affirmed the trial courts grant of summary judgment to Brown & Bain and held that OQuinn must pay Brown & Bain pursuant to the fee agreement between them. The Court noted that while OQuinns alleged loss was actually unproved, even if OQuinn had been able to establish a loss in the class action, such a loss would not determine the reasonableness of the allocation of charges among the lawyers themselves. *Id.* at 1041.

(b) Does Arizona Rule of Professional Conduct 1.5 govern the relationship between lawyer and lawyer and apply to a fee arrangement between co-counsel? In the alternative, OQuinn argued that disbursement of the additional payments would violate Arizona Rule of Professional Conduct 1.5. Arizonas Rule 1.5(a), following ABA Model Rule 1.5(a), states in relevant part: a lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. OQuinn maintained that as a result of absorbing charges related to the case he suffered a loss of \$3.2 million and that payment of the additional payments would bring Brown & Bains total fee to \$6.2 million. OQuinn argued that such allocation of fees between Brown & Bain and himself was unreasonable in violation of Rule 1.5(a).

The Court rejected OQuinn argument on two different grounds. First, it held that even assuming that OQuinn did in fact suffer a loss as the result of absorbing charges related to the case, however ethically appropriate, the absorption of the charges did not diminish what OQuinn had received from the proceeds, and therefore OQuinn remained liable to Brown & Bain for the amount it had agreed to pay. *Id.* at 141.

Second, the Court clarified that the Arizona Rules of Professional Conduct Rule 1.5 govern the relation between lawyer and client, not between lawyer and lawyer. *Id.* Thus, even if the allocation of fees between co-counsel is unreasonable, it does not violate Rule 1.5., because additional payments to Brown & Bain would have no effect on the fees already charged the client. *Id.*

Analysis

The Courts straight-forward reading of the engagement letter and its decision to hold OQuinn to its commitment to pay co-counsel Brown & Bain additional payments, notwithstanding the fact that OQuinn allegedly suffered a loss in the case as a whole, reflects the Courts commitment to the principle of the Freedom of Contracts and its application to dealings among members of the legal profession. The Courts decision amounts to advising OQuinn that you have made your bed, now lie in it. Having executed a contractual agreement with Brown & Bain, OQuinn must accept its consequences, even if, in hindsight, it appears that OQuinn made a bad business decision.

Brown & Bain, P.A. v. OQuinn thus stands for the proposition that courts will strictly enforce fee agreements between law firms. The holding rejects a somewhat nostalgic view of the practice of law as an honorable profession encompassing implicit duties of conduct among practitioners, including, for example, a duty to reasonably share fees among co-counsel. Instead, it affirms a more business oriented image of the practice of law, in which contractual

obligations govern the relationships among lawyers. See generally, Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. Rev. 1229 (1996).

The Courts perspective also explains its interpretation of Arizonas Rule of Professional Conduct 1.5. The Court was correct in pointing out that Rule 1.5 has traditionally been interpreted to govern the relationship between attorney and client, not between lawyer and lawyer. But the language of the Rule does not preclude a broad reading that would cover the latter relationship. Rule 1.5(a) reads: A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. Notably, however, it does not read: A lawyer shall not make an agreement for, charge, or collect *from a client* an unreasonable fee or an unreasonable amount for expenses. (emphasis added). Thus, the Court could have, in theory, read the Rule to cover the relationship between lawyer and lawyer.

Arguably, the Court read Rule 1.5 narrowly consistent with its business oriented approach to the practice of law, pursuant to which relationships between lawyers are to be governed by contracts, not by court-imposed professional duties grounded in the rules of professional conduct.

Practice Tip #1. Co-counsel should negotiate and spell out important contingencies in their fee agreements because courts will strictly enforce fee agreements between law firms and will not read professional duties of reasonable dealings into such contracts.

ABOUT THE AUTHOR(S):

Eli Wald is a professor at the University of Denver Sturm College of Law, where he teaches in the areas of legal ethics and legal profession. He is the author of numerous law review articles examining topics such as the regulation of the corporate bar in the post-corporate scandals era, increased lawyer mobility, attorney-client communications and the rise and fall of Jewish law firms.

Prof. Wald, a Continuing Legal Education instructor and expert witness, is a member of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct and a member of the Colorado Bar Associations Ethics Committee.

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Eli Wald on Unauthorized Practice of Law in Delaware

2008 Emerging Issues 2588

Eli Wald on Unauthorized Practice of Law in Delaware: Revised Delaware Lawyers Rules of Professional Conduct, Rule 5.5(d)

By Eli Wald

July 24, 2008

SUMMARY: The Delaware Supreme Court recently amended its Unauthorized Practice of Law (UPL) provision, Delaware Lawyers Rules of Professional Conduct, Rule 5.5(d). This Commentary, written by Professor Eli Wald, summarizes the pertinent legal issues arising under the revised Rule.

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ARTICLE: **Revised Delaware Lawyers Rules of Professional Conduct, Rule 5.5(d)**

Overview

The Delaware Supreme Court recently amended its Unauthorized Practice of Law (UPL) provision, *Delaware Lawyers Rules of Professional Conduct, Rule 5.5(d)*. The revised Rule allows lawyers admitted in a foreign jurisdiction to practice law as in-house counsel in Delaware on a permanent basis and streamlines Delawares UPL procedures by ordering that lawyers admitted in a foreign jurisdiction must comply with *Delaware Supreme Court Rule 55.1(a)(1), Limited Permission to Practice to In-house Counsel*. This Commentary, written by Professor Eli Wald, a legal ethics expert and member of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct and the Colorado Bar Association Ethics Committee, summarizes the pertinent legal issues arising under the revised Rule.

Revised Delaware UPL Rule

In January 2008 the Delaware Supreme Court amended Rule 5.5(d) of the Delaware Lawyers Rules of Professional

Conduct effective immediately. Rule 5.5(d) and Rule 5.5(d)(1) were amended by adding the words or in a foreign jurisdiction, and the words after compliance with Supreme Court Rule 55.1(a)(1) were added in subsection (d)(1). As amended, Rule 5.5(d) and Rule 5.5(d)(1) read as follows:

(d) A lawyer admitted in another United States jurisdiction, or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates after compliance with Supreme Court Rule 55.1(a)(1) and are not services for which the forum requires pro hac vice admission; or

Background

In August 2002 the American Bar Association revised Model Rule 5.5 to explicitly permit out-of-state lawyers admitted in another United States jurisdiction to work as in-house counsel and provide legal services to the lawyer's employer or its organizational affiliates without requiring pro hac vice admission. *Model Rules of Professional Conduct R. 5.5(d)(1) (2007)* (Rule 5.5 as amended in August 2002). Similarly, the Restatement of the Law Governing Lawyers approves of allowing out-of-state attorneys working in-house to provide legal services to their employer. The Restatement states: [s]tates have permitted practice within the jurisdiction by inside legal counsel for a corporation or similar organization, even if the lawyer is not locally admitted and even if the lawyer's work consists entirely of in-state activities, when all of the lawyer's work is for the employer-client . . . and does not involve appearance in court. *Restatement (Third) of the Law Governing Lawyers §3 cmt. F (2000)*. The Restatement reasons that [l]eniency is appropriate because the only concern is with the client-employer, who is presumably in a good position to assess the quality and fitness of the lawyer's work. *Id.*

Many states exempt in-house counsel from their UPL regulations. Professor Needham explains that such exemptions take the form of regulations granting admission status to in-house counsel (usually rules of professional conduct or court rules) or opinions by states' committees charged with enforcing UPL provisions. *See, Carol A. Needham, Multijurisdictional Practice Regulations Governing Attorneys Conducting A Transactional Practice, 2003 U. Ill. L. Rev. 1331, 1344*1345 (listing states allowing practice by out-of-state in-house counsel).

Analysis

Following the ABA, in September 2003 the Delaware Supreme Court adopted a limited practice rule for in-house counsel. *Delaware Supreme Court Rule 55.1, Limited Permission to Practice to In-house Counsel (2005)*.

While subsection 55.1(a)(1) stated: Lawyers admitted to practice in a jurisdiction outside of the United States may apply individually to the Supreme Court for a Delaware Certificate of Limited Practice, pursuant to the provisions of this Rule, *Id.*, Delaware Rule of Professional Conduct 5.5(d) provided only that A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction: (1) that are provided to the lawyers employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission[.] *Delaware Lawyers Rules of Professional Conduct, Rule 5.5(d) (2005)*. Rule 5.5(d) did not explicitly authorize provision of legal services by in-house counsel admitted in a foreign jurisdiction. Thus, what subsection 55.1(a)(1) permitted, Rule 5.5(d) did not authorize.

The recent amendment to Rule 5.5(d) corrects this ambiguity. Rule 5.5(d), as revised, now clearly states that A lawyer admitted. . . in a foreign jurisdiction. . . may provide legal services in this jurisdiction that: (1) are provided to the lawyers employer or its organizational affiliates after compliance with Supreme Court Rule 55.1(a)(1). . .

However, while clearing one ambiguity, the revised Rule creates a new one: subsection 55.1(a)(1) only applies to lawyers admitted in a foreign jurisdiction. Thus, while presumably the Court intended to generally subject lawyers admitted in another United States jurisdiction to Rule 55.1(a) and lawyers admitted in a foreign jurisdiction to subsection 55.1(a)(1), the revised Rule only accomplishes the latter.

Comment 15 to Rule 5.5 clarifies that in-house counsel authorized to offer legal services in Delaware pursuant to Rule 5.5(d), including attorneys admitted in a foreign jurisdiction, may establish a permanent office in Delaware. While the comment only refers to lawyers who are admitted to practice in another United States jurisdiction, *see, Delaware Lawyers Rules of Professional Conduct, Rule 5.5(d) cmt. 15 (2008)*, it is clear that given the amendment to Rule 5.5(d) itself, the comment should be read to apply equally to lawyers admitted in another United States jurisdiction and attorneys admitted in a foreign jurisdiction.

Similarly, the rationale for allowing out-of-state in-house counsel to offer legal services to their employers in Delaware, stated in comment 16, *see, Delaware Lawyers Rules of Professional Conduct, Rule 5.5(d) cmt. 16 (2008)* (The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.), applies with equal force to lawyers admitted in a foreign jurisdiction. The amendment to Rule 5.5(d) simply acknowledges current global practice realities in which Delaware entities employ attorneys admitted in foreign jurisdictions.

Practice Tip #1. An attorney admitted in a foreign jurisdiction may practice law as in-house counsel in Delaware on a permanent basis, subject to the procedures specified in *Delaware Supreme Court Rule 55.1(a)(1), Limited Permission to Practice to In-house Counsel*. However, foreign attorneys (as well as lawyers admitted in another United States jurisdiction) intending to practice as in-house counsel in Delaware should note:

- . Practice in Delaware pursuant to subsection 5.5(d) subjects attorneys to the disciplinary authority of Delaware, *see, Delaware Lawyers Rules of Professional Conduct, Rule 5.5(d) cmt. 19 (2008)*; and

- . Practice in Delaware pursuant to subsection 5.5(d) subjects attorneys to communication duties pursuant to *Delaware Lawyers Rules of Professional Conduct, Rule 1.4*. Specifically, a lawyer may have to inform the client that the lawyer is not licensed to practice law in Delaware, for example, when the representation occurs primarily in Delaware and requires knowledge of Delaware law. *See, Delaware Lawyers Rules of Professional Conduct, Rule 5.5(d) cmt. 20 (2008)*.

Practice Tip #2. Foreign attorneys (as well as lawyers admitted in another United States jurisdiction) intending to practice as in-house counsel in Delaware should note that establishing an office or other systematic presence in Delaware for the purpose of rendering legal services to the employer, may subject the lawyers to registration or other requirements, *compare, e.g., Massachusetts Supreme Judicial Court Rule 4:02(9), S.J.C. Rule 4:02(9) (2008)* (imposing an annual registration requirement for in-house lawyers), including assessments for client protection funds and mandatory continuing legal education. *See, Delaware Lawyers Rules of Professional Conduct, Rule 5.5(d) cmt. 17 (2008)*.

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Eli Wald is a professor at the University of Denver Sturm College of Law, where he teaches in the areas of legal ethics and legal profession. He is the author of numerous law review articles examining topics such as the regulation of the corporate bar in the post-corporate scandals era, increased lawyer mobility, attorney-client communications and the

rise and fall of Jewish law firms.

Prof. Wald, a Continuing Legal Education instructor and expert witness, is a member of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct and a member of the Colorado Bar Associations Ethics Committee.

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McDonnell on O'Casek v. Children's Home & Aid Society , 2008 Ill. LEXIS 628.

2008 Emerging Issues 2568

Joe McDonnell on O'Casek v. Children's Home & Aid Society of IL, 2008 Ill. LEXIS 628. What is the Effect of a Later Amendment to a Statute after It Has Been Declared Unconstitutional?

By Joseph B. McDonnell

July 24, 2008

SUMMARY: Where the legislature acts to amend a statute shortly after a court decision finding the statute unconstitutional, does the amendment amount to a reenactment of the challenged statute? The answer and how *O'Casek v. Children's Home and Aid Society, 2008 Ill. LEXIS 628*, was decided is explained in detail by experienced Illinois attorney and litigator Joe McDonnell.

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ARTICLE: A Statute is Declared Unconstitutional. Now What? Where a statute is declared unconstitutional, it is simply null and void and has no binding effect. The legislature may or may not take action to cure whatever defect caused the court to find the law invalid. Where the statute in question contained an amendment to a prior law on the same subject, the prior law will ordinarily be considered to have been resuscitated following the declaration of unconstitutionality. This may lead to serious complications if, following the ruling finding the law invalid, the legislature undertakes to amend the statute once more. Without explicit language in the amendment indicating the legislative intent, does the new amendment constitute a reenactment of the statute previously found unconstitutional? Or is the amendment one which is to be applied to the statute as it existed prior to the amendment considered by the court in its finding overturning the statute? To muddy the waters even more, suppose the legislature passes yet another bill years later, more comprehensive in its language, and which purports to reenact the earlier statute without the offensive portion which had fallen with the decision of unconstitutionality? Does that action serve to explain the intent of the previous legislature with respect to the earlier amendment?

These questions were presented in *O'Casek v. Children's Home and Aid Society of Illinois, Docket No. 105050, 2008 Ill. LEXIS 628*, decided by the Illinois Supreme Court on June 19, 2008. The core issue considered by the Court was whether an amendment to *Sec. 2-622 of the Code of Civil Procedure (735 ILCS 5/2-622)* was in fact a reenactment of the statute previously held unconstitutional by the Court in *Best v. Taylor Machine Works, 179 Ill.2d 367 (Ill. 1997)*. If that were the case, it would mean that a plaintiff in a medical malpractice case, who had filed a complaint without the certificate of merit required by *Sec. 2-622(a)*, could not obtain an extension of ninety days to file the required affidavit if she had earlier dismissed a suit based on the same or similar facts. Thus, a complaint filed under such circumstances would suffer dismissal with prejudice.

On the other hand, if the amendment were deemed applicable to the prior version of the statute (i.e., that which preceded the statute held invalid), under which an extension of time was allowable without regard to whether or not an earlier case had been voluntarily dismissed, the plaintiff's complaint would not be subject to dismissal.

In earlier opinions, the same district from which the case under review originated had held that the post-Best amendment constituted a reenactment of the 1995 version of Sec. 2-622 found unconstitutional in *Best. Cargill v. Czelatdko*, 353 Ill. App. 3d at 655 (4th Dist. 2004); followed in *Crull v. Sriratana*, 376 Ill. App. 3d 803 (4th Dist. 2007). In *O'Casek*, the appeal under review by the Supreme Court, a different panel of the fourth district had held that, by virtue of a statutory enactment (Public Act 94-677), several months after its decision in *Cargill*, it was clear that the 1995 version of section 2-622 "disappeared with Best and was never reenacted." *O'Casek*, 374 Ill. App. 3d at 513.

History of the Statute. In its original form, Sec. 2-622 required a "certificate of merit" to be filed with every complaint based on healing art malpractice. Sec. 2-622(a) (1). If, however, plaintiff had been unable to obtain a professional consultation prior to the expiration of the applicable statute of limitations, and was thus unable to supply the required certificate, he could obtain an additional ninety days after filing the complaint to do so. Sec. 2-622(a) (2).

The Civil Justice Reform Amendments of 1995, which effected major changes in medical malpractice litigation, included a change in Sec. 2-622 which eliminated the ninety-day extension in any case where the plaintiff had previously dismissed a suit based on the same or a similar cause of action. Therefore, one who had earlier taken a voluntary dismissal of her case was precluded from obtaining an extension of time to file the certificate of merit, thus suffering dismissal of her suit with prejudice.

On Dec. 18, 1997, the Illinois Supreme Court held the Civil Justice Reform Amendments of 1995 unconstitutional in their entirety. *Best v. Taylor Machine Works*, 179 Ill. 2d 367 (1997). The content of Sec. 2-622 (including the bar on the 90-day extension of time where the plaintiff had earlier voluntarily dismissed her suit) was not directly involved in the Court's determination. However, because the court found the provisions of the Act not severable, it held that the entire statute must fall. *Best*, 179 Ill.2d at 467.

The Naprapath Amendment: Legislative Action -- or Reaction? The Illinois legislature amended Sec. 2-622 to add naprapaths to the list of health care professionals to be included in those covered by the statute only two months after the Court's decision in *Best*. This was Public Act 90-579. The structure and placement of the bill in the pre-Best version of the statute led some to the belief that the bill was intended to and did reenact the statute as it existed when *Best* was decided. If true, that would reinstate the provision barring an extension of time to file the affidavit of merit if plaintiff had previously dismissed her case. This argument appeared to be supported by the Court's invitation to the legislature in *Best* "to reenact whatever provisions it deems desirable or appropriate." *Best*, 179 Ill. 2d at 471. Finally, there was nothing in the *Best* decision which had called into question any aspect of Sec. 2-622; it was included in the finding of unconstitutionality only because of principles of severability.

Those opposing this view argued that Public Act 90-579 was intended only to extend the requirements of Sec. 2-622 to those who practice the healing art of 'naprapathy,' rather than to reenact the pre-Best [i.e., 1995] version of Sec. 2-622. Supporting this view was the fact that nothing in the legislative debates concerning P.A. 90-579 showed any reference to the *Best* decision, or suggested that the legislature intended to do anything than to add naprapaths to the list of health care professionals.

The Supreme Court's holding that P.A. 90-579 did not reenact the statute stricken in *Best* is based on several principles of statutory construction, the most important of which is to ascertain and give effect to the intent of the legislature. The Court emphasized the role of legislative history in determining that intent, and discussed the sometimes convoluted mechanics of law-making and the guidelines offered by the Statute on Statutes and that governing Operations of the General Assembly.

Legislative Intent: What is-and what is not-included? The Supreme Court's opinion is significant in that, although

it affirms the judgment of the appellate court, it disagrees with a major premise of that court's decision—that a still later amendment to Sec. 2-622 demonstrates the legislative intent behind the post-Best amendment.

In its opinion in *O'Casek*, the appellate court stressed the fact that P.A. 94-677 effective August 25, 2005, had amended the Code of Civil Procedure by "reenacting and changing" section 2-622." Unlike P.A. 90-579, which used the 1995 version of section 2-622, P.A. 94-677 used the pre-1995 version of Sec. 2-622, with the exception that it also incorporated the naprapath amendment contained in P.A. 90-579. To the appellate court, this clarified the earlier legislature's intent that P.A. 90-579 was not intended to re-enact the statute stricken by the court in *Best*.

The Supreme Court found this analysis dubious at best, pointing out that the actions of the 94th General Assembly can hardly be relevant in determining the intent of the 90th General Assembly in passing legislation seven years earlier. The Court twice pointed out, at the beginning and at the end of its discussion regarding statutory construction, that "[s]tatutes are to be construed as they were intended to be construed when they were passed." *O'Casek*, slip op. pp. 18, 20.

In addition, the Court criticized the appellate court's construction of P.A. 94-677, enacted in 2005, as being a "continuation" of the pre-1995 version of the statute. The Court stated that the language used in the 2005 amendment -- "reenacting and changing Section 2-622"—indicated more than a mere continuance of existing legislation.

Ultimately, the Supreme Court's opinion was based on an analysis of the language used in P.A. 90-579, aided by a reading of the legislative debates, the Statute on Statutes (5 ILCS 70/5) and the General Assembly Operations Act (25 ILCS 10/10(f)). The debates contained no discussion of the *Best* decision or any suggestion that the bill was intended to re-enact any part of the statute held invalid in *Best*. For all that appeared, the only reason the bill was introduced was to add the practice of naproprathy to the list of healing art practitioners covered by the statute. This conclusion was fortified by the constitutional and statutory directives concerning new legislation, as well as applicable House and Senate Rules, requiring that new matter be either italicized or underscored. The bill in question contained no italics or underscoring except those adding napropaths to the list of health care providers, thus indicating this was the only change the legislature intended, and that the bill was not intended as a re-enactment of Sec. 2-622.

Tips for Practitioners. A case involving the application of a statute may bring into play several principles of statutory construction. The cardinal rule, of course, is to give effect to the intent of the legislature. Unlike other cases where the meaning of statute is unclear, mandating the use of recognized aids in construction, the problem here was not the meaning of the language used, but whether the legislature intended to reenact in its entirety the statute which included the amendment. In such cases, although the dissenters in *O'Casek* correctly point out that it is not always a reliable guide, a study of the legislative debates is imperative for such light as they may impart to the particular issue.

The Legislative Reference Bureau in Springfield is the place to start the search. The Bureau maintains a website at www.ilga.gov which contains a link to researching legislative history, including instructions for obtaining legislative documents. Another excellent source is Northwestern University's website <http://www.law.northwestern.edu/library/services>.

A second aspect of the Supreme Court's opinion deserves mention -- that is the rule of appellate review and that it is the judgment of the Appellate Court, rather than the reasons assigned for its decision, which is the subject of review in the Supreme Court. What the Appellate Court may assign as reasons for its judgment is not a matter of concern in the Supreme Court. See *Ramirez v. Midway Moving and Storage, Inc.* 880 N.E.2d 653 (1st Dist. 2007). The rule should be kept firmly in mind when representing any party on appeal. Is the decision appealed from correct or incorrect, regardless of the reasons given by the lower court?

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Manning on Vitanza v. James & Janicky v. Point Bay Fuel, Inc.

2008 Emerging Issues 2512

The Appellate Division Warns That Its Jurisdictional Rules Are Not To Be Broken: *Manning on Vitanza v. James*, 397 N.J. Super. 516 (App. Div. 2008) and *Janicky v. Point Bay Fuel, Inc.*, 396 N.J. Super. 545 (App. Div. 2007).

By Diana Manning

July 14, 2008

SUMMARY: In this expert commentary, Diana C. Manning, an experienced appellate practitioner and shareholder in the Florham Park, New Jersey law firm of Bressler, Amery & Ross, P.C. discusses the recent Appellate Division opinions in *Vitanza v. James*, 397 N.J. Super. 516 (App. Div. 2008) and *Janicky v. Point Bay Fuel, Inc.*, 396 N.J. Super. 545 (App. Div. 2007).

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ARTICLE: Practitioners are cautioned that the Appellate Division has sent the message that it will be strictly enforcing the rules. Dismissing several interlocutory appeals, the Appellate Division warned practitioners to ignore jurisdictional requirements at their own peril.

Interlocutory Appeals without Proper Leave Will Be Rejected. *Vitanza v. James*, 397 N.J. Super. 516 (App. Div. 2008), a libel and slander case, involved defendants appeal from the entry of summary judgment on liability, and the denial of defendants motion to dismiss plaintiffs claims. Despite the fact that the orders appealed from were not final and did not dispose of all issues, the defendants filed an interlocutory appeal without seeking leave to do so.

Ordinarily, appeals may only be taken from final judgments of the trial courts, and from those interlocutory orders expressly referenced in N.J. Ct. R. 2:2-3. Final judgments are those that dispose of all issues as to all parties. See *Kattoura v. Patel*, 262 N.J. Super. At 40 (App. Div. 1993). Review of an interlocutory order must be sought through a motion for leave to appeal as set forth in N.J. Ct. R. 2:5-6. Leave to file an interlocutory appeal is granted sparingly. *Moon v. Warren Haven Nursing Home*, 182 N.J. at 513 (2005).

Referencing the strong policy against piecemeal review and interruption of the orderly processing of cases to disposition in the trial courts, the *Vitanza* Court noted that its earlier warnings to the bar and trial courts regarding compliance with the rules applicable to interlocutory appeals have gone unheeded. *Id.* at 518. While recognizing that past deviations have been excused if the respondent did not move to dismiss, the Court warned that practitioners should not expect such indulgences in the future:

The Rules are written to require uniformity as a means of providing equal justice. The time has come to enforce the Rules and not to decide an appeal merely because the respondent did not move to dismiss it and it was fully briefed.

Id. at 519.

Rejection of Improper Finality Certifications. Similarly, in *Janicky v. Point Bay Fuel, Inc.*, 396 N.J. Super. 545 (App. Div. 2007), the Appellate Division chastised both the trial court and the attorneys involved for their improper use of a finality certification to circumvent [the Appellate Divisions] exclusive authority to determine whether leave should be granted to appeal an interlocutory order. *Id.* At 547. The Appellate Division rejected the parties attempt to certify as final, and appeal from, a declaratory order which simply disposed of a single legal issue in the case. *Id.* At 552.

The issue considered in *Janicky* related to a home fuel oil suppliers issuance of a ProGuard Accidental Release Protection Certificate designed to reimburse the owners cleanup costs associated with an accidental release of oil from a fuel oil system, and whether that Certificate constituted a policy of insurance. After a claim for reimbursement was denied, plaintiffs filed a Complaint seeking the benefit of the Certificate, and asserting consumer fraud claims based on the alleged misrepresentation that the issuer of the Certificate was not authorized to sell insurance.

Defendant filed a motion seeking dismissal of the *Consumer Fraud Act* claims arguing that the Department of Banking and Insurance had exclusive jurisdiction to determine whether the Certificate constituted insurance. Plaintiffs filed a cross-motion seeking a declaration that the Certificate was an insurance policy. The trial court issued a declaratory order stating that the Certificate constituted a policy of insurance. Thereafter, the Court entered a Consent Order submitted by the parties declaring the order to be final for purposes of N.J. Ct. R. 4:42-2. Despite the fact that there remained open issues for determination in the trial court, defendant then appealed to the Appellate Division seeking review of the predominant legal issue in the case, and which was decided by the trial court.

Under New Jersey Court Rule 2:2-3, parties may seek interlocutory review in a limited number of circumstances. One of those circumstances is an order certified as final pursuant to New Jersey Court Rule 4:42-2 in order to permit execution on a partial summary judgment fully adjudicating a separable claim for affirmative relief or all claims by and against a single party in multi-party litigation. *Id.* At 550 (citing *DOLiviera v. Micol*, 321 N.J. Super. 637 (App. Div. 1999)).

The Order in *Janicky* did not meet those criteria and the Court signaled that procedurally improper attempts to circumvent the Rule will no longer be tolerated:

Unfortunately, however, our numerous pronouncements regarding the inappropriateness of using a finality certification to obtain review of an interlocutory order have gone unheeded.

Id. At 552. Practitioners should now expect the Appellate Division to vacate such a certification if an order does not fall within the terms of Rule 4:42-2. *Id.* At 551 (quoting *S.N. Golden Estates, Inc. v. Contl Cas. Co.*, 317 N.J. Super. At 88 (App. Div. 1998)).

Expect Strict Enforcement. The *Vitanza* and *Janicky* Courts issued a strong warning to practitioners they should strictly adhere to the jurisdictional rules when practicing in the Appellate Division. While their criticism was directed at improper appeal from interlocutory orders, practitioners should prepare for strict enforcement across the full range of procedural issues that may arise. Indeed, the number of appeals properly before the Court is a central focus of the Appellate Divisions determination to strictly enforce its jurisdictional requirements:

If we treat every interlocutory appeal on the merits just because it is fully briefed, there will be no adherence to the Rules, and parties will not feel there is a need to seek leave to appeal from interlocutory orders. At a time when this court struggles to decide over 7,000 appeals a year in a timely manner, it should not be presented with piecemeal litigation and should be reviewing interlocutory decisions only when they genuinely warrant pre-trial review.

Vitanza, 397 N.J. Super. at 519 (quoting *Parker v. City of Trenton*, 382 N.J. Super. at 458 (App. Div. 2006)).

While the *Vitanza* and *Janicky* decisions were decided in the context of improper interlocutory appeals, the logic is equally applicable to other procedural aspects of the Court Rules all of which are designed to efficiently and fairly handle the numerous matters considered by the appellate courts. The Appellate Rules place great emphasis on the timing of appeals, and the manner in which information is presented to the Court. Given the Appellate Divisions harsh reaction to the improper appeals in *Vitanza* and *Janicky*, practitioners should be very mindful of the Appellate Divisions jurisdictional requirements and its many procedural requirements.

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David Fish on Pancoe v. Singh, 376 Ill. App. 3d 900 (1st Dist. 2007)

2008 Emerging Issues 2515

David Fish on Pancoe v. Singh, 376 Ill. App. 3d 900 (1st Dist. 2007): Party May Call Opponents Expert without Disclosing Intent to Do So in Rule 213(f) Disclosures.

By David Fish

July 14, 2008

SUMMARY: A trial court judge may allow a party to call the opposing partys expert witness even if the party did not disclose that witness in its Rule 213(f) disclosures. However, before trying this, a practitioner must carefully assess the likelihood that an appellate court will agree with the trial judge. *Pancoe v. Singh, 376 Ill. App. 3d 900 (1st Dist. 2007)*, discusses this situation and provides some guidance on analyzing the risk.

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ARTICLE: In Illinois, a party may be allowed to call an expert witness it did not include in its Rule 213(f) disclosures if the testimony of the witness is not prejudicial or of great surprise to the opposing party. *Pancoe v. Singh, 376 Ill. App. 2d at 913-14 (1st Dist. 2007)*. Allowing a party to call a witness it did not disclose in its Rule 213(f) disclosure is not automatically an abuse of discretion by the trial court, and the trial courts decision will be overturned only if no reasonable person would adopt the same view. *Id. at 913*.

In reviewing the decision of a trial judge to allow testimony of a witness not disclosed under Rule 213(f), the appellate court will apply a six-factor test to determine whether the trial court abused its discretion. *Id. at 913*. The six-factor analysis considers the following: (1) the surprise to the adverse party; (2) the prejudicial effect of the testimony; (3) the nature of the testimony; (4) the diligence of the adverse party; (5) the timely objection by the adverse party; and (6) the good faith of the party calling the witness. *Id. at 913*.

In *Pancoe*, during the Plaintiffs case-in-chief on the second day of trial, the Plaintiff called the Defendants expert witness to testify. *Id. at 904*. The Defendant objected because the Plaintiff did not disclose this witness in its Rule 213(f) disclosure. Rule 213(f) requires that parties provide the identities and addresses of witnesses who will testify and, if the witness is an expert, the subjects to which the witness will testify and the opinions the party expects to elicit. *Id. at 912*. In spite of the fact that Plaintiff had not disclosed the Defendants expert witness in his Rule 213(f) disclosures, the trial court let the expert testify, but limited the experts testimony to information discussed in his deposition. *Id. at 904-05*.

The Appellate Court found that even though Plaintiff had violated Rule 213(f), the decision by the trial court judge to allow the Defendants expert to testify during Plaintiffs case-in-chief was not an abuse of discretion because there was

no surprise to the Defendant, the witness called was the Defendants own expert, the testimony had no prejudicial effect because the trial court gave the Plaintiffs argument based upon the experts testimony little weight, there was no lack of good faith because Plaintiff had subpoenaed the witness, which put Defendant on notice, and again, it was Defendants own witness. *Pancoe*, 376 Ill. App. 3d at 912-13.

Strategic Considerations. Calling another partys expert witness can be a very compelling trial strategy. A trier of fact expects the expert witness to support the case of the party who retained the expert. After all, a party typically pays quite handsomely for its own experts time in coming to court to testify. Many jurors view experts as hired guns, and if a partys own hired gun does not support the partys case, winning the case will be an uphill battle.

But before calling an opposing partys expert witness, especially one not included in Rule 213(f) disclosures, the practitioner must be sure to evaluate the six-factor analysis that will be applied in any appeal. Having the witness testify only to invite an expensive and likely successful appeal will be a small victory, indeed.

The attorney calling the opposing partys expert witness should confine the testimony to information that was discussed during the deposition. Likewise, an attorney should keep *Pancoe* in mind while determining what to discuss during a deposition because it seems that anything discussed during the deposition will be fair play at trial, even though the witness is the opposing partys expert. A practitioner should avoid calling the opposing partys expert if the purpose is to intentionally cause surprise or the action is in bad faith.

Conclusion. As *Pancoe* highlights, failure to comply with Rule 213(f) does not automatically prevent a party from calling an undisclosed witness or make testimony inadmissible. The trial court is given great discretion to determine whether information not disclosed under Rule 213 should be allowed. The review by an appellate court as to whether the trial court abused its discretion with regard to Rule 213 will look at multiple factors to see whether the decision of the trial court was an abuse of discretion causing the opposing party any unfair surprise or prejudice.

For additional discussion, see Illinois Civil Procedure § 8.02, Methods of Formal Discovery; LexisNexis(R) Forms: FORM 1468-41.07 Interrogatories Concerning Expert Witnesses.

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Innovative Changes in Florida Jury Trials

2008 Emerging Issues 430

Circuit Judge (Retired) Ralph Artigliere on Innovative Changes in Jury Trials Sanctioned by the Florida Supreme Court

By Ralph Artigliere

July 14, 2008

SUMMARY: Eight years after the Florida Courts Jury Innovations Committee was challenged by the Supreme Court to advocate reform and innovations to the jury system, the Supreme Court issued a far-reaching opinion adopting many changes recommended in the Innovations Committee Report. This Emerging Issues Analysis provides a practical analysis of the opinion and adopted changes.

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ARTICLE: Changes in the Jury System Are Upon Us. Eight years after the Florida Courts Jury Innovations Committee was challenged by the Supreme Court to *advocate reform and innovations* to the jury system, the Supreme Court issued a far-reaching opinion adopting many changes recommended in the Innovations Committee Report. *See 967 So.2d at 179.* The Court described the innovations process as the most comprehensive review and thorough evaluation of Floridas jury system in the history of this state *967 So.2d at 179.* The opinion includes new rules of civil and criminal procedure, new rules of judicial administration, and new civil and criminal jury instructions.

In 1999, the Florida Supreme Court embarked on its quest for acceptable and effective innovations. In 2001, the Innovations Committee issued its initial report containing forty-eight recommendations covering jury management and administration, in-court procedures for criminal and civil cases, and juror treatment and compensation, which were published to the Bar for comment. In 2002, the Supreme Court held oral argument and by administrative order approved eighteen of the forty-eight recommendations, most significantly consisting of recommendations relating to juror time management, summons enforcement and postponement, juror orientation, and standardized juror questionnaires. *See, In Re Final Report of the Jury Innovations Committee*, Fla. Admin. Order No. AOSC03-041 (Oct.17, 2003). Other debatable or controversial recommendations were deferred and referred to court committees for study and recommendation, including procedural changes in jury instructions by the court, juror questions, and juror note taking. *See AOSC03-41 2.* Following another five years of study, reports by various court committees, publication to members of The Florida Bar, comments from lawyers, judges and academics, and another oral argument, the Supreme Court issued its opinion implementing changes in procedures and jury instruction for jury trials effective January 1, 2008. *967 So.2d at 184.*

Jury innovations are part of a national trend to improve the comfort of jurors and effectiveness of the jury trial. However, tinkering with the traditional jury trial can be controversial, and change can be unwelcome to judges and trial

lawyers. The strategy, process, and deliberate pace of the Florida innovations effort were remarkably effective. The Supreme Court got it right by identifying the need for change; spurring the Innovations Committee to *advocate* reform and innovation followed by referral of the most controversial measures to appropriate standing committees for review, analysis, debate, and recommendation; allowing an opportunity for comment from judges and lawyers; and considering further input through oral argument with presentation by interested groups and committees. The written reports, briefs, comments and other input are listed in the docket posted at http://jweb.flcourts.org/pls/docket/ds_docket.

While many judges received court-provided judicial education on the innovations, change like this is not easy, and there is a continuing need to emphasize the changes to ensure that judges effectively apply the new law. Counsel should expect some resistance and lack of uniformity in conduct of the jury trial during the transition to new practices and procedures. Practitioners must be aware of the new rules to avoid pitfalls and to turn change to tactical advantage whenever possible. Specific changes in law and procedure and practice considerations for counsel that affect the conduct of the trial are set out below.

Standardized Juror Questionnaires. Juror Questionnaires, properly used, can streamline *voir dire*, enable clear and confidential disclosure of juror answers to sensitive or universal questions, and create a written record of each jurors answers. The innovations Committee recommended standard *voir dire* questionnaires for jurors in criminal and civil cases so that the *voir dire* questions by attorneys and judge may be limited to case-specific inquiry. The Court found that the current civil form questionnaire in Florida Rules of Civil Procedure, Form 1.984--Standard Voir Dire Questionnaire was adequate but adopted a new criminal form Florida Rules of Criminal Procedure 3.9855--Juror Voir Dire Questionnaire. However, the use of the approved forms is left to the discretion of the chief judge in each circuit court. *967 So.2d at 181*.

Practice Tips

- . Since juror questionnaires can vary from jurisdiction to jurisdiction, find out in advance the questions that will appear on the questionnaire before preparing *voir dire* questions.

- . Address the judges *voir dire* procedures at pretrial conference to uncover any limitations regarding asking or clarifying answers to questions that appear on the questionnaire.

- . Remember that the venire will be sitting and waiting while the questionnaires and information they contain is processed. Nonetheless, in the right case, a questionnaire can be a time saver.

- . Perhaps the most useful aspect of a questionnaire is that it obtains information about jurors and their attitudes outside the hearing of the remaining jurors. Thus, questionnaires can identify disqualifying information or issues to be discussed privately with potential jurors without the danger of tainting the panel. Consider requesting a case-specific questionnaire designed to elicit answers to sensitive or important questions that may need to be discussed further *in camera* with jurors.

Juror Questions of Witnesses. The Innovations Committee recommended that jurors be allowed to ask questions of witnesses in civil and criminal cases. In 1999 juror questioning of witnesses became mandatory in civil cases pursuant to statute. See Sec. 40.50(3), Florida Statutes. Then the Supreme Court approved a standard jury instruction for juror questions. See Standard Jury Instruction (Civil) 1.13. Yet availability of and procedure for juror questions varied from courtroom to courtroom. Many judges permitted questioning in all civil cases, but some left it up to the lawyers as to whether questions would be permitted, notwithstanding the statutory mandate. In criminal cases, questioning by jurors was not required, and most judges did not permit it. The issue of juror questions is more controversial in criminal cases because a juror may ask a previously unasked question, the answer to which furnishes evidence of an element of the crime. During the innovations process, there was substantial resistance to juror questioning of witnesses in criminal cases by individuals, committees, and lawyer groups. Ultimately the Supreme Court mandated questioning by jurors in civil cases and authorized the judge to allow questions in criminal cases within the discretion of the *Court*. *967 So. 2d at*

181. The opinion contains rules and jury instructions for civil and criminal cases. See Fla. R. Civ. P. 1.452, Fla. R. Crim. P. 3.371 and Standard Jury Instructions (Civil) 1.13 and (Criminal) 2.13. The practitioner must be cautioned that, notwithstanding rules and jury instructions on the subject, leeway still exists in the procedure for juror questions, allowing judges different ways to conduct the questioning. Judges around the state employ widely varying methods for taking and processing juror questions for witnesses if they allow questions at all. Two trials conducted in the same courthouse the same week may have vastly different juror question procedure. However, a framework and required elements are set forth in the rules and jury instructions cited above. The essential elements are: (1) Questions shall be permitted in a civil case and may be permitted in a criminal case; (2) any juror who has a question shall prepare an unsigned, written question which is given to the bailiff and taken to the judge; (3) the question is read to counsel *outside the hearing of the jury where objections of counsel are considered*. What remains unspecified is the emphasis the judge gives to the process. Some judges ask after every witness whether jurors have any questions. Others announce the process at the beginning of trial and leave it to jurors to raise their hand if they have a question at the end of lawyer questions, thus de-emphasizing juror questioning. A key potential for harm occurs if the judge lets the questioning juror know which party or parties objected to the question. It is one thing to object to a question asked by the opponent. A juror may be more upset with an attorney or party if it becomes known that the attorney objected to the jurors own question. Counsel should object if the objections are not taken out of the jurors hearing and in a manner that does not disclose who objected. Likewise, jurors should not be aware of any other jurors questions that are objectionable and not asked for any reason.

Illustrative Example: Failure to Allow Juror Questions in Civil Cases. If the court decides not to ask questions in a civil case at all, the practitioner may object to the omission and the failure to give Standard Jury Instruction (Civil) 1.13. Under Florida Rules of Civil Procedure Form 1.985, the court does not have the discretion to vary from the standard instruction unless the court enters an order or makes a record explaining the legal basis for not giving the standard instruction and following the statutory mandate. Best practice dictates that the practitioner should request the standard instruction by submission to the court as part of its formal written jury instruction submission to the court. It is incumbent to make the request for the instruction on juror questioning in writing at, or by best practice before, the start of trial. If the court does not give standard instruction 1.13, the practitioner must submit the standard instruction in writing if it was not previously submitted, and lodge a contemporaneous objection. See Fla. R. Civ. P. 1.470(b).

Practice Tips

- . Anticipate differences in procedure for juror questions from judge to judge, and find out at pretrial or at least before the trial starts what procedure the judge will use.
- . Object if the judge varies from the rules and the instruction if the variance is harmful.
- . Object if the judge allows jurors to observe which party is objecting to a juror question.
- . If a juror question involves a subject that is irrelevant or improper, consider requesting that the judge take the opportunity to educate the juror that the subject of the question is not a matter for consideration in the case.

Illustrative Example. In an automobile, premises liability, or malpractice case in which insurance is available, lawyers and judges may be concerned that a juror will ask about insurance. Discuss the possibility with the judge in advance and formulate a proposed judicial response to advocate before the Court from counsels perspective. Otherwise, some judges may be unprepared to deal with the issue, which could arise as part of a written proposed question to a witness or even out loud in *voir dire*. Being prepared in advance with a proposed solution will allow the matter to be handled as seamlessly as possible in the course of the proceedings.

Juror Note Taking. Note-taking is a comfort measure and aid to memory for jurors, just like it is for students, judges, and lawyers. The Innovations Committee recommended and the Supreme Court sanctioned note-taking in civil and criminal cases. The jury instructions adequately set out the procedure for note-taking, use of notes during

deliberations, and the destruction of juror notes after the trial. See Florida Standard Jury Instruction (Civil) 1.8 and (Criminal) 1.6 and Fla. R. Jud. Admin. 2.430. There is still some resistance for juror note-taking on the theory that note takers will not pay attention and that a jurors notes may receive undue weight over the recollection of the group during deliberations. Both of these concerns are addressed in the jury instructions, and it seems incongruous to allow lawyers and the judge to take notes and make jurors rely on memory alone. Further, jurors may be nonplussed if one judge allows note-taking while another judge in the next trial does not. In any event, the Supreme Courts decision is clear: note-taking shall be permitted. One prior inconsistency in the law regarding juror notes was apparently put to rest by the innovations opinion. Florida Statutes, Sec. 40.50 provides that the court shall instruct that the jurors may take notes regarding the evidence and keep the notes to refresh their memories and to *use during recesses* and deliberations. (e.s.) The statute predated the innovations opinion and presumably allows jurors take their notes out of the court room and even possibly home with them in cases exceeding five days. Some judges actually allowed that to happen. The better procedure is set out in the jury instructions approved by the Supreme Court, which state that the bailiff will take possession of the notes during recesses. This is a better practice because jurors who take notes from the courtroom could supplement them with information gleaned or generated outside of court. Since this is a procedural and not a substantive issue, the instructions approved for publication in the opinion would presumably control over the statute. See Art. V, § 2(a), Fla. Const. If the court allows jurors to take their notes from the courtroom, counsel should object to preserve the error.

Juror Notebooks. Upon recommendation that the court rules provide for jury notebooks, the Supreme Court promulgated identical civil and criminal rules authorizing juror notebooks and amended the civil rule on pretrial conference to include juror notebooks as a point of discussion at pretrial. See Fla. R. Civ. P. 1.455 and 1.200(b) and Fla. R. Crim. P. 3.372. The court has the discretion to authorize documents and exhibits to be included in notebooks for juror use during trial. When faced with a complicated civil case, the practitioner may consider requesting the use of juror notebooks. In addition to exhibits, jurors may benefit from a list of witnesses, timeline for the circumstances giving rise to the case, and a list of definitions of technical terms. Judges usually prefer that counsel work out the contents of the notebook by agreement in advance. One copy each of the notebook should be provided for the Court and for the record. The juror notebook may or may not include blank pages for juror note taking. In any event, notebooks furnished to jurors (except for the copy filed with the clerk) may contain juror notes and markings and best practice dictates that they be destroyed along with any juror notes. See Fla. R. Jud. Admin. 2.430(l).

Written Jury Instructions. The Supreme Court implemented the innovations recommendation that jurors be provided a written set of jury instructions by amending the civil and criminal rules of procedure to require the court to provide the jury with a written set of instructions for use in deliberations. 967 So. 2d at 182. See Fla. R. Civ. P. 1.470(b) and Fla. R. Crim. P. 3.390(b) and 3.400. In order to implement this requirement effectively, judges will need the assistance of counsel in furnishing an accurate and clean set of jury instructions. For some judges, this will mean having instructions on a computer disk or forwarded electronically to the Court in advance so they may be edited as necessary. For others, the practitioner may need to provide a copy or copies of the final edited version for the jury in a timely manner during trial. Either way, the time crunch is especially difficult in one-day criminal and short civil trials. Some judges will want to give instructions prior to closing argument (see below) and still others provide each juror with his or her own set of instructions during oral delivery of instructions and deliberations. This is an excellent practice, as it precludes a juror from hogging the instructions during deliberations and facilitates accurate review by all jurors. Failure to anticipate the courts preferences and needs with regard to jury instructions may result in uncomfortable delay and distraction when counsel would prefer to be focused on preparing final argument. For a comprehensive treatment on effectively creating and presenting jury instructions to the court, see **FASTRAIN: HOW TO WRITE AND USE JURY INSTRUCTIONS IN CIVIL AND CRIMINAL CASES**, 4th ed. 2007 (The Florida Bar distributed by LexisNexis).

Practice tips.

- . Cover the courts requirements regarding jury instructions at pretrial conference.

. Request a charge conference to discuss jury instructions well enough in advance of the time the Court will deliver them so that logistics in getting a final set of instructions will be manageable.

. Prepare clean sets of instructions with one instruction per page in advance so a final edited set can be prepared rapidly.

Final Instructions Before Closing Arguments. The Innovations Committee recommended that judges be encouraged to give final instructions before closing argument. The Supreme Court accepted the recommendation for civil and criminal cases. *967 So. 2d 182*. See Fla.R.Civ.P. 1.470(b) and Fla. R. Crim.P. 3.390(a). Most judges and lawyers see the benefit of having the instructions presented prior to closing, but this procedure is still within the discretion of the judge. If the court turns down a practitioners request to have instructions prior to closing, the only additional measure open to counsel is to object and request that the Court state for the record the reason for varying from the course now encouraged by Rule. Counsel should consider, however, whether the objection and request is worth potentially angering the judge, as there is likely to be little or no tactical advantage gained by the objection.

Judicial Answers to Deliberating Jurors Questions. The Innovations Committee recommended that judges be as responsive as possible to deliberating jurors questions. The Standard Jury Instructions Committee Civil studied this issue and recommended a standard jury instruction outlining a procedure for juror questions during deliberations. The Supreme Court responded by authorizing the instruction for civil and criminal cases. See Florida Standard Jury Instruction (Civil) 7.3(a) and (Criminal) 4.3. The Court further authorized the modification to Standard Jury Instruction (Civil) 7.2 informing the jurors prior to deliberations to send any questions in writing via the bailiff that does not disclose any vote or split of the jury. The new instructions provide helpful formats for answering or not answering a question and notes on how to receive and address juror questions.

Illustrative Example. A deliberating juror or jury submits a question that indicates confusion about the law. Does counsel encourage the judge to clarify the law or advocate for the judge to tell jurors to just rely on the instructions that have been given? When faced with this problem, the practitioner should encourage the judge to clarify the law with input from the parties on the instruction to be given. Under the new procedure, rereading the same instructions that were given earlier is not helpful. The jurors already have a written set of instructions with them. Instead, ask the judge to prepare an instruction with the input of counsel, to write out the instruction, and to read it and provide the response in writing to the jury. When a juror or jury indicates confusion on the law during deliberations, a trial court must attempt to ameliorate confusion about the law. *Morgan Intl Realty, Inc. v. Dade Underwriters Ins. Agency, Inc.*, 571 So. 2d 52 (Fla. 3d DCA 1990). Urging the Court to have the jury simply rely on its recollection of the instructions and evidence could result in reversal of a favorable verdict. The *Morgan* holding is consistent with the Innovations Committee recommendation that judges be as responsive as possible to deliberating jurors questions, which was confirmed in the innovations case. See *967 So.2d at 183*.

Read Back of Testimony. Under existing case law, judges were traditionally given broad discretion on whether or not to read back testimony requested by the jury. Civil and criminal cases supporting this view are cited in the opinion and need not be repeated here. *967 So. 2d 183*. The Jury Innovations Committee recommended that the rules provide specific criteria for judges when confronted with a request to read back testimony, but the civil rules committee declined to recommend rules, citing the discretion afforded by the case law. The Supreme Court agreed that rules with criteria should not be adopted, but instead authorized new civil and criminal jury instructions to be given when read back is granted and when it is not. See Florida Standard Jury Instructions (Civil) 7.3(b) and (Criminal) 4.4. The practitioner should be aware that judicial education supports read back of testimony as opposed to simply stating that a transcript is not available. The new instructions contain some guidance on how to get the jury to narrow the request to manageable levels or to inform them of the time needed for preparing the transcript in case they could get along without a read back.

Juror Impasse. The Innovations Committee recommended a more active judicial role in resolving jury impasse. This recommendation was opposed by the civil and criminal jury instruction committees, and the Supreme Court agreed

and declined to adopt any amendment to current jury instructions. In light of the Courts decision, the practitioner should be wary of any judicial effort to coerce a jury verdict by enhancing or repeating the standard jury instructions (commonly referred to as the Allen charge). See Standard Jury Instruction (Civil) 7.3 And (Criminal) 4.1. If the Court varies from the standard instructions or attempts to become more active in resolving impasse than allowed under current law, counsel opposing such variance should object to preserve error.

Other Action. The opinion also addressed instructions to jurors about post verdict discussions, and there are standard instructions for civil and criminal cases in that regard. See Florida Standard Jury Instruction (Civil) 7.4 and (Criminal) 4.2. The Court also adopted a new rule on juror time management to provide meaningful guidance to judges on how to achieve the most efficient use of juror time. See Fla. R. Jud. Admin. 2.256.

Practice tips.

- . Juror satisfaction and effectiveness is directly linked to how efficiently juror time is managed.
- . Judges and jurors appreciate trial lawyer efforts to minimize delay, waiting, and wasted time.

Conclusion. Change is upon us. The Innovations opinion provides a somewhat flexible framework in which new ground will be broken in jury trials. During the transition period of adjustment to the changes and beyond, the practitioner who learns and masters the new process stands the best chance to turn the change to advantage. In any event, if the innovations are properly applied in practice, our citizens will find jury service to be better managed and a more comprehensible experience.

Cross References: Florida Forms of Jury Instruction (LexisNexis); FASTRAIN: HOW TO WRITE AND USE JURY INSTRUCTIONS IN CIVIL AND CRIMINAL CASES, 4th ed. 2007 (The Florida Bar distributed by LexisNexis).

RELATED LINKS: See Implementation Of Jury Innovations Committee Recommendations, 967 So. 2d 178, 2007 Fla. LEXIS 1841 (Fla. 2007).

■ 967 So. 2d 178

See FLORIDA FORMS OF JURY INSTRUCTION (LexisNexis)

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See FASTRAIN: HOW TO WRITE AND USE JURY INSTRUCTIONS IN CIVIL AND CRIMINAL CASES, 4th ed. 2007 (The Florida Bar distributed by LexisNexis).

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Attorney's Fees Recoverable on Remand: Hoffman on Martin v Franklin

2008 Emerging Issues 2508

Attorney's Fees Recoverable on Remand: Hoffman on Martin v Franklin

By Lonny Hoffman

July 8, 2008

SUMMARY: In 2005, the U. S. Supreme Courts decision in *Martin v. Franklin*, 546 U.S. 132 (2005) effectively resolved the uncertainty surrounding the question of when attorney's fees are recoverable after a case has been remanded. In this commentary, Professor Lonny Hoffman summarizes the Martin case and uses the Seventh Circuit's decision in *Lott v. Pfizer*, 492 F.3d 789 (7th Cir. 2007), to illustrate how the lower courts have applied Martin..

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Cite as: Hoffman, Lonny. Lonny Hoffman on the Effect of *Martin v. Franklin* on Recovery of Attorneys Fees after Remand as Illustrated by *Lott v. Pfizer*. LexisNexis Expert Commentary, (*Insert date you accessed the document online*).

Introduction. When are attorneys fees recoverable from a defendant after a case has been remanded back to state court? Although Congress has empowered federal judges to award attorneys fees (and other costs) when a case is remanded, over the years the courts have given uncertain answers to when that discretion is properly exercised. In 2005, the United States Supreme Court decided *Martin v. Franklin*, 546 U.S. 132 (2005), and squarely resolved this uncertainty. Thats the good news. The bad news for plaintiffs is that *Martin* effectively puts the kibosh on getting attorneys fees, at least most of the time. This Expert Commentary summarizes the high points of *Martin* and then turn to a recent example from the Seventh Circuit, *Lott v. Pfizer*, 492 F.3d 789 (7th Cir. 2007), to illustrate how the lower courts, post-*Martin*, have applied the case in handling requests for attorneys fees after remand.

Martin v. Franklin: Background and Procedural History. *Martin v. Franklin* began when Gerald and Juana Martin filed a class action lawsuit in New Mexico state court. The defendant removed the case to federal court, arguing that the amount-in-controversy (AIC) requirement for diversity jurisdiction was satisfied because the punitive damages plaintiffs sought should be included in the calculation. The district judge agreed and refused to remand the case but the Tenth Circuit held that because a recent development in the law clarified that punitive damages are not supposed to be included in figuring out if the minimum AIC had been met, remand should be granted.

Back in district court, the Martins moved for attorneys fees under 28 U.S.C. §1447(c), the statutory section that gives discretion to federal courts to do just that. Again, the district judge ruled for the defendants (as did the Tenth Circuit thereafter) on the ground that although the case law defendant relied upon for its theory of aggregation had since

been overturned, it had not been mistaken in relying on it since it had been sound at the time the notice of removal was filed. The Supreme Court then granted certiorari in the case.

Supreme Court Adopts Stingy Objectively Reasonable Basis Standard. In what was to be the newly appointed Chief Justice Roberts first opinion for the Court, the U.S. Supreme Court affirmed. A natural reading of §1447(c), Roberts wrote, specifically provides that a remand order may require payment of attorneys fees not shall or should and so does not support the Martins argument for even a presumption in favor of awarding fees. In this case, the ultimately improper removal nevertheless had an objectively reasonable basis. What follows is the most important passage in the opinion:

[T]he standard for awarding fees should turn on the reasonableness of the removal. Absent unusual circumstances, courts may award attorneys fees under §1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied.

Martin, thus, makes it pretty darned clear that you only get attorneys fees when a defendant has acted well outside the normal boundaries of good legal judgment. To illustrate how stingy this objectively reasonable standard is and why, after *Martin*, you rarely see a court award attorneys fees after remand, consider the Seventh Circuits recent decision in *Lott v. Pfizer*, 492 F.3d 789 (7th Cir. 2007).

Seventh Circuit, Applying *Martin*, Denies Attorneys Fee Award in *Lott v. Pfizer*. The pertinent parts of *Lott v. Pfizer*s long procedural history are as follows. Almost three years ago, Congress passed the Class Action Fairness Act, making it effective as of February 18, 2005. CAFA allows all kinds of class action suits that previously had to be litigated in state court to be filed in or removed to federal court. For all kinds of reasons, many class action plaintiffs dont want to be in federal court. Ms. Lott certainly felt that way, and so she moved with all deliberate speed to file her suit before CAFA went into effect. Indeed, she filed it on February 17, just one day before the statutes commencement date. Pretty clever, eh?

Not to be out-lawyered, Pfizer found a way to remove the case. It argued that the case nevertheless was commenced in federal court after February 18 because in this context commenced should be the date it actually arrived in federal court: that is, the date it was removed by Pfizer itself to federal court.

Now if this argument sounds like it cant possibly be right, thats because, well, it isnt. Indeed, before Pfizer made this dubious argument several district courts had already rejected it outright (its also notable that literally within days of Pfizers removal both the Tenth Circuit and Seventh Circuit also rejected the identical assertion made by other defendants). Yes, Pfizer tried to distinguish those cases, but neither the district judge nor the Seventh Circuit saw any differences. Judge Posner noted that CAFA could have but said no such thing about commenced being measured as of the date of removal and characterized Pfizers argument as requiring radical judicial surgery on the statute. He also wryly commented that lobbying groups for corporations just like Pfizer surely had sought for the bill to deal with this anticipated problem of suits filed on the eve of CAFAs passage but had not been successful.

Sounds like a case where 1447(c) attorneys fees might be warranted, right? Wrong. Thereafter, another panel of the Seventh Circuit held that even though the removal-as-commencement argument was soundly rejected, the law was still unsettled when Pfizer removed the case (no circuit courts had actually ruled on the issue when Pfizer removed the case) and so it acted objectively reasonably, within the meaning of *Martin*.

And so it goes. *Lott* is typical of the post-*Martin* §1447(c) cases. That is, thanks to the Supreme Courts decision, it is now very difficult to find an occasion where a defendant is considered to have acted objectively unreasonably in removing a case. Whether this really is the balance Congress was trying to strike between discouraging improvident removals while not dampening legitimate bids to gain the federal forum, its a good bet that the Court isnt going to revisit its decision in *Martin* any time soon.

References

For a discussion of costs and attorneys fees on a motion for remand, see *Moore's Federal Practice* (3d ed.) § 107.41[3][a].

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Bisceglie on Thyroff v. Nationwide Mutual Insurance Company, 8 N.Y.3d 283 (2007)

2008 Emerging Issues 2495

Kyle C. Bisceglie on Thyroff v. Nationwide Mutual Insurance Company, 8 N.Y.3d 283 (2007)

By Kyle C. Bisceglie

July 7, 2008

SUMMARY: In a decision that constitutes an important part of the burgeoning body of law covering electronic data, the Court of Appeals ruled that New York permits claims for conversion of electronic property. This commentary, written by Kyle C. Bisceglie, a Partner at Olshan Grundman Frome Rosenzweig & Wolosky LLP in New York City, discusses its importance and implications under New York law.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Cite as: Bisceglie, Kyle C. *Thyroff v. Nationwide Mutual Insurance Company*. LexisNexis Expert Commentary, (Insert date you accessed the document online).

New York Court of Appeals Okays Claim for Conversion of Electronic Data. In *Thyroff v. Nationwide Mutual Insurance Company, 8 N.Y.3d 283 (2007)*, the Court of Appeals unanimously agreed that New York permits a claim for conversion of computerized electronic records. In so doing, the Court answered the previously open question that had been certified by the Second Circuit: whether New York law recognizes a claim for conversion of certain electronic computer records and data. *Id. at 284*.

Louis Thyroff was an insurance agent for Nationwide, who leased his computer equipment as an independent contractor under an agents agreement from the company. Upon termination of the agreement, Nationwide confiscated its equipment, along with all of the information Thyroff had stored on his computer, including personal correspondence and email, customer information, personal documents and data, Microsoft Office, and other hardware and software programs. *Thyroff v. Nationwide Mutual Ins. Co., 460 F.3d at 403 (2d Cir. 2006)*.

Thyroff sued in the U.S. District Court for the Western District of New York, claiming, among other claims, that the taking of his electronic data constituted conversion. The Western District dismissed the action, holding that Thyroff was not excluded from his property by Nationwide, and, in any event, Nationwide owned the computer system. Thyroff appealed.

The *Thyroff* Court determined to expand the scope of conversion, finding [i]t cannot be seriously disputed that societys reliance on computers and electronic data is substantial, if not essential. *Thyroff, 8 N.Y.3d at 291*. The Court noted the ubiquitous and pervasive use of computers and electronic data, including drafting and dissemination of the

Thyoff opinion itself! *Id.* at 292. On this basis, *Thyoff* accorded the supposedly intangible property at issue the same treatment as a paper document kept in a file cabinet. *Id.* at 292.

Preliminaries: Elements of the Tort; Intangible v. Tangible Property and the Merger Doctrine. Conversion in New York requires the "unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights." *Vigilant Ins. Co. of Am. v. Hous. Auth.*, 87 N.Y.2d at 44 (N.Y. 1995). Each of these elements must be met for a court to find conversion.

Traditionally, the term goods required tangible or physical property. *Sporn v. MCA Records*, 58 N.Y.2d at 489 (1983). Later, New York would permit conversion of certain types of intangible property. This distinction between tangible and intangible property is simple in theory only. The theory holds that tangible property is capable of actual possession, *Miller v. United States*, 78 U.S. at 329 (U.S. 1871), while intangible property is not physical matter which can be located on a map. *Texas v. New Jersey*, 379 U.S. at 677 (1965). Intangible property represents value, and creates a property right that may or may not be represented by something tangible, but that itself has no intrinsic value apart from the rights it represents. *United States v. Bellomo*, 263 F. Supp. 2d at 573 (E.D.N.Y. 2003).

According to Restatement (Second) of Torts § 242 cmt. b. (1965), intangible property may include promissory notes, bonds, bills of exchange, share certificates, warehouse receipts, insurance policies and savings bank books. It does not include electronic data. So it was that before the Internet; intangible assets were typically intellectual property or payment rights, including stock certificates. See Juliet M. Moringiello, *False Categories in Commercial Law: The (Ir)Relevance of (In)Tangibility*, 35 Fla. St. U. L. Rev. 119 (2007) (discussing the history of intangible property). Modernity has further blurred the lines between tangible and intangible. Recent law from other jurisdictions finds intangible property encompasses a variety of interests not previously addressed, and suggests that the list will expand hand-in-hand with technological innovation. See, e.g., *Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003) (Internet domain name); *Ali v. Fasteners for Retail, Inc.*, 2008 U.S. Dist. LEXIS 31436 (D. Cal. 2008) (emails and software source codes); *Mundy v. Decker*, 1999 Neb. App. LEXIS 3 (Neb. Ct. App. Jan. 5, 1999) (WordPerfect directory).

Moving beyond theory to application in *Thyoff*, the Court clearly viewed the electronic data as intangible, despite likening it to paper kept in a file cabinet. *Thyoff*, 8 N.Y.3d at 292. The electronic records in *Thyoff* meet definitions of tangible, since the records can transform to literal form by the mere expedient of a printing key function (*Shmueli v. Corcoran Group*, 9 Misc. 3d at 592 (N.Y. Sup. Ct. 2005)), or intangible (as the Court implies), since the data was only stored in virtual form. Perhaps realizing the futility and increasing irrelevance of this distinction, *Thyoff* appeared to just move on to whether the elements of conversion are met or not: In the absence of a significant difference in the value of the information, the protections of the law should apply equally to both forms physical and virtual. *Thyoff*, 8 N.Y.3d at 292.

Thyoff also casts aside another namesake relic of the common law, the so called merger doctrine. Per the Restatement (Second) of Torts § 242 (1965), the merger doctrine applies when intangible property rights are merged with a document, so that transfer of the document will transfer the property right. An early and best example of the merger rule is that a share of stock was so merged in the stock certificate that conversion of the certificate resulted in damages for conversion of the shares as well. *Agar v. Orda*, 264 N.Y. 248 (1934).

Jurisdictions vary in their application of the merger rule, with some courts following a literal interpretation of the Restatement, others disregarding the document requirement, and still others finding that there can never be conversion of intangible property. *Thyoff* mentions the history of the merger rule in New York case law, but ultimately suggests we may have outgrown it: [I]t generally is not the physical nature of a document that determines its worth, it is the information memorialized in the document that has intrinsic value. *Thyoff*, 8 N.Y.3d at 292.

Due to *Thyoff*, New York courts are now largely free of these doctrines when addressing conversion of electronic media. Practitioners should start with the following four cases in developing new conversion theories: *Thyoff*, *Astroworks, Inc. v. Astroexhibit, Inc.*, 257 F. Supp. 2d 609 (S.D.N.Y. 2003), *Shmueli v. Corcoran Group*, 9 Misc. 3d 589

(*N.Y. Supr. Ct. 2005*), and a 9th Circuit decision, *Kremen v Cohen*, 337 F.3d 1024 (9th Cir. 2003).

Astroworks and Shmueli. In *Astroworks*, plaintiff and defendant intended to form a web-based space-related business together, but plaintiff eventually formed the website on his own, allegedly using defendants ideas. *Astroworks*, 257 F. Supp. 2d at 612. The Southern District of New York found that while defendants idea alone could not be converted, the tangible expression or implementation of that idea can be, and therefore plaintiff could be liable for conversion of the website. *Id.* at 617 (quoting *Matzan v Eastman Kodak Co.*, 134 A.D.2d at 864, 521 N.Y.S.2d 917 (4th Dept. 1987))

In *Shmueli*, plaintiff worked as an independent contractor, real estate broker. Similar to *Thyroff*, plaintiff was unable to access her computer files, particularly her electronic client list (composed of contacts made both within and outside of her scope of employment with Defendant) immediately subsequent to her termination. The Supreme Court of New York, Commercial Division found that a computerized client list constitutes convertible property. *Shmueli*, 9 Misc. 3d at 594. *Shmueli* was a widely-publicized and remarkable decision but, as the court itself noted, limited to a narrow type of property electronic client lists.

Thyroff, *Astroworks* and *Shmueli* are all consistent decisions albeit with slightly different methodology and scope. *Thyroff* acknowledges that it was the first time this Court had addressed the issue of conversion of intangible property that does not strictly satisfy the merger test. *Thyroff*, 8 N.Y.3d at 290. The Courts holding in *Thyroff* goes beyond the allowance of computerized client lists in *Shmueli*. While the holding in *Thyroff* is specifically limited by the Court to electronic records that were stored on a computer and were indistinguishable from printed documents (*Id.* at 292), the Court does not rule out the possibility, or even likelihood, that the category of intangible property covered by the tort of conversion will continue to develop and expand to eventually include the myriad other forms of virtual information available. *Id.* at 293. As a federal case, *Astroworks* is not controlling law for New York and predates *Thyroff*, but, in countenancing a claim for conversion of a website, provides an example of the type of other forms of virtual information that are likely now convertible in New York as a result to *Thyroff*.

Possible Impact of *Kremen v Cohen*. In *Kremen v Cohen*, 337 F.3d 1024 (9th Cir. 2003), plaintiff registered the domain name sex.com to a company he owned called Online Classifieds. Defendant Cohen, described as a con artist, sent a letter to the Internet registrar, Defendant Network Solutions, stating Online Classifieds was transferring ownership of sex.com to him. Network Solutions, without further investigation (for example, inquiring as to why a company called Online Classifieds would mail a letter), transferred the domain name to Defendant Cohen. Plaintiff, unable to reach Defendant Cohen to secure damages, claimed that Network Solutions had converted his property, that is, the domain name. The Ninth Circuit agreed with plaintiff that a conversion action could stand.

This decision is significant because it explicitly eliminates the strict merger doctrine, and says the Restatement is not followed in California. *Id.* at 1033. At most, California may retain a minimal merger requirement that calls for some connection to a document or tangible object not representation of the owners intangible interest in the strict Restatement sense. *Id.* at 1033. Additionally, the Ninth Circuit suggests that conversion could be applied to ALL personal property, should the claim arise in future cases. *Id.* at 1031.

As discussed above, the New York Court of Appeals, similar to the Ninth Circuit in *Kremen*, indicates in *Thyroff* that the merger doctrine and tangible/intangible distinction is no longer strictly required in New York, so long as the other elements of conversion are met. One wonders whether or not New York will follow Californias lead and expand the tort of conversion to cover all personal property. *Thyroff*s logic certainly suggests a domain name similar to the one in *Kremen* is subject to the tort in New York: [S]ocietys reliance on computers and electronic data is substantial, if not essential, *Thyroff*, 8 N.Y.3d at 291, and The lack of a compelling reason to prohibit conversion for a redress of a misappropriation of intangible property underscores the need for reevaluating the appropriate application of conversion. *Id.* *Shmueli* and *Astroworks* opened the doors to conversion of intangible property apart from the strict merger

requirement, *Thyroff* broadened the application of that right, and it appears that New York law might go so far as *Kremen* and beyond in future cases.

Application in Employment Law: *Thyroff* likely not available to employees. *Thyroff* provides little for employees seeking to reclaim electronic data left behind with an employer. It is commonplace for employees to use company technology, computers in particular, for their own personal uses. When they leave, they may try to take electronic data in one way or another forwarding documents by email, or converting data to PST files and exporting to a thumb drive. Employees will not find much success in seeking to recoup the electronic data through a claim for conversion, because there are very little to no property rights for employees in New York. By definition, An employer-employee relationship exists when the evidence demonstrates that the employer exercises control over the results produced by a claimant or the means used to achieve the results. *Hertz Corp. v. Comm'r of Labor*, 2 N.Y.3d 733 (N.Y. 2004). *Shmueli* emphasizes plaintiffs status as an independent contractor, and in fact, the *Shmueli* court explicitly denies extension of the rights to an employee because their work product is considered proprietary to the employer. *Shmueli*, 9 Misc. 3d at 595 (quoting *Pullman Group v Prudential Ins. Co. of Am.*, 733 N.Y.S. 2d 1 (1st Dept. 2001)). In other words, all work product is assumed to be within the scope of employment for salaried employees, and employees therefore do not retain a property interest in such work product.

While there is an academic argument for non-work product created in ones place of employment, (See Lee Nolan Jacobs, *Is Whats Yours Really Mine?: Shmueli v Corcoran Group and Penumbra Property Rights*, 14 J.L. & Poly 837 (2006) (discussing the uncertainty surrounding individual property rights in the workplace), the tort of conversion requires exclusivity of ownership. Once information is placed on a company server, or on a computer other employees can access, an employee is no longer able to exercise exclusive control over the document, and there is no longer a cause of action for conversion. In addition, many employers require employees to sign a specific waiver of privacy expectations with regard to their computer usage as a condition of employment.

In narrow circumstances, conversion may still exist including where the employer explicitly allows for personal computer use, the employee guards it with security and/or an employee saves a personal document on the local drive only.

In sum, *Thyroff* should benefit employers who now have another claim against an employee who steals and destroys electronic data and computer records with them on the way out.

Application of *Thyroff* to Licensing, Independent Contractor or Third-Party Relations. The *Shmueli* court emphasizes that plaintiff was an independent contractor working with the defendant, and not just an employee. *Shmueli*, 9 Misc. 3d at 594. Alternatively, *Thyroff* was both a licensee and independent contractor, and *Astroworks* involved arms-length parties in an enterprise. Conversion claims will be much easier to sustain in third-party relations because it is easier to claim exclusivity or control over ones property. Of course, whether or not someone is an employee, an independent contractor or other is a sometimes difficult question that is beyond the scope of this commentary. The take away *Thyroff*, *Astroworks*, *Shmueli*, and *Kremen* make conversion claims more viable in the context of licensing, independent contractors and third-parties.

Conclusion. *Thyroff* is another of the increasing number of cases of importance in how our legal system is responding to the explosion of electronic data. Conversion has its limits in the cyber-world simply because so often data is not stolen but copied, and copying will not engender conversion without exclusion. Subsequent opinions citing *Thyroff* suggest this result. See *A & G Research, Inc. v. GC Metrics, Inc.*, 2008 NY Slip Op 51016U (N.Y. Sup. Ct. May 21, 2008) (stating copied computer data does not exclude the proper owner); *Leser v. Karenkooper.com*, 2008 NY Slip Op 50135U (N.Y. Sup. Ct. 2008) (stating the use of an image from a webpage does not exclude the proper owner).

Because so many data files are copied, this claim may be unavailable in certain circumstances. Practitioners especially those representing employers should look to the Computer Fraud and Abuse Act, *18 USC 1030*, in cases involving copying of data without exclusion. Despite this limitation, as New York applies *Thyroff* to the myriad and exponentially growing other forms of virtual information, *Thyroff*, *8 N.Y.3d* at 293, practitioners should expect to see an increase in conversion claims following termination of licensing agreements, independent contractors and co-venturers.

Cross-References

For more information on the tort of conversion, intangible property and employee property rights, see 1-2A Computer Law § 2A.11 (explaining *Thyroff's* role in the expansion of conversion); 1-4 New York Employment Law § 4.02 (discussing misappropriated employee work product); 1-7 Taxation of Intellectual Property § 7.02 (noting conversion of domain name in *Kremen*); Computer Fraud and Abuse Act, *18 USC 1030* (stating act of copying is not a deletion of original files); 2-249 Warren's Negligence in the New York Courts § 249.02 (noting apparent application of CPLR 5001 to intangible property as well); Juliet M. Moringiello, *False Categories in Commercial Law: The (Ir)Relevance of (In)Tangibility*, *35 Fla. St. U. L. Rev.* 119 (2007) (discussing the history of intangible property); and Lee Nolan Jacobs, *Is Whats Yours Really Mine?: Shmueli v Corcoran Group and Penumbra Property Rights*, *14 J.L. & Poly* 837 (2006) (examining the uncertainty surrounding individual property rights in the workplace).

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Barrett on Old Forge School District v. Highmark Inc., 924 A.2d 1205.

2008 Emerging Issues 2497

Matthew Barrett on Old Forge School District v. Highmark Inc. d/b/a Highmark Blue Shield and Pennsylvania Blue Shield, 924 A.2d 1205, 2007 Pa. LEXIS 1366 (Pa. 2007).

By Matthew P. Barrett

July 7, 2008

SUMMARY: The Pennsylvania Supreme Court discussed in *Old Forge School District v. Highmark Inc. d/b/a Highmark Blue Shield and Pennsylvania Blue Shield*, 924 A.2d 1205, the basis for finding vexatious conduct on the part of a litigant and the award of attorneys fees. Matthew P. Barrett, a partner at O'Malley, Harris, Durkin & Perry in Scranton, elaborates on the impact of Old Forge on seeking attorneys fees and the determination of vexatious conduct.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Cite as: Barrett, Matthew. *Old Forge School District v. Highmark Inc. d/b/a Highmark Blue Shield and Pennsylvania Blue Shield*. LexisNexis Expert Commentary, (Insert date you accessed the document online).

In June 2007, the Pennsylvania Supreme Court reviewed a case where there had been an award of attorney fees. Issue on appeal was whether or not plaintiffs had engaged in vexatious conduct when they filed an action which, in part, challenged Highmarks rates and reserves. Highmark is a health insurance plan which does business as Highmark Blue Cross Blue Shield and Pennsylvania Blue Shield. In 2002, the Pennsylvania Insurance Department set out to determine whether or not surplus and reserve levels maintained by various health insurers, including Highmark, were appropriate. The Pennsylvania Department of Insurance had concluded that certain health insurers had substantial reserves in surplus amounts and felt that accumulating additional surpluses would be inefficient. The health insurers were then requested to submit plans for approval of their reserves and surplus levels.

Insurance Commissioners Decision Issued. In February 2005, a review had been completed of the applications as submitted by the health insurers, and Insurance Commissioner Koken issued an order addressing the reserves maintained by various health insurers. A surplus was considered to be that amount the plan has in capital after all liabilities had been deducted from the assets. *In re Applications of Capital Blue Cross et. al.*, No. MS05-02-006, slip op., p. 10 (Pa. Ins. Dept February 9, 2005). If the plan was operating with a sufficient level of surplus, then that plan would not include a premium for risk and contingency factor in field rates for the next calendar year. *Highmark at 1206*. In making her ruling, the Insurance Commissioner noted that the Department of Insurance had received much input and requests from the public which took the position that plan participants should receive rebates or premium reductions. However, the Commissioner on this issue stated the following: [A]ttempting to target accumulated surplus to one group of rate bearers is inherently problematic and a potentially inequitable notion. In fact, a rate rollback or a rate freeze

could prove detrimental to the marketplace. *Highmark at 1207*, quoting *In re Applications of Capital Blue Cross et. al.*, No. MS05-02-006 at p. 17.

She further noted the following:

[W]here a blue plan has sufficient surplus, forward looking rate relief would assure that additional surplus is not cumulatively derived from premium income. Thus, for example, it would be appropriate to charge rates that do not include a risk and contingency factor where a plan has sufficient levels of surplus.

Id.

Insurance Commissioners Decision Challenged. Following the order issued by the Insurance Commissioner, petitions for review were filed with the Commonwealth Court challenging the Commissioners order and determination. *See City of Philadelphia v. Pennsylvania Ins. Dept.*, 889 A.2d 664, 668 (Pa. Cmwlth. 2005) One group of petitioners were 3 policyholders, 4 Blue Cross subscribers and 14 public interest groups. The second petition was filed by the City of Philadelphia who was an employer and who paid premiums to one of the plans. On dismissing those petitions, the Commonwealth Court held that under Pennsylvania law, the petitioners had no protected property interest in their rates; therefore, they had no right to due process hearing or standing to appeal the findings made by the Commissioner regarding the surplus held by each of the plans. *Id. at 672*.

Insurance Commissioners Decision Challenged Again and Counsel Fees Sought and Granted. Two weeks after that decision by the Commonwealth Court, a separate action was filed with the Commonwealth Court by the Old Forge School District, Lawrence S. Herman, D.C., NACHAS, Inc., Jason H. Herman, Robert Petty, R.G. Petty Masonry, on their own behalf and on behalf of all others similarly situated. This action asserted causes of action under breach of contract and unjust enrichment. In this action, the Plaintiffs sought a refund alleging the Insurance Commissioners pervious order supported a conclusion that the 2004 premium rates were not properly calculated.

Preliminary objections were filed to the complaint and were sustained. In ruling on the preliminary objections, the court determined that the plaintiffs in the class action suit were couching their argument in terms of excess surplus but were in actuality seeking a retroactive rate relief. *Old Forge Shcool District at 1208*. The court held that the class action was not the appropriate vehicle by which to seek retroactive relief. The court considered it noteworthy that a previous determination had been made in the appeal from the Commissioners determination that the plaintiffs did not have a protected property interest in their rates, and, therefore did not have standing to appeal the findings made by the Insurance Commissioner. *Id.* In sustaining the preliminary objections, the court also granted another defendants motion for counsel fees, reasoning that appellants had engaged in single obdurate and vexatious litigation. *Id. At 1209*. In making its ruling, the court stated the following:

This is now at least the third time that most of the appellants herein have had to be reminded of the basic premise that rates and reserves are part of a regulatory process under the sound discretion of the commissioner, and are not proper subject of adversary litigation in which individual entities or groups may assert their private interests. At this point, we believe that imposition of counsel fees for obdurate where vexatious litigation is appropriate.

Thereafter, on February 17, 2006, Highmark, seeking a similar award as had been granted to the co-defendant, filed its application for attorneys fees under Section 2503(7) and 2503(9) of the Judicial Code found at 42 Pa. C.S. Sections 2503(7), (9). Highmark sought an award of attorneys fees against all but one of the defendants. That Section of the Pennsylvania Statutes reads in relevant part as follows:

The following participants shall be entitled to a reasonable counsel fee as part of the taxable cost of the matter:

(7) Any participant who is awarded counsel fees as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter.

(9) Any participant who is awarded counsel fees because the conduct of another party commencing the action or otherwise was arbitrary, vexatious or in bad faith.

On March 21, 2006, the Commonwealth Court entered an order granting Highmarks application for fees.

Supreme Court Vacates and Remands. On appeal to the Pennsylvania Supreme Court, the class action plaintiffs asserted that the Commonwealth Court erred in granting an award of attorneys fees. The Supreme Court engaged in a lengthy discussion regarding the appropriateness of the Commonwealth Courts handling of the motion for attorneys fees as a separate matter under Pennsylvania Rule of Appellate Procedure (hereinafter Pa. R. A. P.) 1701(a). However, more importantly, the Court undertook an examination of what is considered vexatious conduct under Section 2503(9).

Ultimately, the Court issued a remand to the Commonwealth Court with instructions to reevaluate its decision in light of the then recent decision by the Pennsylvania Supreme Court set forth in *Ciamaichelo v. Independence Blue Cross*, 589 Pa. 415, 909 A.2d 1211 (2006). In *Ciamaichelo v. Independence Blue Cross*, the Supreme Court held that a lawsuit alleging a breach of contractual and fiduciary duties by the health insurance plan could proceed in a Court of Common Pleas where there was an allegation by the policyholders that the plan had amassed an excess in surplus funds. Further, the Supreme Court considered it problematic that the Commonwealth Court did not set forth with sufficient clarity how it applied the two prong test for vexatious conduct as set forth in *Thunberg [v. Strause]*, 545 Pa. 607, 617, 682 A.2d 295, 299 (1996). *Old Forge School District at 1213*. The Supreme Court had made clear in the *Thunberg* decision that a court when deciding whether the initiation of an action was vexatious must determine the following: 1) the suit was filed without sufficient ground in either law or in fact; and 2) the suit served the sole purpose of causing annoyance. *Thunberg*, 682 A.2d 299.

Practice Tips

- . Attorney fees in Pennsylvania are only permitted where provided for by contract or statute;
- . when proceeding under 42 Pa. C.S.A. section 2503(7) or (9) be prepared to present evidence to support the two findings required under *Thunberg*;
- . guide the court to make necessary findings to support an award of attorney fees under *Thunberg*.

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Barrett on Cooper v. Schoffstall, 588 Pa. 505, 905 A.2d 482, 2006 Pa. LEXIS 1717

2008 Emerging Issues 2499

Matthew P. Barrett on Cooper v. Schoffstall, 588 Pa. 505, 905 A.2d 482, 2006 Pa. LEXIS 1717 (Pa. 2006).

By Matthew P. Barrett

July 7, 2008

SUMMARY: In a decision that constitutes an important part of the body of law covering discovery of financial data of expert witnesses, the Pennsylvania Supreme Court ruled that compelling an expert witness to produce all of their financial records will typically be viewed as abuse of the discovery process. This commentary discusses Coopers importance and implications for discovery of financial information of an expert witness in civil litigation.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: What started as a common personal injury lawsuit arising out of a pedestrian/automobile accident in December 2001 resulted in an important decision from the Pennsylvania Supreme Court on the determination when there is cause supporting the discovery of financial information and records from an expert witness. That decision did not end the case, but rather resulted in a remand to the court of common pleas with guidance on how to resolve a dispute between the parties involving the discovery of financial records of a non-party expert medical witness to facilitate an inquiry into potential bias.

Plaintiff Seeks Discovery of Defense Medical Experts Financial Records. During the course of the litigation, Barbara Cooper, plaintiff was requested by the defendant to attend an Independent Medical Examination (IME) with Dr. Perry Eagle. Ms. Cooper attended the IME. Thereafter, Ms. Cooper sought through the issuance of subpoenas and discovery copies of federal form 1099 tax records associated with [Dr. Eagles] performance of services as an independent contractor for the calendar years 1999, 2000 and 2001 in undertaking defense related reports, examinations and depositions. *Cooper, 905 A.2d 508*. Dr. Eagle moved to exclude any discovery of payments made by other persons or firms entirely unrelated to the parties, counsel or insurer involved in the case on the basis that it exceeded the bounds of permissible discovery.

Trial Court Orders Disclosure of Defense Medical Experts Financial Documents. Mrs. Cooper presented evidence that Dr. Eagle had participated in a number of prior civil actions maintaining that the doctor had participated in 200 to 400 defense medical examinations in recent prior years. The trial court denied the motions for protective order but did issue an order requiring confidential treatment of the financial information to be produced by the doctor.

Dr. Eagle filed a notice of appeal. In a memorandum, the trial court explained that Pennsylvania Rule of Civil Procedure (hereinafter Pa. R.C.P.) 4003.1 allows discovery of any matter, not privileged, that is relevant to the

litigation subject matter and will substantially aid in advancing claims or defenses. Additionally, the trial court held that Pa. R.C.P. 4003.5 permits additional discovery from an expert witness upon cause shown. In reviewing the evidence presented to him, the trial court concluded that Dr. Eagle performed defense medical examinations, prepared reports and testified in court proceedings with high frequency. The trial court recognized that an expert witness could have a bias in favor of a specific party, and reasoned that it is also proper to show that an expert has a bias in favor of a class of parties. *Cooper v. Schoffstall*, No 5932 CV 2001, slip op at 5-6 (C.P. Dauphin December 15, 2003) The court did not accept the arguments of Dr. Eagle that the discovery which had been served upon him was burdensome, harassing and/or annoying or would have chilling effect on doctors willing to perform independent medical examinations.

The Superior Court Affirmed But for Different Reasons. On appeal to the Superior Court, a three judge panel affirmed the decision of the trial court ruling that the trial court properly used its discretion in allowing the discovery. However, the Superior Court performed its own analysis and determined that Pa. R.C.P. 4003.5 was not applicable to the discovery of potential bias on the part of expert witnesses. *Cooper at 486*. Rather, the Superior Court held that the rule addresses only facts and opinions required or divulged in anticipation of litigation. The Superior Court held that the discovery sought from Dr. Eagle fell within the broad, general scope of discovery under Rule 4003.1 of the Pennsylvania Rules of Civil Procedure.

The Supreme Court Undertakes Review. Unfortunately for Dr. Eagle, not only was he embroiled in the discovery dispute in the *Cooper* matter, but he was also involved in a similar discovery dispute in another case. *J.S. v. Whetzel*, 2004 Pa. Super. 406, 860 A.2d 1112 (Pa. Super. 2004). The Pennsylvania Supreme Court allowed the appeal in the *Cooper* case to address the discovery issue.

On appeal to the Pennsylvania Supreme Court, Dr. Eagle asserted that the discovery sought by the plaintiff was beyond that permitted of an expert witness. Dr. Eagle urged the court to adopt the trial courts view that Pa. R.C.P. 4003.5 governed the dispute and that the trial court had erred in ordering the disclosure. Dr. Eagle requested the Supreme Court to reject the Superior Courts approach of determining the dispute under Pa. R.C.P. 4003.1 which he considered too liberal. Dr. Eagle argued that the Superior Courts approach would authorize litigants, without seeking leave of court or paying expert fees, to freely depose an opposing partys expert witness on virtually any subject except the one most central to the litigation (the experts opinion on the facts of the case). *Cooper at 488*. Dr. Eagle urged the Supreme Court to consider the privacy interest of expert witnesses and suggested that the court consider the decision by the Third Circuit Court of Appeals in the matter of *Fraternal Order of Police v. City of Philadelphia*, 812 F.2d at 109, 115 (3rd Cir. 1987). In that matter, the court held that public disclosure of financial information may be personally embarrassing and highly intrusive. Dr. Eagle sought the Pennsylvania Supreme Court to limit the scope of discovery of an experts financial interests to those instances where the financial interests are demonstratively probative of any bias that [the witness] may harbor in favor of the law firm retaining [the expert]. *Cooper at 489*.

The Supreme Court considered the three important public policy issues advanced by Dr. Eagle that allowing discovery of an expert witnesses financial would (1) have a chilling effect on the availability of qualified expert witnesses; (2) substantially increases the burden, expense and delay attendant on permitting the parties to delve into matters that are collateral to the central issues in personal injury litigations; and has a disproportionate adverse effect on the defense. *Cooper at 490*.

The Supreme Court also considered the arguments of the plaintiff who maintained that the information was an essential response to the defense tactics of cultivating and employing professional witnesses as well as the evasiveness of such witnesses in responding to legitimate inquiries concerning the extent of their financial entanglements with the firms and/or the insurance industry. *Id.*

Supreme Court Set Guidelines. Ultimately, the Pennsylvania Supreme Court determined that the trial courts are in the best position to make an assessment after interrogatory responses are received and upon appropriate motion to determine whether or not there is cause to support further supplemented discovery of the personal documents of the expert. Where a witness has been evasive or untruthful in responding to written discovery, additional discovery may be

warranted. Noting that the trial court should exercise sound discretion, the Supreme Court determined that in all likelihood, information exchanged through written interrogatories would adequately provide information which would support adequate trial preparation. The Supreme Court determined that there are procedures supporting adequate trial preparation on the issue of potential bias of non-party expert witnesses less burdensome than production of personal financial records. In other words, the trial courts throughout the Commonwealth will serve as gatekeepers, and there would be no categorical right to obtain information regarding the financial documents of litigation experts.

Practice Tips

. Practitioners should prepare extensive and carefully crafted interrogatories inquiring into the extent an expert is engaged in litigation or expert services.

. Although personal financial documents may not be easily obtainable, trial preparation should include interrogatories as to the number of times an expert has served as and expert, performed examinations or other services, been deposed and other questions to flesh out potential evidence of bias. Other questions should be posed to find out the amounts received by the expert in providing the services in the present litigation and in other matters.

. Careful consideration should be given to pursuing additional discovery by filing a motion supported with evidence that the personal financial documents of the expert are necessary to establish his or her bias based upon evasive or untruthful discovery responses.

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CAFA's Exception for Securities: Vairo on Estate of Pew v. Cardarelli

2008 Emerging Issues 2502

Vairo on Estate of Pew v. Cardarelli

By Georgene Vairo

July 7, 2008

SUMMARY: For the first time, a federal appellate court has construed the reach of CAFAs statutory exception for actions that relate to the rights, duties, and obligations relating to or created by or pursuant to any security. This commentary, by Moores Federal Practice Editorial Board member Georgene Vairo, analyzes the Second Circuits reading of the exception in *Estate of Pew v. Cardarelli*.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Cite as: Vairo, Georgene. *Estate of Pew v. Cardarelli*. LexisNexis Expert Commentary, (Insert date you accessed the document online).

Estate of Pew v. Cardarelli, 527 F.3d 25, 2008 U.S. App. LEXIS 10269 (2d Cir. May 13, 2008), involves a rarely litigated provision of the Class Action Fairness Act (CAFA): the statutory exception for actions that relate to the rights, duties, and obligations relating to or created by or pursuant to any security. It is the first federal appellate ruling on the reach of the provision, 28 U.S.C. § 1332(d)(9). The Second Circuit, by a 2-1 vote, ruled that the exception applies only to suits that seek to enforce the terms of instruments that create and define securities, and to duties imposed on persons who administer securities. The court also grappled with some of the problems raised by CAFAs appellate jurisdiction provisions.

Background. This action alleged that officers of an issuer of debt certificates, abetted by the issuer's auditor, failed to disclose that the issuer was insolvent. The plaintiffs sought relief under New York's consumer fraud statute. The action was brought as a class action in state court and then removed to federal court under the Class Action Fairness Act. The plaintiffs sought remand, arguing that the suit fell within the securities exception to CAFA's removal provision. The district court remanded, and the defendants sought permission to appeal the district court's remand order.

General Appellate Issues. Ordinarily, an order of remand is not appealable [see 28 U.S.C. § 1447(d)]. CAFA, however, allows a party who loses on a motion to remand to seek permission to appeal [28 U.S.C. § 1453(c)(1)]. However, the timing provisions are tricky. First, the text of § 1453(c)(1) states that the petition be made to the court of appeals not less than 7 days after entry of the order." Following the other courts of appeals that have considered the issue, the Second Circuit concluded that this was a drafting error, and that the language should be interpreted to mean not more than seven days after entry of the order. Clearly, the intention of Congress was to impose a seven-day

deadline, not to require an indefinite waiting period. Because the defendants petition for review filed on the seventh business day after the entry of the district court's remand order, the petition was timely.

Second, CAFA imposes a strict deadline on the court of appeals to resolve the appeal. Again, the language of the statute is problematic. Section 1453(c)(2) provides: If a court of appeals accepts an appeal . . . the court shall complete all action on the appeal, including rendering judgment, not later than 60 days after the date on which such appeal was *filed*. [emphasis added]. What if the court of appeals does not accept the appeal until 61 days after the appeal was filed? Again, like the other courts of appeals who have had to deal with this issue, the Second Circuit essentially finds that an appeal is not an appeal until the request for review is granted. It ignores the word filed. So, once it grants the request to appeal, the Court has only 60 days to render a decision [see *DiTolla v. Doral Dental IPA of N.Y., LLC*, 469 F.3d at 275 (2d Cir. 2006) (CAFA's 60-day clock for rendering judgment starts running on the day that the Court's order granting permission to appeal is filed")].

Finally, the Second Circuit noted that a court of appeals retains discretion to decline to hear CAFA appeals, and that its sound exercise of discretion should be guided by consideration of the importance and novelty of the issues raised by the case. Here, the Second Circuit allowed the appeal because the question of whether a state-law deceptive practices claim predicated on the sale of a security is removable under CAFA was important and consequential, was a case of first impression in the courts of appeals, and a decision on the question would alleviate uncertainty in the district courts.

Comment. It is laudable that the courts of appeals are sticking together on their readings of the appellate timing provisions of CAFA. It would be preferable for Congress to clean up the language of the statute, but at least in the meantime, there is emerging clarity on these technical issues.

Parity of District Court and Appellate Court Jurisdiction. The CAFA provision allowing interlocutory review of remand orders does not apply to any class action that solely involves a claim that relates to the rights, duties, and obligations relating to or created by or pursuant to any security [28 U.S.C. § 1453(d)(3)]. This exception mirrors 28 U.S.C. § 1332(d)(9)(C), which provides an exception to CAFA's grant of original federal jurisdiction. The plain language of § 1453(d), the Second Circuit said, limits all of § 1453, including subsection (c), which delineates the scope of the court of appeals' authority to accept an appeal from a remand order. Accordingly, § 1453(d) limits a court of appeals jurisdiction to review the district court's remand order.

The congruity of the text of the original jurisdiction and appellate jurisdiction exceptions led the court to combine its grant of leave to appeal with the merits of the appeal. Not to do so would waste some of the 60-day time limit for deciding the appeal. More importantly in this case, it would be inefficient because the decision on appellate jurisdiction required construction of the same statutory language on which the district court based its remand order. In other words, CAFA's relevant jurisdictional and removal provisions operate in tandem" because both original and appellate jurisdiction depend on whether plaintiffs' allegations fall within CAFA's exception for claims that relate to rights, duties and obligations related to or created by or pursuant to a security. If there is original jurisdiction for plaintiffs' underlying claim, the court of appeals would have appellate jurisdiction, and it would reverse the remand order, with the case remaining in federal district court. If, on the other hand, the district court lacked jurisdiction over the underlying claim, the appellate court would dismiss the appeal for lack of appellate jurisdiction. Thus, the remand order would stand, and the action would be litigated in state court.

Interpretation of Statutory Exception. The question then, both as to the merits and as to appellate jurisdiction, was whether the case fell under the exception to CAFA's grant of original federal jurisdiction for any class action that solely involves a claim . . . that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security [28 U.S.C. § 1332(d)(9)(C)]. The Second Circuit acknowledged that CAFAs general purpose was to ensure that cases of national importance involving securities be litigated in federal court. But, it also noted that the securities exception was one of several CAFA provisions designed to keep purely local matters in the state courts. Because it found the wording of the statute to be ambiguous, the Second Circuit considered not only the text of statute itself but also the statutory context and the legislative history.

The Second Circuit interpreted the exception as applying only to suits that seek to enforce the terms of instruments that create and define securities, and to duties imposed on persons who administer securities. The natural reading of the statute, the court said, is to differentiate obligations from duties by reading obligations to be those created in instruments, such as a certificate of incorporation, an indenture, a note, or some other corporate document. The rights are those of the security-holders (or their trustees or agents) to whom these duties and obligations run.

The Second Circuit rejected the idea that the term rights . . . relating to . . . any security" includes the right to bring *any* cause of action that relates to a security. This interpretation would defeat any limitation that was intended by the use of the term. Moreover, this interpretation would render superfluous other sections of CAFA excepting class actions concerning a covered security [*see* 28 U.S.C. §§ 1332(d)(9)(A), 1453(d)(1)].

The Second Circuit then found that the certificates involved here were clearly securities and created obligations and corresponding rights in the holders. However, the suit did not relate to those rights; rather, it was a state-law consumer fraud action alleging that the defendants fraudulently concealed the issuer's insolvency when it sold the certificates. The claims here were not grounded in the terms of the security itself, the kind of claims that might arise, for example, when the interest rate was pegged to a rate set by a bank that later merges into another bank, or when a bond series is discontinued, or when a failure to negotiate replacement credit results in a default on principal. The present claim that a debt security was fraudulently marketed by an insolvent enterprise did not enforce the rights of the certificate holders as holders, and therefore it did not fall within the statutory exception.

Because the statutory exception to jurisdiction did not apply, the Second Circuit had appellate jurisdiction. This also meant that the district court had jurisdiction and the case should not have been remanded to state court. Accordingly, the Second Circuit reversed the remand order and remanded to the district court for further proceedings.

Dissent. The dissenting judge argued that the majority opinion misconstrued the plain language of the statute. While the majority saw the provision as ambiguous and even cryptic, the dissent saw it as straightforward. Section 1332(d)(9)(C) applies to claims relating to the rights, duties . . . and obligations relating to or created by or pursuant to any security. In the dissent's view, it was readily apparent that the present suit did relate to rights and obligations created by, or at least relating to, the securities. It plainly concerned the defendant's failure to fulfill its obligations with respect to the certificates, and the plaintiffs' deprivation of rights with respect to the certificates.

Indeed, the dissenting judge notes her agreement with virtually every assertion made by the majority, but then chastises it for reaching a wrong conclusion that does not follow from its own analysis.

The majority opinion, the dissent said, was a wholly inexplicable departure from the plain text of Section 1332(d)(9)(C). . . . I can only conclude that the majority's specifications as to what claims must be in order to qualify for exemption is an act of judicial re-drafting of CAFA."

Comment. Judge Rosemary Pooler, in dissent, has the better of the argument. However, it is not surprising that the majority ruled as it did. First, as both the majority and the dissent point out, the purpose of CAFA is to expand federal jurisdiction. Moreover, subsection (A) of § 1332(d)(9) carves out class actions only because jurisdiction exists under another federal statute: the Securities Litigation Uniform Standards Act (SLUSA"). Between SLUSA and CAFA, Congress clearly wanted to steer cases involving claims of securities fraud into federal court.

The decision shows once again that the importance of the mode of statutory construction. Judge Pooler, quoting Benjamin Cardozo, acknowledges that there are times when judges will need to fill in the gaps of poorly drafted or ambiguous statutes [Benjamin N. Cardozo, *The Nature of the Judicial Process*, 83 (1921) (statutes are designed to meet the fugitive exigencies of the hour")]. In Judge Pooler's view, the text of CAFA points to a clear remand. In contrast, the majority has ignored the plain terms of CAFA, created its own waste space, and filled in the resulting gap with an unwarranted exercise of legislative power."

References. 5 *Moore's Federal Practice* (3d Ed.) §§ 23.63[2][a], 23.63A[1]; 15 *Moore's Federal Practice* (3d Ed.)

§ 102.26[1][a][ii]; 16 *Moore's Federal Practice (3d Ed.)* § 107.15[13][b][i][B]; 19 *Moore's Federal Practice (3d Ed.)* § 203.34[2].

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Pre-Action Depositions: Vairo on In re Vioxx Prods. Liab. Litig.

2008 Emerging Issues 2503

Vairo on In re Vioxx Prods Liab Litig

By Georgene Vairo

July 7, 2008

SUMMARY: Can pre-action depositions under Civil Rule 27 be used by a nonparty as a vehicle for compliance with Civil Rule 11? In *In re Vioxx Prods. Liab. Litig.*, the Eastern District of Louisiana rejected such a use of Rule 27. This commentary, by Moores Federal Practice Editorial Board member Georgene Vairo, addresses the practical implications of this decision.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Cite as: Vairo, Georgene. *In re Vioxx Prods. Liab. Litig.* LexisNexis Expert Commentary, (*Insert date you accessed the document online*).

In re Vioxx Prods. Liab. Litig., 2008 U.S. Dist. LEXIS 36744 (E.D. La. May 5, 2008), involves the issue of whether a nonparty may argue that its pre-filing compliance with *Fed. R. Civ. P. 11* necessitates the opportunity to use *Fed. R. Civ. P. 27* to take depositions to perpetuate testimony. The U.S. District Court for the Eastern District of Louisiana held that Rule 27(a) pre-action depositions cannot be used as a vehicle for compliance with Rule 11 representations to the court that claims or legal contentions are warranted and that factual contentions have evidentiary support.

Background. In connection with the Vioxx Multi-District Litigation (Vioxx MDL") against Merck & Co., Inc., Healthcare Recoveries, Inc. (HRI), on behalf of numerous health insurers, filed a verified petition for pre-action depositions pursuant to Rule 27(a). The petition sought an order requiring all plaintiffs counsel in the Vioxx MDL to provide (1) the names of all plaintiffs who allegedly took Vioxx and suffered personal injury or wrongful death as a consequence; (2) the addresses and social security numbers of these individuals; (3) the docket numbers of specific cases filed by these individuals; and (4) the identities of health insurers who provided coverage for some or all of the medical expenses incurred to treat the injuries or conditions alleged to have been caused by Vioxx.

The Plaintiffs Steering Committee (PSC") from the Vioxx MDL, as well as Merck, filed motions to dismiss the petition, both arguing that HRI attempted use of Rule 27 was improper. Specifically, they asserted that Rule 27 does not permit a party to seek pre-action discovery so that the party can comply with Rule 11. They alleged that HRI sought to identify the names of Vioxx plaintiffs for the sole purpose of framing a cause of action against those individuals to attempt to recover all or a part of the monies these individuals would potentially receive as a result of the Vioxx settlement. PSC and Merck also argued that the information HRI sought was in no danger of being destroyed or lost,

which is a requirement for Rule 27(a) relief.

Rule 27 Cannot Be Used to Meet Rule 11 Requirements. Rule 27 provides that:

A person who wants to perpetuate testimony about any matter cognizable in a United States court may file a verified petition in the district court for the district where any expected adverse party resides. The petition must ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony."

The Rule further provides that the petitioner certify that the petitioner expects to be a party to an action cognizable in a United States court but cannot presently bring it or cause it to be brought; and that the petitioner provide (1) the subject matter of the expected action and the petitioner's interest; (2) the facts that the petitioner want to establish by the proposed testimony and the reason to perpetuate it; (3) the names or a description of the persons whom the petitioner expects to be adverse parties and their addresses, as far as known; and (4) the name, address, and expected substance of the testimony of each deponent [*Fed. R. Civ. P. 27(a)*].

The district court explained the purpose of Rule 27. It merely provides a means to perpetuate known testimony. The Rule is intended to apply when testimony might be lost to a prospective litigant unless the litigant is permitted to take the testimony without waiting until suit is filed. Thus, the petitioner must show that there is a danger the testimony will be lost by delay. The rule is most frequently applied to potential deponents who may be unavailable after a complaint is filed due to such reasons as advanced age, illness, or an indefinite departure from the country. General allegations that evidence may not be lost are not sufficient.

Most courts interpreting the rule have concluded that Rule 27 may not be used as a discovery device to determine whether a cause of action exists, and if so, against whom the action should be instituted. A petitioner may not use Rule 27 for discovery of unknown information that the petitioner hopes will assist it in the future when the petitioner applies for judicial relief. Courts have also held that a petitioner may not use Rule 27 to seek information in order to complete a Rule 11 investigation [*see In re Landry-Bell*, 232 F.R.D. 266 (W.D. La. 2005)].

The court opined that HRI, in filing its Rule 27 petition, was attempting to use Rule 27 in order to fulfill its Rule 11 requirements, or to discover information it already had access to through its own records. HRI sought the basic identifying information of the plaintiffs in the Vioxx MDL so that it could determine whether it had a lien against any recovery the plaintiffs would potentially receive through settlement or trial. Based on the overwhelming weight of authority, the district court concluded that HRIs attempted use of Rule 27 should not be allowed.

The court also found that petitioner had not met its burden of showing that the information sought was likely to be lost or destroyed prior to it being able to file suit. In fact, the majority of the information HRI sought the names and addresses of the plaintiffs was public record and not likely to be destroyed any time soon. The court suggested that HRI could easily compare the names and addresses of its insureds against the names and addresses of the plaintiffs and find out which of its insureds had a case pending in the MDL. Instead, HRI was seeking to make the existing parties in the Vioxx MDL undertake the time and incur the cost to do its work. This is not a proper purpose of Rule 27. Therefore, the district court granted the motions to dismiss the Rule 27(a) petition for pre-action discovery.

Court Disagrees With Contrary Case. The district court acknowledged the case of *In re Alpha Industries* [*see In re Alpha Indus.*, 159 F.R.D. 456 (S.D.N.Y. 1995)], in which the petitioner argued that it could not bring a copyright and trademark infringement action that complied with Rule 11 because it was unsure which potential defendants were actually selling counterfeit goods. The *Alpha Industries* court held that the fact that petitioner must delay bringing suit until receiving the information sought is a sufficient showing to allow the use of Rule 27 to perpetuate the respondents testimony. However, the Vioxx MDL court noted that other courts have routinely disagreed with *In re Alpha Industries*, and found that *In re Alpha Industries* is not a correct statement of the law. The threat of evidence being lost or destroyed is in fact a requirement for use of Rule 27(a).

Comment. This case was correctly decided. When Rule 11 was first amended in 1983, there were suggestions that

Rule 27 could be used to help a prospective plaintiff, in particular, both comply with Rule 11's reasonable inquiry requirement and to ensure that the evidence needed to bring a meritorious case existed. However, the suggestion fell on deaf ears. First of all, Rule 11 does not require that a prospective plaintiff have all the evidence needed to prove the elements of all claims. Rather, it requires a reasonable inquiry "and that the fact allegations of a pleading have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery" [*Fed. R. Civ. P. 11(b)(3)*]. And, if such further investigation fails to reveal such evidentiary support, Rule 11 prohibits the claimant from later advocating "the facts alleged" [*Fed. R. Civ. P. 11(a)*].

In other words, Rule 11 and Rule 27 are apples and oranges, designed for specific purposes. Rule 11 imposes obligations on lawyers; and Rule 27 is a discovery tool to be used only in limited situations when there is a need to preserve known testimony. [See 6 *Moore's Federal Practice* § 27.13 (3d ed.).] The costs of litigation are high enough. The evolution of a rule suggesting that there is a need to take depositions to comply with pre-filing Rule 11 obligations would increase costs and open the door to a flood of formal pre-filing depositions that may not ever otherwise need to have been taken. The Vioxx MDL court was entirely correct to slam the door shut on HRI's attempt to increase the costs of its potential adversaries. Indeed, *In re Vioxx Prods. Liab. Litig.*, is somewhat reminiscent of the Supreme Court's ruling in *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947), in which the Court dealt a blow to another prospective free-rider who sought the work-product of his adversary. Bottom line: Do your own work first!

References. 6 *Moore's Federal Practice* (3d Ed.) §§ 27.03, 27.13[4].

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Kyle C. Bisceglie on Ehrenfeld v. Mahfouz, 9 N.Y.3d 501 (N.Y. 2007)

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Kyle C. Bisceglie on Ehrenfeld v. Mahfouz, 9 N.Y.3d 501 (N.Y. 2007), and the New York Libel Terrorism Protection Act

By Kyle C. Bisceglie

July 7, 2008

SUMMARY: The Court of Appeals held in *Ehrenfeld* that NY lacked jurisdiction over a NY writers action to declare a foreign libel judgment unenforceable; four months later, the NY Legislature passed the Libel Terrorism Protection Act effectively reversing the COA. Kyle Bisceglie, a partner at Olshan Grundman Frome Rosenzweig & Wolosky LLP, discusses personal jurisdiction in foreign libel/defamation actions and forum shopping in light of *Ehrenfeld* & LTPA.

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New York Legislature Extends Limits of New Yorks Personal Jurisdiction Statute to Permit Declaratory Actions in New York of Enforcement of Foreign Libel Judgments

On December 20, 2007, the Court of Appeals ruled in a unanimous 6-0 decision that the New York long-arm statute did not confer personal jurisdiction over a foreign defendant who had won a default judgment in England against a New York based author and dismissed the authors declaratory action. *Ehrenfeld v. Mahfouz, 9 N.Y.3d 501 (N.Y. 2007)*. In so holding, *Ehrenfeld* reminded us that the New York long-arm statute does not reach the Constitutional limits of due process. Suing a New York resident abroad, serving her here and publishing the English opinion on the winning partys website accessible in New York were insufficient to confer jurisdiction in New York. By these acts, the defendant simply did not purposefully conduct business in New York, nor did he avail himself of the laws and privileges of New York.

The New York State Legislature effectively overturned the *Ehrenfeld* decision on April 30, 2008 when Governor David Paterson signed into law the Libel Terrorism Protection Act (the Act) which amended New Yorks personal jurisdiction and foreign judgment sections of the CPLR to overrule *Ehrenfeld* to the extent it prevented authors in New York from obtaining a declaration of unenforceability of foreign libel judgments. This statute was the result of a political and editorial uproar in the aftermath of *Ehrenfeld*, and, while clearly aimed at helping plaintiffs such as Ms.

Ehrenfeld, it has extended New York's personal jurisdiction in ways unintended.

Background of *Ehrenfeld v. Mahfouz*. Rachel Ehrenfeld wrote a book entitled *Funding Evil: How Terrorism is Financed and How to Stop It*. Published in 2003 by Bonus Books, her book claims that Khalid bin Mahfouz, a Saudi businessman and financier, has directly and indirectly financed various Islamist terror groups. The book was published in the United States, but one chapter was available on the Internet on the ABCNews.com website, and twenty-three copies were purchased in the United Kingdom via the Internet from third-party vendors. Mahfouz denied any claims that he funded terrorism in any way, and, in January 2004, demanded that Ehrenfeld cease and desist in various ways set forth in the Court of Appeals decision. Mahfouz then sued in England and, on four occasions in 2004 and 2005, served legal papers upon Ehrenfeld in New York.

Ehrenfeld did not appear in England for the same reasons that Mahfouz chose to sue her there: the high costs and plaintiff-friendly standards for libel suits in England. Because Ehrenfeld never defended herself, the English court entered default judgment against her in 2004, and awarded Mahfouz the then-equivalent of approximately \$225,000 in damages and attorneys fees.

Before Mahfouz took any significant step to enforce his judgment, Ehrenfeld preemptively filed a declaratory action in the Southern District of New York claiming the decision was both incorrect and unenforceable under New York and federal law. Not surprisingly, Mahfouz moved to dismiss based on lack of personal and subject matter jurisdiction.

The district court held it lacked personal jurisdiction under New York's long-arm statute, CLPR 302(a)(1). This decision was appealed to the Second Circuit which then certified the personal jurisdiction question to the New York Court of Appeals.

Libel Tourism: United States Versus British Libel Laws. It is not uncommon to strike at U.S. publishers and authors from England because the libel standards vary. This overview will place *Ehrenfeld* in context.

The U.S. libel standard for a public figure is found in *New York Times Co. v. Sullivan*, 376 U.S. 254 (U.S. 1964). To recover damages for libel, a public figure must prove that the statement was made with actual malice that is, with knowledge that it was false or with reckless disregard of whether it was false or not. *Id.* at 279-280. A non-public official may still be deemed a public figure for purposes of the libel law if he or she commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able to expose through discussion the falsehood and fallacies of the defamatory statements. *Curtis Pub. Co. v. Butts*, 388 U.S. at 155 (U.S. 1967).

Private figures have as a lower standard for proving libel: where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false. *Phila. Newspapers v. Hepps*, 475 U.S. at 769 (1986) Private parties bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant because holding otherwise (therefore putting the burden on the media defendant) could only result in a deterrence of speech which the Constitution makes free. *Id.* at 777.

Until 2006, British defamation laws generally did not distinguish between public and private figures, and typically presumed that the contested statement is defamatory and required that the defendant prove the truth of the allegedly defamatory statement. Heather Maly, Note and Comment, *Publish at Your Own Risk or Don't Publish at All: Forum Shopping Trends in Libel Litigation Leave the First Amendment Un-Guaranteed*, 14 J.L. & Pol'y at 898-99 (2006). A statement is considered defamatory if it is likely to injure the reputation of an individual in the eyes of reasonable members of the public. *Id.* at 899.

This burden on the defendant can make British libel suits extremely costly to defend. See Sarah Lyall, *Where Suing for Libel is a National Specialty*, NY Times, July 22, 2000, at B9 (an author of a book about the denial of the Holocaust spent \$3 million defending a British libel suit brought by a Holocaust denier portrayed in the book). While the *Reynolds*

v. *Times Newspapers Ltd.*, [2001] 2 AC 127, case held that journalists may have a defense against libel charges when the media has a legitimate duty to report matters of public interest, this case did not change British libel law in practice courts still imposed a high standard upon defendants. See Catherine Spratt, *A new day in the U.K.: Britains highest court has handed down a watershed ruling that allows the media to better defend responsible journalism against libel claims*, News Media & The Law, Winter 2007, <http://www.rcfp.org/news/mag/31-1/lib-anewdayi.html>.

Not surprisingly, such standards have made British courts a destination for libel lawsuits. Doreen Carvajal, *Britain, a Destination for Libel Tourism*, *Inth Herald Tribune*, Jan. 20, 2008. This arises not only from plaintiff-friendly standards but also because British courts exert jurisdiction even if there are very tenuous ties between the conflict and the United Kingdom. *Id.* An Icelandic investment bank successfully brought suit against a Danish tabloid for libel in the UK because there was an English translation on a Danish website that gets some minimal traffic in the UK. *Id.* In *Ehrenfeld*, Mahfouz could maintain suit against Ehrenfeld in the UK because twenty-three copies of the book were purchased in the UK via the Internet and one chapter of the book was accessible in the UK on the ABCNews.com website. *Ehrenfeld*, 9 *N.Y.3d* at 504. These contacts that the British court used to assert personal jurisdiction are comparable to or less palpable than the contacts that Mahfouz had with New York State (which included suing a New York resident in British court and publishing the British courts decision on his website that was accessible in New York). The fact that the Court of Appeals held that it did not have personal jurisdiction over Mahfouz shows that the New York standard for personal jurisdiction in libel cases is more limited than the British standard.

A better known example of libel tourism involves film director Roman Polanskis 2005 libel suit victory in British court against American magazine *Vanity Fair* for its description of events that occurred after Polanskis wife died in 1969. Sarah Lyall, *Polanski Wins Vanity Fair Libel Suit*, *N.Y. Times*, July 23, 2005. Although the events described were largely accurate, *Vanity Fair* was ordered to pay \$87,700 in damages and a substantial portion of Polanski's legal costs because some of the dates and chronology were inaccurate. Further, the court reached this result without Polanski ever stepping foot into the UK during the duration of the trial. Why? Because Polanski was a fugitive from justice in the United States and may face arrest and extradition in the UK, the British court permitted his testimony from France via live video link. Polanski had no real contact with the UK and the only real contact that this libel suit had with the UK was the magazines limited circulation there. As a result, Polanski prevailed in a suit about damage to his character from inaccurate dates when he can't be here [in the UK] because he slept with a 13-year-old-girl and has been a fugitive from justice for more than a quarter of a century. *Id.* Apparently, the UK also does not recognize that some people should be libel proof.

Serious journalism may have finally caught a break because of the House of Lordss decision in *Jameel v. Wall Street Journal Europe Sprl* [2006] UKHL 44. In this case, which also involved allegations of Saudi entities financing terrorism, the court gave journalists the right to publish allegations about public figures, so long as the reporting is responsible and in the public interest. See Sarah Lyall, *High Court in Britain Loosens Strict Libel Law*, *NY Times*, Oct. 12, 2006. The court agreed it would be impossible for the newspaper to prove the truth of the allegations because they were based upon secretive surveillance by Saudi authorities. As a result of this decision, journalists have a public interest defense to libel claims and do not always bear the burden of proving accuracy. This moves British libel law closer to American libel law for serious journalism, but the defense will not be available to celebrity magazines, which are often the subject of libel suits for vapid gossip. See Catherine Spratt, *A New Day in the U.K.* Further, *Jameel* will not curtail British courts from asserting jurisdiction over every libel claim that the Worldwide Web can carry.

Media and Legislative Response to *Ehrenfeld*. Numerous American publishers and media companies that supported Ehrenfeld in her lawsuit and provided *amicus curiae* briefs were upset by the result of her case. Jim Milliot, *Appeals Court Rejects Ehrenfelds Bid to Block Libel Tourism*, *PublishersWeekly*, Dec. 20, 2007, available at <http://www.publishersweekly.com/article/CA6514697.html>. Ehrenfeld claimed that the English judgment deterred publishers from accepting her work on financing of terrorism in order to avoid foreign libel suits. *Ehrenfeld*, 9 *N.Y.3d* at 510-11. Ehrenfeld's attorney, Daniel Kornstein, has stated publicly that having the judgment hanging over her head has affected Ehrenfelds research and writing. Joseph Goldstein, *N.Y. Appeals Court Opens Door to 'Libel Tourism'*, *The Sun*, Dec. 21, 2007. Ehrenfeld herself described Mahfouzs award against her as the Damocles sword effect. He's

holding it above my head to intimidate me and others. James Oliphant, *Saudi wields British law against U.S. author: Billionaire leverages harsher libel rules to suppress unflattering book*, Chicago Tribune, Mar. 17, 2008.

The New York State Legislature responded very quickly to the *Ehrenfeld* decision. *Ehrenfeld* was decided on December 20, 2007, and in January 2008, Assemblyman Rory I. Lancman and Senator Dean Skelos introduced the Libel Terrorism Protection Act (the Act) that would effectively overrule *Ehrenfeld*. After some debate in the NY Legislature (and some constitutional concerns which will be discussed below), the Act was signed into law by Governor Paterson on April 30, 2008. The new law amends the CPLR in the following ways:

1. By prohibiting enforcement of overseas libel judgments in New York unless the court determines that the overseas law satisfies speech and press protections guaranteed by the New York and United States Constitutions; and

2. By permitting New York courts to exercise long-arm jurisdiction over persons outside of New York who obtain a judgment in a defamation proceeding outside the United States against a person who is a New York resident, has assets here and/or involving a New York publication.

See bill summary, <http://assembly.state.ny.us/leg/?bn=A9652>.

The Act adds subdivision 2(b)(8) to CPLR 5304, adding no recognition of foreign country judgment if:

the cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless the court before which the matter is brought sitting in this state first determines that the defamation law applied in the foreign courts adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by both the United States and New York Constitutions.

The new law also adds section (d) to CPLR 302 (Personal jurisdiction by acts of non-domiciliaries):

(d) Foreign Defamation Judgment. The Courts of this State shall have personal jurisdiction over any person who obtains a judgment in a defamation proceeding outside the United States against any person who is a resident of New York or is a person or entity amenable to jurisdiction in New York who has assets in New York or may have to take actions in New York to comply with the judgment, for the purposes of rendering declaratory relief with respect to that persons liability for the judgment, and/or for the purpose of determining whether said judgment should be deemed non-recognizable pursuant to section Fifty-Three Hundred Four of this Chapter, to the fullest extent permitted by the United States Constitution, provided:

1. The publication at issue was published in New York, and

2. That resident or person amenable to jurisdiction in New York (i) has assets in New York which might be used to satisfy the foreign defamation judgment, or (ii) may have to take actions in New York to comply with the foreign defamation judgment. The provisions of this subdivision shall apply to persons who obtained judgments in defamation proceeding outside the United States prior to and/or after the effective date of this subdivision.

That the Act overruling the *Ehrenfeld* holding passed so quickly shows the widespread dissatisfaction with the decision. Much of the justification behind the bill was to protect writers who expose terrorist networks and financiers. See http://www.ny.gov/governor/press/press_0501082.html. In other words, much of the enthusiasm for the Act had to do with combating the financing of terrorism. Many American writers and organizations previously have been sued for libel in England without any such connection to exposing terrorism. Fortunately for those like them, despite the intentions and title of the Act, the Act is broad enough to protect all writers, publishers, and media outlets from the enforcement of British defamation or libel suits in New York.

The public response to *Ehrenfeld* and libel tourism doesnt end there. On May 22, 2008, Rep. Cohen (D-TN)

introduced a bill to Congress that would have the same effect as the New York legislation, except it would apply to federal courts across the country. See <http://cohen.house.gov/index.php?option=content&task=view&id=542>. Presumably, this would give every federal court in the country the personal jurisdiction to declare a foreign libel judgment against an American defendant unenforceable (if the speech protection in the foreign country are not as great as those under the First Amendment), and would preclude every federal court from enforcing such a judgment.

The New York law (and pending federal law) relieves writers of the negative effect of *Ehrenfeld*, that is, the unresolved threat of a foreign lawsuit and, because the Act is retroactive, helps Ehrenfeld achieve her established goal when she brought her suit in the Southern District.

As discussed below, it is this authors belief that this Act was both unnecessary and proceeds on questionable constitutional grounds.

Enforcement of Foreign Libel Judgments in New York Courts. Even if the New York legislature had not passed the Libel Terrorism Protection Act, Mahfouz would not be able to collect his British libel award in New York. Generally, the non-enforcement of a foreign judgment requires more than a difference in law, procedure, or policy. Jeremy Maltby, Note, *Juggling Comity and Self-Government: The Enforcement of Foreign Libel Judgments in U.S. Courts*, 94 Colum. L. Rev. at 1990 (1994). By defaulting in a foreign lawsuit, a defendant ensures that the judgment will be entered in against [her], and assumes the risk that an irrevocable mistake of law or fact may underlie that judgment. *Ackermann v. Levine*, 788 F.2d at 842 (2d Cir. 1986). When there is a foreign default judgment, the New York courts accept the finding of the foreign court, but still must consider whether the foreign law applied is repugnant to the public policy of New York. *Sarl Louis Feraud Intl v. Viewfinder, Inc.*, 489 F.3d at 479 (2d Cir. 2007). A judgment is unenforceable as against public policy to the extent that it is repugnant to fundamental notions of what is decent and just in the state where enforcement is sought. *Ackermann v. Levine*, 788 F.2d at 941 (2d Cir. 1986) (internal citation omitted). CPLR 5304(b)(4) reflects this principle.

The non-recognition of a foreign judgment may be considered constitutionally mandatory when the judgment conflicts with the principles of the U.S. Constitution. *WIP Wohnungsbaugesellschaft Prenzlauer Berg mbH v. Sutton*, 2007 N.Y. Misc. LEXIS 6381, at * 6 (N.Y. Sup. Ct. 2007). State and federal courts in New York have been clear that foreign libel awards cannot be enforced in New York unless the foreign courts gave the defendant the same protections guaranteed by the First Amendment. See *Ajitabh Bachchan v. India Abroad Publication, Inc.*, 154 Misc. 2d 228 (N.Y. Sup. Ct. 1992). Foreign lawsuits against the press must meet the safeguards for the press which have been enunciated by the courts of this country. *Id.* at 231. Because British libel law places no burden on the plaintiff to prove the falsity of the statement, enforcement would jeopardize the guarantees of the First Amendment, and the judgment is unenforceable in New York. *Id.* at 234-35. Because British libel laws offer significantly less protection than the protection offered under the First Amendment of the United States Constitution, courts in New York would almost certainly find that the default libel judgment against Ehrenfeld was repugnant to public policy and, therefore, should not be recognized. Admittedly, the *Jameel* decision may ultimately affect the willingness of U.S. courts to enforce British libel judgments.

Additionally, *Ehrenfeld* would be unenforceable because the UKs personal jurisdiction standards vary from those of the U.S. Constitution. CPLR 5304(a)(2) states that a foreign country judgment is not conclusive if: . . . the foreign court did not have personal jurisdiction over the defendant. It is likely that the jurisdictional analysis used by British courts to assert personal jurisdiction over Ehrenfeld would not meet our due process requirements. There is no evidence that Ehrenfeld wrote her book to target Mahfouz. Furthermore, the facts that twenty-three copies of her book were purchased in England over the Internet from a third-party vendor and that one chapter of her book was available on the Internet were probably not enough for an American court to assert jurisdiction because they do not meet the due process requirements of the U.S. Constitution. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119 (E.D. Pa. 1997).

Constitutionality of the Libel Terrorism Protection Act. Despite homage to the bounds of the fullest extent of the U.S. Constitution, the Act confers jurisdiction upon New York Courts in circumstances that exceed the due process limits of the U.S. Constitution. While the bill passed the N.Y. Senate unanimously, the Assembly noted that an advisory committee to the state court administrator opposed the bill because of constitutional concerns. James Oliphant, *Saudi wields British law against U.S. author*.

Unlike New York, the Supreme Court of the United States does not give any special procedural protection to defendants in libel and defamation actions. *See, e.g., Calder v. Jones*, 465 U.S. at 790 (1984). In *Calder*, the Court stated that the potential chill on protected First Amendment activity stemming from libel and defamations is already taken into account in the constitutional limitation on the substantive laws governing such suits. To reintroduce those concerns at the jurisdictional stage would be a form of double counting. *Id.* (internal citations omitted). Therefore, in determining the constitutionality of the Act, the fact that its goal is to protect First Amendment activity cannot be taken into account at all.

In *Calder*, the Supreme Court found jurisdiction over the defendants because their allegedly libelous activity was aimed at the forum state, and they knew that the brunt of that injury would be felt by the plaintiffs in the forum state, even though the conduct (publishing the article) occurred in another state. *Id.* at 789-90. To claim personal jurisdiction under *Calder*, the effects or *actual* injury must occur in the forum state. In the case of foreign libel suits against New Yorkers, the plaintiff is targeting a New Yorker. However, because the Act prohibits the enforcement of foreign libel suits, it *precludes* the bulk of what should constitute the actual (economic) injury. Without injury to New Yorkers (as the law precludes it), how can New York courts assert personal jurisdiction consistent with *Calder*? Therefore, the portion of the Act giving New York Courts personal jurisdiction in cases where New Yorkers are subject to foreign libel judgments lacks an element *Calder* requires under the Due Process Clause. An exception may exist in those cases where the plaintiff can establish injury by an unenforceable foreign award (as *Ehrenfeld* attempted to do).

Additionally, the provisos of the Act seem to provide personal jurisdiction based on the plaintiffs own actions rather than the defendants independent activities, and, thereby, runs afoul of long standing Court of Appeals precedent. *See Haar v. Armendaris Corp.*, 31 N.Y.2d 1040 (1973); *Parker-Bernet Galleries, Inc. v. Franklyn*, 26 NY2d 13 (1970).

Finally, if the Act prohibits the enforcement of certain foreign libel judgments, why does an author need a declaratory judgment as well?

Significance of *Ehrenfeld* in Light of the Libel Terrorism Protection Act. The Libel Terrorism Protection Act overturned the result of *Ehrenfeld*, but left certain statements contained in *Ehrenfeld* intact as dicta. In particular, *Ehrenfeld* helps define the extent of New Yorks long-arm statute under CPLR 302(a)(1). The Act added an exception to the New York long-arm statute for the occurrence of foreign libel judgments only. *Ehrenfeld*s analysis and description of New Yorks long-arm statute remain valid.

The decision affirms that CPLR 302(a)(1) is not co-extensive with constitutional limits. *Ehrenfeld* distinguishes *Yahoo! v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006) (*en banc*), in which the Ninth Circuit asserted personal jurisdiction in a situation with facts very similar to that in *Ehrenfeld*. *Yahoo!* states that the Ninth Circuit interprets the effects test from *Calder v. Jones*, 465 U.S. 783 (1984), to impose three requirements for personal jurisdiction: the defendant allegedly [must] have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state. *Ehrenfeld* states that this test is broader than that in CPLR 302(a)(1) and following the Ninth Circuits test would usurp the legislative function. The fact that New York does not follow the Ninth Circuits effects test is still good law, even with the passage of the Act. Practically speaking, the new CPLR 302(a)(5) effectively adopts the Ninth Circuits holding in *Yahoo!* for

libel actions only.

Ehrenfeld reiterates holdings from a number of earlier cases that the overriding criterion necessary to establish a transaction of business is some act by which the defendant *purposefully avails itself of the privilege of conducting activities within New York*. *Id.* at 508 (emphasis added). Personal jurisdiction is only proper when a defendant purposefully engages in activity in New York, and invokes the benefits and protections of New York law. *Id.* As Mahfouz's only relevant contacts to New York were to further his assertions under the laws of England, the court could not assert jurisdiction. *Id.* at 509. The court said that Mahfouz's prior acts, including his prior ownership of New York real estate and his previous indictment by a New York grand jury, were not relevant because the judgment in question has nothing to do with these acts. *Id.* at n. 6. Therefore, in cases *other than* foreign libel suits, these sorts of contacts with New York are insufficient to confer personal jurisdiction on New York courts.

Beyond *Ehrenfeld*. The *Ehrenfeld* decision is still valid outside of defamation cases. The Libel Terrorism Protection Act effectively overrules only that part of *Ehrenfeld* that denied Ehrenfeld's ability to obtain a declaration of rights, and codifies what was likely preexisting New York law on enforcement of foreign judgments. However, this Act likely unintentionally challenges the long-standing principle under New York law that the plaintiffs' own actions cannot be used as a basis for personal jurisdiction over a defendant. More fundamentally, because the Act immunizes New York authors and others from liability, establishing injury in New York will require carefully crafted case theory. Without that injury, application of the Act to a foreign defendant likely exceeds the Due Process limits of *Calder* and progeny.

As to the problem of libel tourism, American writers, publishers, and media companies are still susceptible to foreign libel suit and there is nothing the Court of Appeals, New York legislature or Congress can do about the law in the United Kingdom and elsewhere. New York has certainly done as much as its territorial limits permit for writers and New York based publishers.

Because so much is accessible to read or purchase over the Internet, British courts can assert jurisdiction over a wide range of writing, including most contemporary published books that can be purchased easily over the Internet and shipped to the UK. Until British laws change, litigants from around the world are going to file libel and defamation suits in the UK against American writers and media organizations. While they may have piece of mind in New York, they still must carefully avoid exposure to the UK forum.

For a detailed analysis of American versus British libel laws and a more extensive discussion of libel tourism, see Heather Maly, Note and Comment, *Publish at your own Risk or Dont Publish at All: Forum Shopping Trends in Libel Litigation Leave the First Amendment Un-Guaranteed*, 14 J.L. & Pol'y 883 (2006); Marin Roger Scordato, *The International Legal Environment for Serious Political Reporting Has Fundamentally Changed: Understanding the Revolutionary New Era of English Defamation Law*, 40 Conn. L. Rev. 165 (2007); Raymond W. Beauchamp, Note, *Englands Chilling Forecast: The Case for Granting Declaratory Relief to Prevent English Defamation Action from Chilling American Speech*, 74 Fordham L. Rev. 3073 (2006).

For a detailed analysis of the enforcement of foreign libel judgments in the United States, see Jeremy Maltby, Note, *Juggling Comity and Self-Government: The Enforcement of Foreign Libel Judgments in U.S. Courts*, 94 Colum. L. Rev. 1978 (1994); Melinda Luthin, *U.S. Enforcement of Foreign Money Judgments and the Need for Reform*, 14 U.C. Davis J. Intl L. & Poly 111 (2007); Eric P. Enson, Comment, *A Roadblock on the Detour Around the First Amendment: Is the Enforcement of English Libel Judgments in the United States Unconstitutional?*, 21 Loy. L.A. Intl & Comp. L. Rev. (1999); 2-27 Weinstein, Korn & Miller *CPLR Manual* § 27.27; 1-3 Weinstein, Korn & Miller *CPLR Manual* § 3.06.

For a general overview of the exercise of long-arm jurisdiction under CPLR 302(a)(1), see 2-3 New York

Civil Practice: CPLR P 302; 1-3 Weinstein, Korn & Miller *CPLR Manual* § 3.05; 1-2 LexisNexis AnswerGuide New York Civil Litigation § 2.03; and 1-2 LexisNexis AnswerGuide New York Civil Litigation § 2.05.

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Susan M. Brazas on Loman v. Freeman, 2008 Ill Lexis 317 (April 17, 2008)

2008 Emerging Issues 2490

Susan M. Brazas on Loman v. Freeman, 2008 Ill Lexis 317 (April 17, 2008), rehearing denied, 2008 Ill Lexis 338 (May 27, 2008).

By Susan M. Brazas

July 7, 2008

SUMMARY: The Race to the Courthouse: But Where? The Illinois Supreme Court considered the question of which forum is appropriate for a veterinary malpractice claim when the defendant is a state university employee.

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ARTICLE: Illinois Supreme Court Examines Court of Claims vs. Circuit Court as Forum for Action Against State University Employees

In *Loman v. Freeman* the Supreme Court of Illinois gave new hope to plaintiffs attorneys trying to avoid confinement to the Court of Claims, thought by many to be a black hole and not plaintiff-friendly. Traditionally, claims against the State of Illinois must be litigated in the Illinois Court of Claims. Among the significant differences that distinguish the Court of Claims is that jury trials are not available there. *Kiersch v. Ogena*, 230 Ill. App. 3d at 63-64 (1992).

In *Loman* the owners of a race horse sued a professor of equine surgery, who was a state university faculty member, for negligence after the allegedly unauthorized surgery he performed on their horse made the horse lame and unable to race. The Supreme Court of Illinois rejected the professors contention that the Court of Claims had exclusive jurisdiction over the claim. The Court held that because the duty of care breached by the professor arose from his status as veterinarian, not from his status as a state employee, and because he was not performing a governmental function when he operated on the horse, the circuit court was the proper venue. Additionally, a decision against the defendant would not control the actions of the state, or subject the state to liability.

In finding that the alleged acts of negligence were independent of the equine professor's role as a state employee and, therefore, subjected him to the jurisdiction of the circuit courts, the majority made a distinction between the duties arising from the professor's state employment and the common law duty of a veterinarian which he was alleged to have breached. Although the actions of state employees within the scope of employment are afforded immunity, actions that do not arise solely from state employment are not. The professor was not performing a uniquely government function.

The second aspect of the court's inquiry, in considering whether the suit's proper venue was the Court of Claims, was whether a judgment against the defendant employee would operate to control the actions of the state or subject it to liability. The *Loman* court concluded that it would not. In the future, this will be an important point for counsel to address. Depending on the factual circumstances, counsel could argue that the imposition of liability would (or would not) have such an impact that state policies and procedure changes would follow, therefore controlling (or not controlling) the actions of the state.

Other Professional Liability Cases. The Illinois courts have, in several decisions, held that the doctrine of sovereign immunity does not shield physicians from liability for their conduct. The source of duty rule was first applied to physicians in the case of *Jenkins v. Lee*, 785 N.E.2d at 921, 337 Ill. App. 3d 403 (1st Dist. 2003). Since then, nearly all of the appellate court cases in which the question of sovereign immunity is raised in this context hold that it does not shield the professional from liability.

Practical Implications for State Employees. State employees who practice in a profession such as law, medicine, or veterinary medicine, should explore whether their state employer provides liability insurance adequate to cover them for a judgment rendered in a circuit court action. Moreover, the question will likely be raised of whether such coverage applies if the basis for jurisdiction in the circuit court is that the actions for which liability was imposed were outside the scope of the employee's duties.

Impact on Pleadings. The *Loman* opinion makes such a fine distinction between scope of employment and scope of duty that plaintiff's attorneys should be cautious to use language to place the action within the latter category in an effort to avoid the Court of Claims. Averments that the veterinarian or other professional was an employee of the state should be avoided. However, if the state (in the form of any of its units, agencies, or entities, such as a state university) is the employer, then the plaintiff must be careful to assert a duty apart from that employment. Otherwise, the court would undoubtedly grant a motion to dismiss or transfer the action to the Court of Claims.

The attorney should discuss with the client whether to proceed in two actions simultaneously: one against the individual (professor, veterinarian, physician, etc.) in the circuit court, and one against the state entity in the Court of Claims. Even though the latter is generally disfavored by plaintiff's attorneys, nonetheless the client should be informed of the right to proceed in that venue.

Of note, too, in the *Loman* opinion is the statement that because the defendant was a professor of equine surgery, he was not required to be a licensed veterinarian. The defendant suggested that it was important that while the surgeries in question were being performed, the defendant professor was teaching and students were present. Defense counsel explained that such allegations had not been pleaded because the motion to dismiss served as his responsive pleading.

One way for a party to include such important facts within the pleadings would be, for example, to raise an affirmative defense, or even an answer, filed simultaneously with a motion to dismiss. In this way the court can consider all such factors when deciding whether indeed the breach occurred solely as a result of the individual's state employment. Counsel should be cautioned, however, to follow the requirements of the Code of Civil Procedure that certain defenses (such as forum non conveniens and lack of jurisdiction) be raised by the time of the first responsive pleading.

Implications for Charging Allegations. The *Loman* court relied heavily on the case of *Currie v. Lao*, 148 Ill. 2d 151 (1992), citing to it almost exclusively in its analysis. In that case, a state police officer collided with another driver. Although the officer had been in pursuit of a suspect at the time, the collision occurred when the officer was traveling the wrong way on a one-way street. The *Currie* court held that the duty breached was the officer's duty as a licensed driver, rather than as a police officer, and thus the officer was not entitled to immunity.

The *Loman* court noted that the strongest parallel to the *Currie* case was that the professor performed a surgery which was not authorized by the horse's owner, and, therefore, was like the *Currie* officer who had driven down a

one-way street the wrong way, then collided with the plaintiff. The *Loman* court explained, when [the professor] performed a procedure that the owners of the animal had forbidden, his conduct was like that of Officer Lao, who was acting outside his authority as a state trooper when he caused an accident.

This language should guide attorneys in the preparation of their pleadings. They should frame the charging allegations (or responses thereto) so as to characterize the conduct as outside (or within) the authority of the state employee's position.

Statute of Limitations Concerns. The fact that sovereign immunity so rarely shields a state's employee from liability should not lull plaintiff's attorneys into a false sense of security as to the statute of limitations. The Local Governmental and Governmental Employees Tort Immunity Act, found at 745 ILCS 10/1-101, contains a one-year statute of limitations for filing an action against a state or local government employee. As was noted by the court in *Wheaton v. Suwana*, 355 Ill. App. 3d 506, 823 N.E.2d 993 (5th Dist. 2005), this one-year period will apply even if the employee is held not to be protected by immunity.

Impact on Liability of Other Professionals. Attorneys should explore whether the principles of the *Loman* case would extend to other professional teaching scenarios, such as legal aid clinics affiliated with state law schools, health clinics at state universities, and even practicums, internships, and externships affiliated with public high schools, or state colleges and universities. Although the *Loman* opinion made no suggestion as to such extension, counsel will be well advised to tailor their pleadings toward or away from, as applicable the source of duty factor. The move from a police officers duty as a licensed driver (in *Currie*) to a professionals duty to comport with the requirements of their professional judgment (in *Jinkins* and beyond) may signal the willingness of courts to widen the scope of civil liability of state employees.

For additional discussion of circuit court jurisdiction and immunity of state employees, see Illinois Civil Procedure § 2.05 Alternatives to Circuit Court Adjudication; Illinois Tort Law § 22.08 Tort Immunities; Illinois Jurisprudence, Personal Injury and Torts Ch. 3, Part I State Government Tort Liability; LexisNexis(R) Forms: FORM 1468-4.28 Caption and Designation of Parties in Complaint at Law Against Government Entity and Officer Sued Individually; LexisNexis(R) Forms: FORM 1468-71.22 Motion to Dismiss for Lack of Personal Jurisdiction-Defendant Immune.

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Rabiej on the Uniform Rules Relating to the Discovery of ESI

2008 Emerging Issues 2450

Rabiej on the Uniform Rules Relating to the Discovery of ESI

By John K. Rabiej

July 2, 2008

SUMMARY: In August 2007, the National Conference of Commissioners on Uniform State laws approved and recommended for adoption by all states the "Uniform Rules Relating to the Discovery of Electronically Stored Information (ESI)." John K. Rabiej, Chief of the Rules Committee Support Office, identifies the differences with the federal rules, including a emphasis in the Uniform Rules on "cost sharing" as a means to facilitate the production of ESI.

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ARTICLE: At its annual conference held on July 27-August 3, 2007, the National Conference of Commissioners on Uniform State Laws approved and recommended for enactment in all states the Uniform Rules Relating to the Discovery of Electronically Stored Information (ESI) (Uniform Rules) (*see* http://www.law.upenn.edu/bll/archives/ulc/udoera/2007_final.htm). The Uniform Rules were approved by the American Bar Association's House of Delegates in February 2008.

The Uniform Rules are based on the electronic-discovery amendments to the Federal Rules of Civil Procedure that took effect on December 1, 2006. They are intended to mirror the spirit and direction of the federal rule amendments and are different only where necessary, to accommodate the varying state procedures.

To a large extent, the Uniform Rules achieve their stated mission and accurately reflect the substance of the electronic-discovery federal rules. But there are some subtle differences between the two, primarily differences in degree, including a greater emphasis in the Uniform Rules on: (1) early direct judicial intervention to address ESI discovery issues; and (2) cost sharing as a means to facilitate the production of ESI. Unlike the federal rules, the Uniform Rules also do not expressly require the parties to meet and confer to resolve ESI issues that arise at various stages of litigation. The difference is an example of the preference of the Uniform Rules for early judicial intervention. The following discussion identifies the differences between the two in the order presented in the Uniform Rules.

Rule 1. Definitions. The definition provision in Rule 1 has no counterpart in the federal rules. None of the definitions of the four terms in Rule 1 (discovery, electronic, electronically stored information, and person) is inconsistent with the federal rules. The Civil Rules Committee considered, but ultimately declined, to define ESI in the

federal rules, though a description of ESI is provided in the Committee Notes. The Committee recognized that technology was rapidly changing how information was transmitted, stored, and retrieved. Exotic technologies based, for example, on biologic principles, were being explored that some day may be used to store ESI. The Committee's goal was to ensure that the federal rules were flexible enough to encompass future changes and developments. It believed that defining ESI might unnecessarily constrain its meaning in the future (*see* Committee Note to Rule 34(a) (2006) (rapidity of technological change, counsel against a limiting or precise definition of ESI)). The drafters of the Uniform Rules were also sensitive to the inherent limitations of a definition, but they determined that direct guidance on basic terms was appropriate. Their definition of ESI is broad and is intended to define ESI to encompass future technological changes and developments, a policy consistent with the position of the federal rules (Note to Uniform Rule 1 (2007)).

Under Rule 1, ESI is defined to mean information that is stored in an electronic medium and is retrievable in perceivable form. The Committee Note to the federal rules describes ESI as information that is fixed in a tangible form and ... information that is stored in a medium from which it can be retrieved and examined (Committee Note to Rule 34(a) (2006)). The definition in Rule 1 focuses on ESI as matter that is retrievable in perceivable form. The federal rules seem to focus more on the definite, fixed nature of ESI. But it is difficult to imagine any real-life scenario in which the different articulations of ESI would make any difference. The meaning of ESI is very broad under both Rule 1 and the federal rules. There is no appreciable difference between the two now, and that status will likely continue for the foreseeable future.

Rule 2. Supplemental Rules of Discovery. There is no counterpart to Rule 2 in the federal rules. Rule 2 serves as a necessary bridge, facilitating incorporation of the Uniform Rules into state procedural rules.

Rule 3. Conference, Plan, and Report to Court. Rule 3 requires parties to meet and confer to discuss ESI and to prepare a plan addressing any ESI discovery issues. It lists topics that parties must discuss at the discovery-planning conference if ESI is likely to be sought. The rule is similar, though not identical, to its counterpart in the federal rules (*see* Fed. R. Civ. P. 26(f); *see also* 7 Moores Federal Practice, Ch. 37A, *Discovery of Electronically Stored Information*, § 37A.20[1]). For example, the provisions of Rule 3 apply to conferences dealing only with ESI discovery issues, while the federal rules apply to conferences dealing with any discovery issue (*see* Fed. R. Civ. P. 26(f)(2)). There are some other noteworthy differences between the two.

Though both Rule 3 and the federal rules recognize that holding a discovery-planning conference may not be appropriate in every case, they adopt different approaches to determine which cases do not require a conference. Under Rule 3, the parties decide which cases a conference should be held. The presumption under the rule is that the parties will hold a discovery-planning conference. It appears, however, that the conference must be held unless the parties unanimously agree not to hold it. On the other hand, the federal rules require the parties to hold a conference in all cases with the exception of nine enumerated categories of cases, including cases initiated *pro se* without the assistance of an attorney (*see* Fed. R. Civ. P. 26(f)(1)). Thus, unlike Rule 3, the parties cannot opt out and decline to hold a conference in a non-exempted case under the federal rules.

Rule 3(a) sets a relatively short deadline to hold the ESI discovery-planning conference, no later than 21 days after each responding party has appeared in the case. The comment to the rule recognizes that parties may be joined after other parties have met and conferred. Parties added later to the litigation are encouraged to adopt the earlier discovery plan or incorporate the plan into their own plans and reports. The federal rules encourage parties to meet as soon as practicable and set an outside deadline that provides slightly more time to schedule and hold the discovery-planning conference. The conference must be held no later than 21 days before a scheduling conference is to be held or a scheduling order is due (earlier of 120 days after any defendant has been served with a complaint or 90 days after any defendant has appeared). The different time deadlines adopted by the Uniform Rules and the federal rules reflect different approaches that are each designed to encourage prompt discovery conferences while providing for parties added later in the litigation.

Among the topics to be considered at the discovery-planning conference, Rule 3(a)(6) requires parties to discuss

whether allocation among the parties of the expense of production [of ESI] is appropriate (Uniform Rule 3(a)(6)). This is the first of three separate references in the Uniform Rules to cost sharing as a means of facilitating discovery and production of ESI. Cost sharing has many champions, who view this option as a fair way to handle particularly close judgment calls in cases when the equity interests between the requesting party and producing party are not at all clear. The federal rules do not prohibit cost sharing; in fact, courts have ordered cost sharing in traditional discovery, and are increasingly ordering it in ESI cases (*see* 7 Moores Federal Practice, Ch. 37A, *Discovery of Electronically Stored Information*, § 37A.36). The prominence of the cost-sharing recommendation in the Uniform Rules as an appropriate means to facilitate discovery lies in contrast to the federal rules, which is deliberately silent and omits a specific reference to cost sharing in the text of the rules, referring explicitly to it only once in the Committee Notes (*see* Committee Note to Rule 26(b)(2) (2006)).

Cost sharing as an option in discovery proved to be a lightning rod for criticism in earlier discovery proposals considered by the Civil Rules Committee. Critics were concerned that courts would view any reference to cost sharing in the federal rules as an expression of official approval. They contended that though cost sharing might make sense when parties were financially evenly matched, it would provide an unfair advantage to parties with financial resources greater than their opponent's. Moreover, the critics were concerned about the potential slippery slope effect. Parties without financial resources might be deterred from filing legitimate claims or prematurely might agree to inadequate settlement offers if compelled to share discovery costs. After careful and long deliberations, the Committee decided not to refer directly to cost sharing in the text of the federal rules. The federal rules expressly mention cost sharing only as a factor to be considered in evaluating whether good cause has been shown to compel a party to produce inaccessible ESI (*see* Committee Note to Rule 26(b)(2) (2006)).

The note to Rule 3 makes clear that parties are not required to hold a face-to-face discovery-planning conference. Video teleconference or conference calls are adequate. The same policy applies in the federal courts, though the federal rules expressly authorize a court to require that the parties hold a face-to-face conference (*Fed. R. Civ. P. 26(f)(2)*).

Rule 4. Order Governing Discovery. Rule 4 encourages a court to issue an order governing ESI, which is similar in nature to a scheduling order or an order following a pretrial conference issued under the federal rules (*see* Fed. R. Civ. 16(b) and (c)). A court, under either the Uniform Rules or the federal rules, with one exception, has discretion to determine the order's contents (*see* Fed. R. Civ. P. 16(b)(3)(A) (scheduling order must limit the time to ... complete discovery)).

Rule 4 enumerates eight specific categories relating to ESI issues and a ninth catch-all category that a court should consider in its order. Each of these categories has a counterpart in the federal rules, with one exception (federal rules do not refer to cost sharing). The federal rule counterparts are set forth as topics that parties must consider during their discovery-planning conference. The parties must state their views on these topics in a discovery plan, which is presented to the court for its consideration when preparing its mandatory scheduling order (*see* Fed. R. Civ. P. 26(f)(3) listing the topics and *Fed. R. Civ. P. 16 (b)(3)* describing contents of the court order; *see also* 7 Moores Federal Practice, Ch. 37A, *Discovery of Electronically Stored Information*, § 37A.24 and § 37A.25).

Rule 4(b)(6) and (7) encourage a court to address in an order the *method* for asserting or preserving claims of privilege or of the protection of the information as trial-preparation material after production for both parties and nonparties. The federal rules provision is more general, authorizing a court to include [in an order] any agreement the parties reach for asserting claims of privilege or of protection as trial-preparation materials after information is produced (*see* Fed. R. Civ. P. 16(b)(3)(B)(iv)). The federal rules do not focus on the *method* for asserting a privilege or protection because a uniform method is prescribed in another part of the rules (*see* Fed. R. Civ. P. 26(b)(5)). Nor do the federal rules focus on such agreements relating to a person not a party to the proceeding, which is explicitly addressed in Rule 4.

Rule 4(b)(8) contains the second reference to cost sharing. The rule encourages a court to address the allocation of the expense of production of both accessible and inaccessible ESI in its order. As discussed above, the federal rules do

not expressly provide for cost sharing and mention it as an option only when evaluating good cause for producing inaccessible ESI. Highlighting this option is not without controversy. Some courts, including *Zubulake*, expressly limit cost sharing to instances in which the source of the ESI is determined to be inaccessible (*see Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 284 (S.D.N.Y. 2003) (It is worth emphasizing again that cost-shifting is potentially appropriate only when *inaccessible* data is sought.)). In these courts, sharing the cost of producing accessible ESI typically would be inappropriate. Recognizing the lack of consensus among the courts, the federal rules left the cost-sharing issue to case law development. Rule 4 takes a more definitive position on the issue, strongly implying that cost sharing is available for the production of both accessible and inaccessible ESI in appropriate cases (*see* 7 Moores Federal Practice, Ch. 37A, *Discovery of Electronically Stored Information*, § 37A.36[3], supporting position that cost sharing may be appropriate when producing accessible ESI under certain circumstances).

Rule 5. Limitation on Sanctions. Rule 5 provides a safe harbor for the destruction of ESI as a result of the good faith operation of an electronic information system. The provision is virtually identical to its federal counterpart (*see* Fed. R. Civ. R. 37(e); *see also* 7 Moores Federal Practice, Ch. 37A, *Discovery of Electronically Stored Information*, § 37A.57). Unlike the Committee Note to Rule 37(e), however, the Note to Rule 5 does not highlight the limitation on the protection provided by the safe harbor. The Committee Note makes clear that the protection, which applies in both the federal rules and the Uniform Rules, governs only sanctions under these rules and does not affect other sources of authority to impose sanctions or rules of professional responsibility (*see* Committee Note to Rule 37(e) (2006)).

Rule 6. Request for Production. Rule 6 sets out procedures governing the form of production of ESI. The text of the rule is similar to its federal rule counterpart (*see* Fed. R. Civ. P. 34(b)(2)(D) and (E); *see also* 7 Moores Federal Practice, Ch. 37A, *Discovery of Electronically Stored Information*, § 37A.42). Neither Rule 6 nor its Note, however, provides specific guidance to a party who is not satisfied with the form of ESI selected by the producing party. In contrast, the Committee Note to federal Rule 34 states that if the requesting party objects to the selected form of ESI identified in the written response to the production request, the parties must meet and confer to resolve the matter before raising the issue with the court (*see* Committee Note to Rule 34(b) (2006)). The meet and confer requirement is viewed as an important tool to limit the number of occasions a federal court must intervene to settle a discovery dispute. The absence of a similar meet-and-confer requirement in Rule 6 may reflect a policy preference in the Uniform Rules for early judicial intervention in discovery.

Rule 7. Form of Production. Rule 7 provides procedures governing the form of production of ESI. The provision is nearly identical to the federal rules counterpart (*see* Fed. R. Civ. P. 34(b)(2); *see also* 7 Moores Federal Practice, Ch. 37A, *Discovery of Electronically Stored Information*, § 37A.43).

In some cases, the volume of relevant ESI may be enormous and a party may store different types of ESI in different mediums. In these cases, it often would not make sense to require the party to produce all the different types of ESI in a single form (*see* Committee Note to Rule 34(b)). Though Rule 7 refers only to a form of production, it clearly permits a party to produce different forms for different types of ESI. The federal Rule 34 refers to form or forms and makes explicit this option.

Rule 8. Limitations on Discovery. Rule 8 provides procedures governing the discovery of inaccessible ESI (*see* 7 Moores Federal Practice, Ch. 37A, *Discovery of Electronically Stored Information*, § 37A.35[1], discussing what constitutes inaccessible ESI). It has a similar counterpart in the federal rules (*see* Fed. R. Civ. P. 26(b)(2)(B)). The Uniform Rule and the federal rules prescribe standards to determine whether and on what conditions a party must produce inaccessible ESI. Both sets of rules require the court to consider the same factors or elements in determining whether to issue an order compelling production of inaccessible ESI. But each set of rules uses different language, adopting different drafting approaches. Though the articulated standards are different, they produce the same results.

Both the Uniform Rules and federal rules use a two-tier structure when evaluating production requests for inaccessible ESI. The first tier in both sets of rules is the same. The producing party must produce relevant, non-privileged ESI, unless it objects, showing that the requested ESI is not reasonably accessible because of undue

burden or expense. The producing party has the burden to demonstrate the undue burden or expense. If the producing party meets this burden, the court may nonetheless order the party to produce the inaccessible ESI under the second-tier.

The difference between Rule 8 and the federal rules lies primarily in the wording of the second tier. A court may order production of inaccessible ESI under federal Rule 26(b)(2)(B) if the requesting party shows *good cause*, considering the limitations of Rule 26(b)(2)(C) (*see* 7 Moores Federal Practice, Ch. 37A, *Discovery of Electronically Stored Information*, § 37A.35[2]). The limitations include two general factors: (1) whether the requested ESI is unreasonably cumulative or duplicative; and (2) whether the party seeking discovery has had ample opportunity to obtain the information; and a balancing test, which weighs the benefits of the requested ESI against the burden and expense in obtaining it, taking into consideration five separate factors. In applying the balancing test, the Committee Note provides an additional seven elements that the court should consider (Committee Note to Rule 26(b)(2) (2006)).

Rule 8 adopts a different drafting approach to the second tier. Unlike the federal rule, Rule 8 does not explicitly require a good cause showing. But the difference is not material because the sole function of the good cause requirement in federal Rule 26 is to serve as a bridge to the limitations referenced in Rule 26(b)(2)(C). The bridge was necessary as a drafting artifice so that all the elements and factors that a court must consider in both approving and limiting a request to produce inaccessible ESI could be included in a single provision.

Rule 8 addressed this drafting task differently and broke down the factors and elements into two separate provisions; the first identifies elements that the court should consider when ruling on a request to produce inaccessible ESI and the follow-up second provision identifies elements that the court should consider when determining whether to limit the discovery. The first provision is contained in Rule 8(c). Under this provision, a court may order discovery after it applies the same balancing test used in the federal rule. In applying the balancing test, the Note to Rule 8 states that the court should consider the same seven elements that are set out in the Committee Note to Rule 26(b)(2). If a court orders discovery of ESI under Rule 8(c), the second provision set out as Rule 8(e) becomes operative. Under Rule (e), the court considers the two general limiting factors used in the federal rule after again applying the same balancing test to determine whether the frequency or extent of discovery should be limited. Though Rule 8 takes a different and more winding road, it arrives at the same destination as federal Rule 26. Rule 8 is wordier. Whether it is clearer than the federal rule is a matter of preference.

For the third time, the Uniform Rules highlight the potential use of cost sharing, expressly providing that a court should consider cost sharing as a condition for discovery of inaccessible ESI (*see* Uniform Rule 8(d)). As earlier discussed, cost sharing is not mentioned in the text of the federal rules and is mentioned only once in the Committee Notes. In addition, neither Rule 8 nor the comment to the rule expressly requires the parties to meet and confer if they fail to agree on whether ESI is inaccessible. The federal rules require the parties to try and resolve this matter before raising it with the court (*see* Committee Note to Rule 26(b)(2) (2006)).

Rule 9. Claim of Privilege or Protection After Production. Rule 9 provides procedures for asserting a claim of privilege or protection for trial preparation materials, which are very similar to the federal rules counterpart (*see* Fed. R. Civ. R. 26(b)(5); *see also* 7 Moores Federal Practice, Ch. 37A, *Discovery of Electronically Stored Information*, § 37A.32[5]). The federal rule requires a party to promptly return, sequester, or destroy the ESI that the other party identifies as subject to a claim of privilege or protection. The provision in Rule 9 seems more urgent, requiring immediate sequestration.

Under the federal rule, a party may sequester, as an alternative to returning or destroying, ESI that is claimed to be privileged or protected in a situation in which the party has incorporated the substance of the privileged information in its own documents. Rule 9 provides that the party must first sequester the ESI in all cases and then return, destroy, or present the information to the court for resolution of the underlying privilege claim. It is unclear why the party is required to sequester the ESI in all situations.

Rule 10. Subpoena for Production. Rule 10 extends the ESI discovery standards and procedures to requests for

production of ESI from nonparties. It provides basically the same standards and procedures as does the federal rule (see Fed. R. Civ. P. 45; see also 7 Moores Federal Practice, Ch. 37A, *Discovery of Electronically Stored Information*, § 37A.27). Rule 10(d) provides that a court order must protect nonparties against subpoenas for ESI that would impose undue burden or expense. The federal rules seem to employ a narrower standard. Under the federal rules, if the nonparty objects to the subpoena, the court may order compliance with the subpoena so long as the order protects the nonparty from *significant expense* resulting from compliance (Fed. R. Civ. P. 45(c)(2)(B)(ii)). But the apparent difference is not material. A court is obligated under federal Rule 45 to protect nonparties from subpoenas that would impose undue burden or expense (Fed. R. Civ. P. 45(c)(1)). Moreover, a court must quash or modify the subpoena on timely motion if it subjects a person to undue burden (Fed. R. Civ. P. 45(3)(A)(iv)).

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Arthur Best on State v. Reynolds, 746 N.W.2d 837 (Iowa 2008)

2008 Emerging Issues 2413

Arthur Best on Business Records and Hearsay Within Hearsay: The Iowa Supreme Court Gets Back to Basics in *State v. Reynolds*, 746 N.W.2d 837 (Iowa 2008)

By Arthur Best

June 30, 2008

SUMMARY: In this criminal case, the Supreme Court of Iowa dealt with some important and basic hearsay issues, involving hearsay within hearsay and the business records exception. On appeal, the court held that the evidence the prosecution used to show that the money orders were counterfeit had been wrongly admitted. Arthur Best, a Professor of Law at the University of Denver Sturm College of Law, comments on *State v. Reynolds*, 746 N.W.2d 837 (Iowa 2008).

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

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Overview. In this criminal case, the Supreme Court of Iowa dealt with some important and basic hearsay issues, involving hearsay within hearsay and the business records exception. The defendant was convicted of theft and forgery in connection with his cashing twelve money orders at an Iowa bank for a total amount of more than \$12,000. On appeal, the court held that the evidence the prosecution used to show that the money orders were counterfeit had been wrongly admitted.

Crucial Evidence and Rationale for Admission. For ten of the money orders, to prove that they were counterfeit the trial court allowed the prosecution to use the business records exception to introduce documents described by an employee of the bank where the defendant cashed them. The documents, for each money order, included an e-mail and an error report allegedly sent by the Federal Reserve to the cashing bank. The e-mails and error reports stated that each of the money orders was counterfeit. The cashing bank's employee testified that she commonly received and dealt with e-mails and error reports of the type introduced, as part of the normal course of work at her bank. For two other money orders, the trial court similarly accepted a business records exception rationale for testimony by an employee of the cashing bank. She described a telephone call she made to an automated phone number operated by the apparent issuer of the money orders, and stated that in response to her providing the money order identification numbers, she heard a computerized recording stating that the money orders had no value.

Significant Rules. The business records exception, under Iowa Rule of Evidence 5.803(6), treats hearsay as

admissible if it satisfies the following definition:

(6) *Records of regularly conducted activity.* A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and the regular practice of that business activity was to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this subrule includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

The *Reynolds* court summarized this definition as requiring the proponent of hearsay evidence to establish:

- 1) That it is a business record;
- 2) That it was made at or near the time of an act;
- 3) That it was made by, or from information transmitted by, a person with knowledge;
- 4) That it was kept in the course of a regularly conducted business activity;
- 5) That it was the regular practice of that business activity to make such a business record.

State v. Reynolds, 746 N.W.2d at 841 (Iowa 2008) (relying on *Beachel v. Long*, 420 N.W.2d at 484 (Iowa Ct.App.1988)).

For evidence that incorporates more than one level of hearsay, Iowa Rule of Evidence 5. 807 provides:

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in this chapter.

Basic Rationale for the Business Records Exception. The rationale for the business records exception has usually been that the records it covers are likely to be accurate because those who make them have a strong incentive to be careful and accurate. They may lose their jobs if they make mistakes, the business may suffer if it relies on internal records that turn out to be flawed, and normal routines within a business are likely to uncover errors in the business's own records. In a straightforward example of a business record, someone employed at a business makes contemporaneous notes about some aspect of the entity's work. If it is the regular practice of the entity to make such notes, then the document would be admissible.

Multiple Declarants and Business Records. Often, more than one declarant is involved in the production of a document that can qualify as a business record. For example, a salesperson might report weekly sales figures to a sales manager, and the sales manager might make a record that incorporates information from that salesperson. The salesperson had knowledge of what he or she recorded, and presumably did that recording in the ordinary course of the business. The sales manager had knowledge of what he or she was recording information from the salesperson and presumably made the summary record in the ordinary course of business.

Third-Party Statements Adopted by a Business. Sometimes a business record may contain information from someone outside the business, a third party. The usual understanding of the business record exception treats the business's recording of the third party's statement as admissible evidence of the fact that the third party said something. It does not serve to remove the hearsay taint from the third party's statement, if there is a need to have the third party's statement admitted for the truth of what it asserts. This makes sense, because the third party does not have incentives for accuracy; the third party can't be fired and the third party doesn't care about the ongoing success of the business that recorded his or her statement.

If a business record contains a third party's statement and the third party's statement itself is covered by a hearsay exception, then the business record is admissible proof that the third party said something, and whatever additional exception covers the third party's statement enables a court to properly admit the business record as proof of the underlying fact reported by the third party.

The Iowa Supreme Courts Decision. The Iowa Supreme Court held that the federal reserve e-mails and error reports and the telephone computerized statements were all wrongly admitted. It cited its decision in *Polson v. Meredith Publ'g Co.*, 213 N.W.2d at 525 (Iowa 1973), where the court held that admitting third-party hearsay statements contained in a business record without a separate hearsay exception for the third-party hearsay would constitute a complete departure from the most elementary rules of evidence rather than obedience to the statutory admonition that such rules should be liberally applied.

Since there was no foundation evidence about how the e-mails or error reports were created, there was no allowable basis for treating them as reliable. There was no attempt made to establish that they were within the coverage of any hearsay exception except the business record exception. With regard to that exception, the fact that the cashing bank saved them and relied on them does not make them qualified for admission as business records. Similarly, there was no foundation evidence about the process by which the computerized telephonic statement was made, and this prohibited their introduction for the truth of what they asserted, even though the cashing bank relied on them.

Lessons for Practice. The key to handling hearsay problems is to be very careful in identifying declarants and statements. The prosecution in this case treated the error reports as business records of the cashing bank, essentially overlooking the fact that the declarants for those reports were employees of another entity, the Federal Reserve. In the Supreme Courts analysis, there were multiple declarants employees of the Federal Reserve and any workers at the cashing bank who might have incorporated those records into the banks files or data systems. For the telephonic data also relied on by the prosecution, although the prosecution sought to use a business records theory for their admission, the Supreme Court properly noted that there was only one declarant, the money order company, and that the cashing bank actually did no record-keeping about that telephonic data.

See 1-16 Weinstein's Evidence Manual § 16.07 for a full discussion of the rationale for the business records exception and an analysis of proper treatment of statements by volunteers contained in business records, in the context of the Federal Rules of Evidence.

See 1-9 California Evidentiary Foundations D and 1-10 New York Evidentiary Foundations § D, for analysis of the business records exception in the context of California and New York law that is instructive for those states in particular and has general application for other states as well.

Rival Analysis. There are some federal precedents that contradict the Iowa Supreme Courts analysis. Applying the Federal Rules of Evidence, for example, in *Air Land Forwarders, Inc. v. United States*, 172 F.3d 1338 (Fed. Cir. 1999), the court held that if a business usually relies on third-party statements and if those statements have some indicial of reliability, the business records exception should cover them. This position is opposite to the Iowa courts rationale, and seems to give little weight to the underlying rationale for the business record exception. Nonetheless, the opinion and some other precedents cited in it could support argument by counsel in future Iowa cases or in cases in other jurisdictions that a more pro-admissibility interpretation of the business records exception is proper.

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McCullagh on Washington E-Discovery

2008 Emerging Issues 2416

James R. McCullagh on Washington State Law and E-Discovery Requirements

By James R. McCullagh

June 25, 2008

SUMMARY: Washington currently has no e-discovery rules or statutes, but a State Bar committee is considering e-discovery amendments to the Civil Rules. This commentary reviews reported Washington cases on the subject of e-discovery, summarizes the status of proposed Washington rules, then addresses fundamental e-discovery issues to consider when litigating in Washington courts.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

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Introduction. The explosion of electronically stored information ("ESI") is well documented and continues to accelerate. Recent estimates indicate that 97 billion emails are sent each day worldwide and that 92 percent of all new data is created and stored electronically. While e-discovery has become a regular and required component of federal litigation since the 2006 amendments to the Federal Rules of Civil Procedure, which included e-discovery amendments to federal rules 16, 26, 33, 34, 37, and 45, states have been less uniform in their approach to e-discovery issues. Some states such as Idaho, New Hampshire, New Jersey and Minnesota enacted amendments based on the Federal Rules. Other states, such as Texas, Mississippi and New York had ESI rules in place before the Federal Rules. However, the majority of states, including Washington, have not yet addressed ESI.

In addition to the lack of state statutes or rules addressing e-discovery obligations in Washington, there is very little Washington case law addressing this topic. The Washington State Bar Association Court Rules and Procedures Committee is currently considering whether to propose amending the Washington Civil Rules to address e-discovery issues. However, the exact contours of the state e-discovery rules, or even if such rules will be proposed, has not yet been decided. Furthermore, it will take many months for any recommendation that may eventually find its way out of committee to work its way through the approval process. As a result this commentary primarily relies upon secondary sources to suggest one possible approach to addressing e-discovery issues in Washington state litigation.

This commentary first reviews the few reported Washington cases that even arguably touch on the subject of e-discovery. It then summarizes the status of proposed Washington state rules before addressing fundamental e-discovery issues that should be considered when litigating in Washington courts.

Washington E-Discovery Case Law

Electronic files are generally discoverable, but absent a court order, backup files (or other inaccessible information) do not need to be searched or produced by the responding party. In *Bedford, LLC v. Safeco Ins. Co. of America* [140 Wn. App. 1033 (9/24/2007, unreported)], plaintiff was granted permission to examine defendant's consultant's computer system after learning of the presence of a draft report that had not been produced by defendant. Plaintiff eventually located the draft report on a backup file on the penultimate day of trial and moved for discovery violation sanctions on the grounds that the defendant's failure to produce the report prejudiced plaintiff's case. The Court of Appeals noted that "electronic files and experts' draft reports are generally discoverable, but the failure to produce a responsive document is not necessarily a violation of discovery rules. The court expressly noted that there was no requirement that a testifying expert witness retain all electronic drafts, including "those that were overridden or subsumed during the drafting process." The court did not expressly refer to the Federal Rules, but its analysis is consistent with *Federal Rules of Civil Procedure* 26(b)(2)(B), which does not require a party to provide ESI "from sources that the party identifies as not reasonably accessible because of undue burden or cost" [*Fed. R. Civ. Proc.* 26(b)(2)(B)]. Thus, this unpublished case, while having no precedential value, may be indicative of Washington courts willingness to look to the federal rules for guidance in matters related to e-discovery.

ESI produced in anticipation of litigation is subject to disclosure pursuant to same considerations as traditional work product. Even though *Demelash v. Ross Stores, Inc.* [105 Wn. App. 508, 20 P.3d 447 (2001)] was decided well before the issue of ESI took center stage on discovery issues, it remains instructive as a reminder that Washington courts will evaluate ESI as they would any other item of potentially relevant information. In *Demelash*, defendant delayed its response to plaintiff's discovery requests for some 14 months and then stated that the requested records had been destroyed in a recent flood [*Demelash* 105 Wn. App. at 518]. Defendant withheld certain computer records on the grounds that they were protected under the attorney work product doctrine, but did produce a computer-generated summary of the records. On appeal, the court applied a standard work product analysis to the withheld computer records and found that plaintiff had demonstrated the required substantial need for the information sought. It then found that the computer summary produced by defendant was "useless" and remanded with instructions that the trial court order defendant to produce the alleged work product [*Demelash*, 105 Wn. App. at 520].

Proposed E-Discovery Amendments to Washington Civil Rules

As of June 2008, the Court Rules and Procedures Committee of the Washington State Bar Association has tabled consideration of e-discovery amendments to the Civil Rules until the ESI subcommittee has given additional consideration to recently submitted comments. Current information regarding the Committee and the ESI subcommittee's work can be found at: <http://www.wsba.org/lawyers/groups/courtrules/default1.htm>.

The ESI subcommittee is currently considering amendments that generally track federal ESI rules. In addition, there is also a proposal that the comments to the Federal Rules be adopted by Washington. Conforming Washington ESI rules to the Federal Rules and incorporating the advisory notes is attractive to some for the consistency that it would bring between e-discovery practice in state and federal courts. In addition, adopting amendments that track the federal language should allow Washington courts and practitioners to be guided by the growing body of federal law addressing ESI issues.

However, some entities, such as the Washington State Association of Prosecuting Attorneys and the Washington State Association of Municipal Attorneys, are not in favor of adding ESI provisions at this time. These groups and others believe that ESI amendments are premature for a variety of reasons including: (1) the state of advancing

technology and the rapidly evolving body of federal case law; (2) state courts are not in the same position as federal courts because they address inherently different questions (more unsophisticated litigants and a wider variety of problems); and (3) state courts have not experienced problems with electronic discovery similar to the that which was the impetus for the federal ESI amendments. There is also concern with the often substantial costs associated with ESI. Some groups are concerned that especially when the discovery burden is asymmetric, the costs of collecting, reviewing, and producing ESI can alter the litigation playing field, and have suggested that Washington adopt mandatory cost shifting when the requesting party demands ESI that is not reasonably accessible. Other groups are concerned that cost shifting will add further hurdles for litigants with limited resources. The cost-shifting issue has received much attention and appears to be one of the major issues that the rules committee will need to address, if it proceeds with proposing ESI amendments to the civil rules.

E-Discovery Practice Pointers

As noted, there are no Washington Rules that directly address ESI. However, both case law and the Civil Rules leave no doubt that ESI is clearly within the scope of permissible discovery. Washington permits broad discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of a party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody condition and location of any books, documents, or other tangible things" [CR 26(b)]. "Documents" are further defined by CR 34 to include writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained.

Since the scope of discovery in state courts is similar to that permitted in federal courts, it is likely that Washington courts will consider federal law when grappling with e-discovery issues. In addition to the guidance provided by federal rules and case law, state courts may also refer to the "Guidelines for State Trial Courts Regarding Discovery of Electronically Stored Information" ("Guidelines") when addressing ESI issues. The Guidelines were developed by the Conference of Chief Justices Working Group on Electronic Discovery in August 2006. (available at <http://www.ncsconline.org/images/EDiscCCJGuidelinesFinal.pdf>). A review draft of the Guidelines was sent to each state's chief justice and a wide array of lawyer organizations and e-discovery experts in late 2005. Comments related to the draft were reviewed by a working group of the Conference of Chief Justices and incorporated into the final Guidelines.

The Guidelines note that [Guidelines at vii]:

Uncertainty about how to address the differences between electronic and traditional discovery under current discovery rules and standards exacerbates the problems [associated with e-discovery]. Case law is emerging, but it is not consistent and discovery disputes are rarely the subject of appellate review.

The Guidelines are "intended to help reduce this uncertainty in state court litigation by assisting trial judges faced by a dispute over e-discovery in identifying the issues and determining the decision-making factors to be applied" [Guidelines at vii]. The Guidelines were not intended to be treated as model rules, but rather were crafted to offer guidance to judges faced with addressing the practical problems created by ESI. As such, counsel should at least consider whether following and citing the Guidelines would be advantageous in state court litigation.

After briefly defining ESI as "any information created, stored, or best utilized with computer technology of any type," the Guidelines state that it is the responsibility of counsel to be informed about the client's ESI [Guidelines at 1]. They also recognize that judges "should, when appropriate, encourage counsel to become familiar with the operation of the party's relevant information management systems" and that "If a party intends to seek the production of [ESI] in a specific case, that fact should be communicated to opposing counsel as soon as possible and the categories or types of

information to be sought should be clearly identified" [Guidelines at 1]. There can be no mistake that state court chief justices recognized that ESI-related issues will arise in state courts, and believe that a common set of guidelines would be helpful.

The Guidelines recommend that the parties meet and confer and voluntarily agree on the scope of ESI to be produced as well as the manner and timing of its production. Where the parties are unable to agree, the Guidelines suggest that judges consider the following items when crafting a discovery order [Guidelines at 2B3]:

1. A list of persons most knowledgeable about the relevant computer systems or networks, the storage and retrieval of ESI, and the backup, archiving, retention, and routine destruction of ESI;
2. A list of most likely custodians or relevant ESI, including non-parties;
3. A list of all the electronic systems that may contain relevant ESI and general description of each system;
4. An indication of whether relevant ESI may be of limited accessibility or duration of existence, and an explanation for the limitation;
5. A list of all ESI that has been stored off-site or off-system;
6. A description of efforts to preserve relevant ESI, including the suspension of regular document destruction, removal and storage of computer media with relevant information, or the making of forensic image back-ups;
7. The form of production preferred by the party; and
8. Notice of any known problems reasonably anticipated to arise in connection with compliance with requests for ESI.

Prior to conferring with opposing counsel regarding the scope and details of e-discovery, it may be prudent to consider those items that may be evaluated by a court in the event that agreement cannot be reached. To that end, the Guidelines suggest specific factors that a judge may consider in weighing the benefits to the requesting party against the burden and expense of the discovery to the responding party [Guidelines at 5]:

1. The ease of accessing the requested information;
2. The total cost of production compared to the amount in controversy;
3. The materiality of the information to the requesting party;
4. The availability of the information from other sources;
5. The complexity of the case and the importance of the issues addressed;
6. The need to protect privileged, proprietary, or confidential information, including trade secrets;
7. Whether the information or software needed to access the requested information is proprietary or constitutes confidential business information;
8. The breadth of the request, including whether a subset or representative sample of the contested ESI can be provided initially to determine whether production of additional such information is warranted;
9. The relative ability of each party to control costs and its incentive to do so;
10. The resources of each party compared to the total cost of production;

11. Whether the requesting party has offered to pay some or all of the costs of identifying, reviewing, and producing the information;

12. Whether the ESI is stored in a way that makes it more costly or burdensome to access than is reasonably warranted by legitimate personal, business, or other non-litigation-related reasons; and

13. Whether the responding party has deleted, discarded, or erased ESI after litigation was commenced or after the responding party was aware that litigation was probable.

The Guidelines also contain separate discussions related to cost-shifting and suggests that cost-shifting is only appropriate where the ESI sought is not accessible and when restoration and production of a small sample of the requested information is not sufficient. In an effort to assist courts with resolving issues of cost, the Guidelines adopt the analysis set out in *Zubulake v. UBS Warburg LLC* [216 F.R.D. 280 (S.D.N.Y. 2003) ("Zubulake III")] and identify (1) the extent to which the request is specifically tailored to discovery relevant information; (2) the availability of the requested information from other sources; (3) the total cost of production versus the amount in controversy; (4) the total cost of production compared to the resources available to each party; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues at stake in the litigation; and (7) the relative benefits of obtaining the information, as factors to consider when determining how the burdens of e-discovery should be apportioned among the parties [Guidelines at 7].

The Guidelines also comment on the issues of inadvertent disclosure of privileged information by encouraging the parties to agree to procedures to be used for clawing back inadvertently disclosed privileged information as a way to permit litigation to move forward without undue delay or expense on the producing party. The Guidelines further recommend that courts consider supporting parties' claw-back agreements by issuing orders that recognizes the agreements and declare that inadvertent production of privileged information will not create an express or implied waiver of privilege [Guidelines at 8B9].

The message that resonates throughout the Guidelines is that courts should encourage parties to addresses ESI issues early and that discovery disputes involving ESI should be handled with an eye for a practical and balanced resolution. While the Guidelines are not binding on Washington courts, they may be a useful tool to address ESI-related issues.

Regardless of what, if any, weight a Washington court will place on the Guidelines, practitioners should take steps to ensure that they are in the best position possible to fully and accurately consider the potential costs and benefits of ESI, that they have taken steps to minimize the potential need to access information stored on back-up media, and that they have counseled their clients on the importance of addressing ESI in addition to traditional paper discovery. To that end, every litigator should consider the following five subjects at the onset of every representation.

1. Document hold notices. As soon as litigation is reasonably anticipated, a client should evaluate the need to send document hold notices to persons that may have relevant information and instruct them to retain and not destroy any potentially relevant information. A client's IT department should also be notified of the document hold and steps should be taken to prevent the deletion of potentially relevant information in order to minimize the chance of motion practice related to document preservation issues.

2. Understand scope of ESI before initiating discovery. If you are considering seeking ESI from the other side, carefully consider both the cost of receiving and reviewing the discovery requested as well as the burden that will be placed on your client in responding to a reciprocal request.

3. Preservation letters/orders. Once the decision is made to seek ESI in the course of discovery, consider sending a letter notifying the opposing party that ESI will be sought and instructing them to preserve and not destroy potentially responsive information. This letter should identify the potentially relevant issues with as much specificity as possible in order to minimize the burden on the opposing side and ensure that the most important sources of ESI are retained. If

necessary, consider whether a preservation order from the court is warranted. In such a case, a court is likely to weigh the following factors: (1) the likelihood that the requested ESI will not be preserved absent an order; (2) the importance of the information and the level of harm likely to be suffered absent a preservation order; (3) the capability of the responding party to maintain the information sought in its original form, condition, and content; and (4) the physical, technological, and financial burdens created by ordering preservation of the information.

4. Address ESI issues with opposing counsel early and thoroughly. Among the topics that should be discussed are: (1) the potential sources of ESI; (2) the format for production; (3) a production schedule; (4) whether there are sources of ESI with limited accessibility or availability; and (5) issues related to privilege. Determining how to resolve these issues will depend on the specific facts and parties involved in the dispute. There is no one-size-fits-all answer to ESI issues.

5. If agreement on the scope of ESI related discovery cannot be reached, motion practice will be necessary. When taking ESI-related discovery issues to the court, be prepared to both educate the court and support your position as one of reason. Consider addressing the following topics: (1) the ease (or difficulty) of accessing the requested information; (2) the total cost of production compared to the amount in controversy; (3) the complexity of the case; (4) the likely materiality of the information to the requesting party; (5) the availability of the information from other sources; (6) possible ways to limit the burden on of ESI production, including limiting the search by date, custodian, or keyword searching prior to production; (7) the relative ability of each party to control costs; (8) the burden of the requested discovery on the responding party and that party's ability to absorb the burden; and (9) issues related to shifting the costs of discovery.

Summary. E-discovery is a rapidly developing area of law. There is little formal guidance on requirements and limitations in discovery of ESI in Washington state litigation. The lack of guidance results in both uncertainty and the potential for the unwary to suffer unintended consequences from inadequate preparation. However, the growing body of federal law as well as guidance provided by the Conference of Chief Justices provides signposts by which Washington courts are likely to evaluate disputes related to ESI. The prudent practitioner will recognize the growing import of ESI to almost every type of litigation and will address ESI issues very early in litigation.

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Arthur Best on Pineda v. Ford Motor Co., 520 F.3d 237 (3d Cir. 2008)

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Arthur Best on Pineda v. Ford Motor Co., 520 F.3d 237 (3d Cir. 2008)

By Arthur Best

June 25, 2008

SUMMARY: Does the rule against introduction of evidence of subsequent remedial measures to prove liability for defective warnings preclude an experts reliance on a car manufacturers Safety Recall Instruction? Arthur Best, a Professor of Law at the University of Denver Sturm College of Law, comments on the practical implications of *Pineda v. Ford Motor Co., 520 F.3d 237 (3d Cir. 2008)*.

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ARTICLE: Overview

Does the rule against introduction of evidence of subsequent remedial measures to prove liability for defective warnings preclude an experts reliance on a car manufacturers Safety Recall Instruction? In *Pineda v. Ford Motor Co., 520 F.3d 237 (3d Cir. 2008)*, the plaintiff was injured when glass in a vehicle tailgate he was repairing shattered and cut him. He sought damages from the manufacturer in a failure to warn products liability case. The District Court granted summary judgment to the defendant. It found that the plaintiffs expert was not qualified to give testimony about warnings because his background and expertise in product design, glass and ceramics did not related to warnings. Also, it held that the expert could not rely in any way on the manufacturers safety recall instructions that were issued after the plaintiffs injury. The Third Circuit rejected each of these District Court conclusions.

Summary of the case

The plaintiff was injured he was replacing the rear liftgate glass of a 2002 Ford Explorer and the glass shattered. He brought a products liability action against the defendant, raising numerous claims. As the case progressed, the plaintiff dropped all claims except one for failure to warn.

The plaintiff sought to introduce testimony from an expert. This expert received a Bachelor of Science and a Master of Science in Metallurgical Engineering and Material Science, and had spent considerable time studying fracture mechanics and modeling materials such as glass. Upon graduation, he worked at Westinghouse Electric in its materials engineering lab and then Phoenix Steel Corporation as the manager of quality control. He eventually joined a consulting company, and has consulted in over two hundred cases involving the failure of glass or other ceramics. At a *Daubert* hearing, he testified that although he had experience in materials analysis and systems failure analysis, he was a warning

expert only in the sense that warnings and instructions are solutions to an engineering problem and are part of a hierarchy of approaches designers can use to create products that will be properly safe.

The proposed expert testified at the hearing that he had reached a conclusion that the vehicle was excessively dangerous because the defendant had failed to provide warnings and instructions related to the danger of glass fracturing when the vehicle's liftgate was replaced. He based that conclusion on a 2004 Safety Recall Instruction ("SRI") that described the procedure for replacing the liftgate brackets and hinges on the 2002 Ford Explorer. This SRI, unlike a 2002 service manual used by the plaintiff, provided adequate warnings and detailed instructions for replacing the liftgate brackets and hinges.

The trial court held that the expert was not properly qualified to give testimony about warnings. It also held that the proposed opinion testimony was not reliable, because it was based only on generalized experience. The trial court criticized the proposed testimony because it did not include any proposed alternative language for a warning, did not test the effectiveness of a possible alternative warning, and did not compare the language of the 2002 service manual with the language provided by other automobile manufacturers. The trial court also ruled that the expert could not use the defendant's 2004 SRI as a basis for his testimony.

These rulings rejecting testimony by the plaintiff's expert were the basis for grant of summary judgment to the defendant.

Pertinent Legal Principles

***Daubert* requirements.** Admission of expert testimony usually requires a *Daubert* pretrial hearing in which a court determines whether a proffered expert witness's testimony is relevant and reliable, as required by *Federal Rule of Evidence 702* and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

Federal Rule of Evidence 702. This Rule provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Federal Rule of Evidence 407. This rule provides:

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

For analysis of Rule 407, see 1-407 Federal Evidence § 407.3, and 1-7 Weinsteins Evidence Manual § 7.04.

Federal Rule of Evidence 703. This Rule provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury

by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

For analysis of Rule 703 see 1-703 Federal Evidence § 703.5, and 1-13 Weinstens Evidence Manual § 13.03.

The Third Circuits Decision

Qualification of the proposed expert. The Third Circuit reasoned that the District Court applied qualification requirements too narrowly. The fact that the expert did not have significant background in the details of product warnings was not crucial, since the defendant in this case had provided no warnings or instructions at all. The Third Circuit relied in part on its decision in *Holbrook v. Lykes Bros. S.S. Co.*, 80 F.3d at 782 (3d Cir. 1996) ("[I]t is an abuse of discretion to exclude testimony simply because the trial court does not deem the proposed expert to be the best qualified or because the proposed expert does not have the specialization that the court considers most). This pro-admissibility approach is consistent with *Knight v. Otis Elevator Co.*, 596 F.2d at 87-88 (3d Cir. 1979), in which the court held that an expert could testify that unguarded elevator buttons constituted a design defect despite expert's lack of specific background in design and manufacture of elevators.

Having established that the trial courts requirement of specific warning experience was improper, the Third Circuit readily characterized the experts background and training as adequate to qualify him to testify in a case involving the safety of glass in a products design. Because he would not opine on how the warning should have been worded or presented, but would testify only that neglecting to follow the steps of an instruction when replacing the 2002 Explorer's liftgate brackets and hinges might result in failure of the liftgate glass, and that therefore a warning was necessary, the Third Circuit held that he was substantively qualified to testify. It held that a proper warning is a solution to an engineering problem and that therefore general engineering expertise is adequate to support such testimony.

Subsequent Remedial Measure Evidence. At the *Daubert* hearing, the expert testified that his conclusion that the lack of instructions rendered the product improperly dangerous was based on comparing the 2002 service manual with the SRI issued by the defendant about two years later. The District Court ruled that *Federal Rule of Evidence 407* precluded such a comparison and that without that basis for comparison, the experts testimony lacked an adequate basis.

The Third Circuit acknowledged that Rule 407 precludes admission of the subsequently issued SRI to establish liability. However, it noted that Rule 703 only requires that the data used by an expert in developing an opinion be "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." The Rules provision that data need not be admissible in order to be a basis for expert opinion made it legitimate for the experts opinion to be based on the subsequent recall notice. The court stated that it is reasonable for an engineer to rely upon a warning and alternative safety instruction subsequently issued by a manufacturer in forming an opinion that an earlier service manual fails to provide adequate instructions and warnings to automobile technicians. Thus, despite Rule 407's general exclusion of subsequent remedial measure evidence, we hold that Rule 703 permits [the expert] to base his opinion on a consideration of the SRI. *Pineda v. Ford Motor Co.*, 520 F.3d at 247 (3d Cir. 2008).

The Third Circuit noted additionally that Rule 703 permits otherwise inadmissible evidence to be disclosed to the jury if the trial court determines that the probative value in assisting the jury substantially outweighs the prejudicial effect. Without deciding the issue of whether the SRI should be admitted into evidence, the Third Circuit referred with approval to Rules of Evidence Advisory Committee notes providing that if otherwise inadmissible information is admitted, then the trial judge must give a limiting instruction if one is requested, stating that the underlying information must not be used for substantive purposes. This limitation on introduction of the recall notice would apply only to the plaintiffs case. If the defendant were to cross-examine the expert on the bases of his opinion, which would include the SRI, the SRI would then become part of the record for the jury to consider.

Comments. Rule 407s limitations on the use of subsequent remedial measures has been controversial. Some courts

have suggested that where a manufacturer is required to take such actions, as in the case of automobile recalls, the rule should be withdrawn because its public policy justification encouraging corrective actions has no application when a manufacturer is compelled to act. See, e.g., *See O'Dell v. Hercules, Inc.*, 904 F.2d 1194, 1204 (8th Cir. 1990); *Nexen Petroleum U.S.A., Inc. v. Sea Mar Div. of Pool Well Servs. Co.*, No. 06-3043, 2007 U.S. Dist. LEXIS 71675, at *5 (E.D. La. Sept. 26, 2007) (citing *Rozier v. Ford Motor Co.*, 573 F.2d at 1343 (5th Cir. 1978)). This opinion creates a new and potentially powerful avenue for the use of subsequent remedial measures, despite the Rule 407 prohibitions. An expert may rely on such a measure in developing his or her opinion. Then, on cross-examination the expert will be permitted to describe that remedial measure to the jury. While this seems contrary to the purpose of Rule 407, the provisions of Rule 703 permitting inadmissible evidence as a basis for expert opinion provide strong support for the Third Circuits conclusion.

With regard to the Third Circuits treatment of evidence from experts whose knowledge is general, it should be noted that the plaintiffs use of a general engineering expert with no significant experience regarding warnings was facilitated by the fact that the defendant had provided no warnings or instructions related to the problem cited by the plaintiff. Had there been *some* warnings provided, the issue in the case would have been the particular value of those warnings and it is likely that an expert with greater experience connected to warnings would have been required.

ABOUT THE AUTHOR(S):

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Connolly on Virginia v. Moore

2008 Emerging Issues 2406

Sean F. Connolly on Analyzing State Arrest Statutes Under Virginia v. Moore

By Sean F. Connolly

June 23, 2008

SUMMARY: Until recently, plaintiff's lawyers and criminal defense practitioners had been crying foul for arrests made by police officers that, while permissible under the United States Constitution, violated specific state-law arrest statutes. The United States Supreme Court has now put to rest the argument that a violation of state law may form the basis for a federal Constitutional violation. This Expert Commentary analyzes this Supreme Court ruling.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Introduction. Until recently, plaintiff's lawyers and criminal defense practitioners had been crying foul for arrests made by police officers that, while permissible under the United States Constitution, violated specific state-law arrest statutes. The issue fueled arguments by the plaintiff's bar and criminal defense bar that these arrests violated the Fourth Amendment. The United States Supreme Court has now put to rest the argument that a violation of state law may form the basis for a federal Constitutional violation [*Virginia v. Moore*, 533 U.S. , 128 S. Ct. 1598, 177 L. Ed. 2d 559 (2008)]. The Supreme Court ruling will affect civil and criminal practitioners in California by limiting a police officer or other state actor's liability in civil lawsuits, and limiting a criminal defendant's ability to argue for suppression of evidence based on purported violations of specific state statutes.

Relevant Facts of Virginia v. Moore. The lawsuit in *Virginia v. Moore* [533 U.S. , 128 S. Ct. 1598, 177 L. Ed. 2d 559 (2008)] arose out of the arrest of David Lee Moore by police officers in Portsmouth, Virginia, after he was stopped and arrested for driving on a suspended driver license, a misdemeanor. The police subsequently searched Moore and found that he was in possession of 16 grams of cocaine and a large amount of cash. Moore was charged with possession of cocaine with intent to distribute and then tried, convicted, and sentenced to prison. Moore appealed, arguing that because Virginia had a "cite and release" law, which characterized some offenses such as driving on a suspended driver license as a non-arrestable offense, the Portsmouth police should have cited and released him from custody without having conducted a search of him incident to arrest [*Moore*, 128 S. Ct. at 1601-1602].

That is to say, under Virginia state law, the police officer had no business conducting a full custodial arrest of Moore for a minor non-arrestable offense, or searching him incident to that arrest. Virginia state law required the police to release him, as long as he promised to sign the citation and discontinue his offense. The case bounced back and forth through the Virginia state court appellate system before landing in the Virginia Supreme Court, where Moore's conviction was reversed [*Moore v. Commonwealth*, 272 Va. 717, 725, 636 S.E. 2d 395 (2006)]. The Virginia Supreme

Court reasoned that because Moore should have been cited and released, and because the Fourth Amendment does not allow search incident to citation, the arrest violated the Fourth Amendment and thus the exclusionary rule required that the fruits of search incident to arrest (the cocaine and cash) be suppressed [*Moore*, 272 Va. at 725]. The United States Supreme Court granted certiorari [128 S. Ct. 28 (2007)].

Supreme Court Holding in *Virginia v. Moore*. In *Moore*, the United States Supreme Court held that "warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution, and that while States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment's protections" [*Moore*, 128 S. Ct. at 1607]. In reaching this conclusion, the Court examined the historical context of the Fourth Amendment, as well as traditional standards of reasonableness, before finding that although the states are free to afford greater protections to their citizens, "the Constitution's protections concerning search and seizure remain the same" [*Moore*, 128 S. Ct. at 1605]. The Court was careful to point out that Moore's preferred remedy for the state-law violation was to exclude the evidence, a remedy traditionally reserved for violations of the Fourth Amendment. The *Moore* Court flatly rejected the argument that violations of state law alone can constitute a Fourth Amendment violation. The Court, wanting to maintain a bright-line standard when assessing Fourth Amendment issues, pointed out that the danger in "linking Fourth Amendment protections to state law would cause them to vary from place to place and from time to time" [*Moore*, 128 S. Ct. at 1607].

The significance of *Moore* is better understood in the context of *Atwater v. City of Lago Vista* [532 U.S. 318, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001)], which essentially revived the issue that *Moore* resolved. *Atwater* involved a civil rights lawsuit for false arrest after a Lago Vista, Texas, police officer conducted a full custodial arrest of a mother driving with her children in violation of state seatbelt laws and other related offenses. The seatbelt violations were punishable only by fine, and Texas law allowed for citation at the officer's discretion. The issue in *Atwater* was whether police officers violated the Fourth Amendment when they conducted a full custodial arrest of a person for a minor offense. Stressing the need for uniformity of the Fourth Amendment when applied to serious and minor crimes alike, the Supreme Court held that the Fourth Amendment does not forbid a warrantless arrest for a minor criminal offense, such as misdemeanor seatbelt violation [*Atwater*, 532 U.S. at 354].

Because *Atwater* involved a cite-and-release law that was discretionary with the arresting officer, civil rights and criminal defense practitioners began arguing that full custodial arrests of persons for minor citeable offenses, such as Virginia's a suspended driver license law (which mandates citation), were unconstitutional, thus entitling them to constitutional remedies such as exclusion of evidence in criminal cases, or a viable claim for false arrest under the federal Constitution in civil cases. *Moore* resoundingly rejects the argument.

Impact of *Virginia v. Moore* on California Civil and Criminal Practice. The Supreme Court's decision in *Moore* will directly impact California practitioners in both the civil and criminal arenas. California has a cite-and-release law similar to the Virginia law implicated in *Moore* [see Cal. Penal Code §§ 853.5, 853.6; Cal. Veh. Code § 40303 et seq.]. These laws essentially require police to "cite and release" a person arrested for various minor offenses (both infractions and misdemeanors in California) as long as certain requirements are met.

Before *Moore*, it was commonplace for plaintiffs to bring civil rights actions under 42 U.S.C. § 1983 against police officers and municipalities for "false arrest" in instances where police conducted full custodial arrests of persons for "citeable" offenses. Plaintiffs and their attorneys were aided by financial incentive to argue that a police officer's violation of state law constituted a Fourth Amendment violation, because Section 1983 allows for attorneys' fees to be awarded to a prevailing plaintiff. City attorneys, county counsel, and other attorneys defending police officers and public entities in civil actions frequently argued that no constitutional basis existed for such claims based on *Cooper v. California* [386 U.S. 58, 87 S. Ct. 788, 17 L. Ed. 2d 730 (1967)] and *California v. Greenwood* [486 U.S. 35, 108 S. Ct. 1625, 100 L. Ed. 2d 730 (1988)], and later *Atwater* [532 U.S. 318, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001)], all of which rejected similar arguments attempting to assign constitutional magnitude to violations of state procedural arrest laws, or alternatively argued that the arresting officers were entitled to qualified immunity due to the ambiguity in the law. Likewise, criminal defendants would argue for suppression of evidence as a purported Fourth Amendment remedy

for violations of state law.

The impact of *Moore* and *Atwater* together should end this trend. Now, police officers and public entities will be protected from claims of Fourth Amendment violations if and when they make an arrest that comports with the "reasonableness" standard of a Fourth Amendment analysis, yet violates a state procedural law. However, both *Moore* and *Atwater* leave room for plaintiffs to argue that custodial arrests made in violation of state "cite and release" laws give rise to state-law based remedies.

After *Moore*, criminal defendants will no longer be able to argue for suppression of evidence under the Fourth Amendment and will have to rely strictly on state-court remedies for such violations, to the extent they exist.

Impact of *Virginia v. Moore* on Qualified Immunity. Another significant impact of the *Moore* decision for civil practitioners who bring or defend civil rights cases under 42 U.S.C. § 1983 is that it strengthens a police officer's argument to the right to qualified immunity. Because the doctrine of qualified immunity applies in those areas where a constitutional right is not clearly defined, *Moore* highlights the ambiguity faced by police officers confronted with making an arrest that would be legal under the Fourth Amendment, but illegal under state law. Any police officer making such an arrest will clearly enjoy protection from civil suit pursuant to the doctrine of qualified immunity because of the ambiguity in the law before *Moore*.

ABOUT THE AUTHOR(S):

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Scallen on New Minnesota E-Discovery Rules

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Professor Eileen A. Scallen on the New Minnesota E-Discovery Rules: The Times They Are A-Changin

By Eileen A. Scallen

June 23, 2008

SUMMARY: Minnesota amended its rules of civil procedure in 2007 to account for new issues arising from the discovery of ESI. Professor Eileen Scallen examines the impact of the new rules, and reviews Minnesota e-discovery practice.

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There is nothing new under the sun, wrote the sage behind the Book of Ecclesiastes. In the case of electronically stored information (ESI), this maxim is both true and false. Litigants are still free to pursue all of the information and data they have always sought in the myriad kinds of civil cases litigated in Minnesota, but the way that information or data is created, stored, copied, and reproduced has changed significantly in the digital age. Most types of potentially relevant evidence are now created and stored in electronic formats. The range of types of evidence is staggering--calendars, voicemails, emails, spreadsheets, word processing files, and other electronic files of infinite variety. Thus, effective July 1, 2007, Minnesota amended several of its Rules of Civil Procedure to address the growing prevalence e-discovery.

The Scope of E-Discovery

The types of digital information that may be sought in discovery are almost too numerous to name with specificity. Consider the breadth of this definition from an order requiring preservation of ESI in an antitrust case [*In re Flash Memory Antitrust Litigation*, 2008 U.S. Dist. LEXIS 40433 (N.D. Cal. Apr. 22, 2008)]:

Documents, data, and tangible things" shall be interpreted broadly to include writings, records, files, correspondence, reports, memoranda, calendars, diaries, minutes, electronic messages, voice mail, E-mail, telephone message records or logs, computer and network activity logs, hard drives, backup data, removable computer storage media such as tapes, discs and cards, printouts, document image files, Web pages, databases, spreadsheets, software,

books, ledgers, journals, orders, invoices, bills, vouchers, check statements, worksheets, summaries, compilations, computations, charts, diagrams, graphic presentations, drawings, films, charts, digital or chemical process photographs, video, phonographic, tape or digital recordings or transcripts thereof, drafts, jottings and notes, studies or drafts of studies or other similar such material. Information that serves to identify, locate, or link such material, such as file inventories, file folders, indices, and metadata, is also included in this definition.

Moreover, litigants and courts face a moving target; innovation leads to new modes of creating and storing ESI, so these categories keep expanding.

The ESI Amendments to the Minnesota Rules of Civil Procedure

Here is the essence of the 2007 amendments to Minnesota Rules of Civil Procedure 16, 26, 33, 34, 37, and 45, dealing with ESI:

. **Pretrial Scheduling Issues.** Minn. R. Civ. P. 16.02 (Pretrial Conference) and Minn. R. Civ. P. 26.06 (Discovery Conference) allow, but do not require, courts to address ESI issues in the discovery conference and the pretrial scheduling orders. These amendments allow the court to incorporate agreements reached by the parties to minimize the risk of waiver of claims of privilege or work product protection. For example, parties may want to allow documents to be reviewed or sampled, to permit the requesting parties to assess the reasonable need for further production but without prejudice to any privilege claims. The rule amendments authorize the court to incorporate these sneak peek agreements but do not weigh in on whether such peeking could be grounds for waiver of privilege or work product protection.

. **Protective Orders and Inadvertent Disclosure.** Minn. R. Civ. P. 26.02 contains two significant amendments:

- o The rule permits a responding party to identify ESI that is not reasonably accessible because of undue burden or cost. If a responding party raises this objection, the party seeking discovery may bring a motion to compel, forcing the responding party to prove the undue burden or cost of accessing the information. Moreover, even if the responding party makes a showing of undue burden or cost, the court has the discretion to order discovery of ESI if the discovering party shows good cause for the ESI under the circumstances or the court can shape an order to minimize the burden on the responding party.

- o The rule creates a procedure for raising claims of privilege after production and directs the discovering party to, sequester, or destroy the material produced, pending a decision by the court on whether protection for the material has been waived through inadvertent disclosure. The rule itself does not create a presumption or a standard for determining whether claims of privilege or work product protection have been waived; those issues are to be determined under existing law.

. **Interrogatories.** Minn. R. Civ. P. 33.03 allows a party to answer an interrogatory simply by specifying the ESI that contains the answer.

. **Production of Documents.** Minn. R. Civ. P. 34 contains two revisions:

- o Minn. R. Civ. P. 34.01 allows parties specifically to request ESI for inspection, copying, testing or sampling in addition to requesting documents and things. The testing or sampling provision is especially meaningful in the ESI context; it enables a party to inspect a small subset of requested information to determine whether it is worth pursuing additional or broader discovery.

- o Under Minn. R. Civ. P. 34.02, a party requesting production of ESI may specify the form in which the information is to be produced, otherwise the responding party is directed to produce the ESI in a form in which it is ordinarily maintained or that is reasonably usable. If the responding party objects to the requested form, the responding

party must then state the form it plans to use instead. If the parties cannot agree on this issue, the court will resolve the issue.

. **Subpoena of ESI Directed to Nonparties.** Minn. R. Civ. P. 45 allow for the issuance of subpoenas commanding production of electronically stored information for inspection, copying, testing, or sampling. Although a subpoena may specify the form in which the ESI is to be produced, the responding party need not produce the same ESI in more than one form, and may seek a protective order when production in the specified form would be unduly burdensome.

. **Sanctions.** Minn. R. Civ. P. 37.05 provides a safe harbor provision that precludes sanctions for spoliation of evidence when loss of ESI is the result of the routine, good faith operation of a computer system. This good faith test does not apply if a responding party with a duty to preserve ESI failed to take reasonable steps to do so.

Case Law to Remember

Minnesota was one of the first states to follow the federal lead in amending its discovery rules to account for ESI. The federal rule amendments became effective December 1, 2006. Minnesotas amended rules were effective July 1, 2007, and have slightly different numbering, but are substantively identical to their federal counterparts (Minnesota does not have a counterpart to the mandatory initial disclosure provisions of *Fed. R. Civ. P. 26(a)*, which now encompass ESI). Thus, one can safely predict that Minnesota courts will turn to federal court interpretations of the rules for guidance, for although there are no published Minnesota cases regarding ESI, there is a growing number of federal cases addressing the issues raised by ESI.

Hold Everything! Litigation Holds and Preservation Orders. A fundamental premise of discovery--electronic or otherwise--is that a party to litigation, or someone who reasonably anticipates being a party to litigation, has a duty to preserve relevant evidence that might be useful to an adversary [*E*Trade Sec. LLC v. Deutsche Bank AG*, 230 F.R.D. at 591 (D. Minn. 2005), citing *Zubulake v. UBS Warburg LLC*, 220 F.R.D. at 217 (S.D.N.Y. 2003)]. The obligation to preserve evidence begins when a party knows or should have known that the evidence is relevant to future or current litigation [*E*Trade Sec. LLC*, 230 F.R.D. at 588]. A party who disregards the obligation to preserve evidence may be punished for spoliation of evidence. Sanctions may include an adverse inference jury instruction, which allows jurors to infer that the material that was destroyed was unfavorable to the party that should have preserved it. Other potential sanctions include issue preclusion or dismissal, or monetary sanctions [*see Qualcomm Inc. v. Broadcom Corp.*, 2008 U.S. Dist. LEXIS 16897 (S.D. Cal. 2008) (\$8.5 million attorneys fees sanction)].

In the electronic evidence context, the spoliation principle takes on additional significance, since most major companies have a system for preserving information for some period of time, but eventually destroy it, or make it functionally unavailable, pursuant to a document retention policy. Any organization large enough to have a computer network should have a written document retention policy. Such a policy establishes processes to identify, locate, preserve, retrieve, and produce information that may be relevant or required for future litigation [The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production, at 30 (June 2007) (The Sedona Principles)]. Moreover, the policy should state how it relates to the legitimate business purposes of the organization, to avoid any inference of improper destruction of data.

There are two devices used to stem the possibility of intentional or inadvertent spoliation. The first is a litigation hold, which puts a prospective party and its agents on notice that certain types of ESI will be sought in discovery and should be preserved. A litigation hold is typically issued by in-house counsel or litigation counsel and should include the following information [*see The Sedona Principles* at 32]:

(1) A description of the subject matter of the litigation and the subject matter, dates, and other criteria defining the information to be preserved;

- (2) A statement that relevant electronically stored information and paper documents must be preserved;
- (3) The likely location of relevant information (e.g., network, workstation, laptop, cell phones, blackberries, and other devices);
- (4) The steps that can be followed for preserving the information as may be appropriate (such as the form the data is to be preserved in); and
- (5) A reminder of the significance of the preservation obligations to the recipients.

The description of the material to be preserved and the scope of the preservation are especially crucial, for although a party is required to identify relevant information to future litigation, a company is not required to take heroic efforts far beyond those consistent with [the party's] regular course of business [*Convolv, Inc. v. Compaq Computer Corp.*, 223 F.R.D. at 177 (S.D.N.Y. 2004)].

The second restriction limiting destruction of ESI is a preservation order issued by the court as a direction not to destroy particular classes of information. This is less common because it is a more direct intrusion into the operations of the litigants and can result in undue expense in collecting and maintaining information that may not be vital to the resolution of the dispute. In general, courts should not issue a preservation order over objection unless the party requesting such an order demonstrates its necessity, which may require an evidentiary hearing in some circumstances [The Sedona Principles at 33; *see also* Advisory Committee Note to *Fed. R. Civ. P. 26(f)* (preservation orders should be given only in extraordinary circumstances); *Gorgen Co. v. Brecht*, 2002 Minn. App. LEXIS 539 (Minn. Ct. App. 2002) (TRO that ordered former employees party to preservation ESI reversed for lack of showing of irreparable harm)].

If a party does destroy ESI, there is the limited safe harbor of Minn. R. Civ. P. 37.05. When the destruction was done in good faith pursuant to a routine document destruction policy, the court will not impose sanctions. This underscores the need for a clearly written document retention policy. Good faith is a highly fact-intensive and discretionary standard. It does not, however, necessarily mean unintentional. A party who accidentally destroys ESI that was subject to a litigation hold or preservation order will face an uphill battle proving that the destruction was in good faith.

Who Pays for E-Discovery? The prevailing rule in American litigation is that parties pay their own expenses in discovery [*Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. at 358, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978)]. However, in the context of electronic discovery, there are situations in which courts will shift the burden of paying for discovery, in whole or in part, to the party seeking production of ESI. The most common scenario for cost-shifting is when a party seeks an unusually large or broad array of material or where the information sought is no longer readily available (through no fault of the responding party) and can be produced only at great expense. Minn. R. Civ. P. 26.02 provides the court with the authority to shape such a cost-shifting discovery order. The most widely used guidelines come from *Zubulake v. UBS Warburg LLC* [217 F.R.D. 309 (S.D.N.Y. 2003)].

The discovery dispute in *Zubulake*, a gender-discrimination case, centered on the production of emails that existed only on backup tapes and other archived forms. The *Zubulake* factors, in order of importance, are (1) the extent to which the request is specifically tailored to discover relevant information; (2) the availability of the information from other sources; (3) the total cost of production, compared to the amount in controversy; (4) the total cost of production, compared to the resources available to each party; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues at stake in the litigation; and (7) the relative benefits to the parties of obtaining the information [*Zubulake*, 217 F.R.D. at 332; *see also* Advisory Committee Note to *Fed. R. Civ. P. 26(b)(2)* (citing *Zubulake* factors)]. As with any discovery matter, these issues are subject to an abuse of discretion standard of review.

Coping With E-Discovery Requires Forethought, Planning, and Communication

1. Communicate With the Client. Lawyers cannot afford to ignore e-discovery. Courts will hold counsel overseeing the production of ESI responsible. Counsel should establish a good working relationship with the clients technology staff and review the clients document retention policy with them, stressing the significance of litigation holds.

2. Communicate With Opposing Counsel. The major emphasis of the e-discovery amendments to the Minnesota Rules of Civil Procedure is that ESI issues are best dealt with through consultation, negotiation, and agreement with opposing counsel. The rules for the discovery conference order [Minn. R. Civ. P. 26.05] and pretrial scheduling order [Minn. R. Civ. P. 16.02] both strongly reflect this intent. The rules reinforce the role of planning by their willingness to incorporate agreements by counsel which allow for sampling or quick peeks of information that has not been pre-screened for privilege so discovery can be organized in a cheaper and more efficient manner and for claw-back agreements, which allow for the return of documents discovered to be privileged after production. Although these procedural devices do not alter the rules of selective privilege waiver and inadvertent production, courts will likely modify those doctrines to uphold the value of these agreements to further the goal of cooperative, efficient discovery.

Moreover, courts always want see discovery disputes resolved among the parties without court intervention. This is reflected in the numerous requirements that counsel meet and confer before bringing any motion to compel or motion for a protective order [see e.g., Minn. R. Civ. P. 26.02; *Mikron Industries, Inc. v. Hurd Windows and Doors, Inc.*, 2008 U.S. Dist. LEXIS 35166 (W.D. Wash. 2008) (denying protective order that would have prevented discovery or imposed cost-shifting because of failure of party to engage in meaningful pre-motion discussions about difficulty of producing responsive ESI, degree to which responding party had searched for ESI to date, and basis for responding partys belief that more detailed search of backup tapes would not produce additional responsive material)].

3. Communicate Candidly With the Court. Although E-discovery may interject new issues arising from a wider range of data available for discovery, some basic litigation truths remain the same. Most fundamental is that courts do not look kindly on behavior that appears to be less than candid with the tribunal [see *Afremov v. Amplatz*, 2006 Minn. App. Unpub LEXIS 39 (Minn. Ct. App. Jan. 10, 2006) (attorney sanctioned for being untruthful with district court, obstructing discovery, and violating court order; reversed due to procedural due process defects)].

LexisNexis E-Discovery Resources

Moore's Federal Practice (3rd ed.), Ch. 37A, *Discovery of Electronically Stored Information* (Matthew Bender)

Search lexis.com source Discovery: Mealey's Litigation Report

Search lexis.com source E-Discovery: The Newly Amended Federal Rules of Civil Procedure

LexisNexis Applied Discovery provides electronic discovery services to law firms and corporations:
<http://www.lexisnexis.com/applieddiscovery/electronicDiscovery/litigation.asp>

Other Online Resources

. Rothstein, Hedges, & Wiggins, *Managing Discovery of Electronic Information: A Pocket Guide for Judges* (Federal Judicial Center 2007), available for download at [http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt.pdf/\\$file/eldscpkt.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt.pdf/$file/eldscpkt.pdf)

. Conference of Chief Justices, *Guidelines for State Trial Courts Regarding Discovery of Electronically Stored Information* (2006), available for download at

http://www.ncsconline.org/WC/Publications/CS_ElDiscCCJGuidelines.pdf

. The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production (2d ed. 2007), *available for download at* http://www.thesedonaconference.org/content/miscFiles/TSCGlossary_12_07.pdf

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Ferstendig on Miller v. Waters

2008 Emerging Issues 2397

David L. Ferstendig on Miller v. Waters, 51 A.D.3d 113, 853 N.Y.S.2d 183, 2008 N.Y.App. Div LEXIS 1630 (3d Dept 2008)

By David L. Ferstendig

June 18, 2008

SUMMARY: Despite recent amendments to the CPLR, problems with proper commencement of actions persist. As the decision in *Miller v. Waters* illustrates, only the passage of time and the attention of practitioners will fully resolve the issues.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

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Commencement Problems Persist Despite CPLR Amendments

In 2007, two separate amendments to the CPLR were passed purporting to deal with commencement problems. Nevertheless, in *Miller v. Waters*, 853 N.Y.S.2d 183, 2008 N.Y.App. Div LEXIS 1630 (3d Dept 2008), the Third Department dismissed the action based on a commencement defect, finding that one of the amendments was inapplicable and the other was not in effect. Thus, practitioners must await further pronouncements to determine whether the 2007 legislation has effectively eliminated, or even reduced, the possibility of the harsh result of the dismissal of actions based on technical commencement defects.

The 2007 Amendments. Two significant amendments were passed in 2007 aimed at dealing with commencement problems:

1. An amendment *effective January 1, 2008* (L 2007, ch. 125) attempted to clear up the ambiguities of CPLR 304, 305, 1007, and 2102 and to avoid a trap for unwary counsel concerning where papers should be filed for commencement purposes. The amendment, which was originally introduced years before in response to the decision in *Mendon Ponds Neighborhood Assn v. Dehm*, 98 N.Y.2d 745, 751 N.Y.S.2d 819, 781 N.E.2d 883 (2002), confirms, among other things, that the initiating pleadings should be filed with the county clerk. Significantly, the amendment provides that:

A paper filed in accordance with the rules of the chief administrator or any local rule or practice established by the court shall be deemed filed. Where such rules or practice allow for the filing of a paper other than at the office of the clerk of the court, such paper shall be transmitted to the clerk of the court. CPLR 2102 (b); and

A clerk shall not refuse to accept for filing any paper presented for that purpose except where specifically directed to do so by statute or rules promulgated by the chief administrator of the courts, or order of the court. CPLR 2102(c).

2. CPLR 2001 was amended (L 2007, ch. 529, eff. 8/15/07) to provide a court with discretion to correct or ignore mistakes in the commencement process that do not prejudice the opposing party. This amendment brings these mistakes in line with other non-prejudicial procedural events already covered by CPLR 2001. The amended statute specifically refers to defects in filing and the failure to purchase an index number. In the case of a failure to pay an index number fee, the court will have to condition the denial of a motion to dismiss on plaintiffs payment of the proper fee. Significantly, the sponsors memorandum specifically noted that the amendment did not:

- a. excuse a complete failure to file within the statute of limitations;
- b. excuse a plaintiff or petitioner from having to actually file a summons and complaint or petition in order to properly commence an action;
- c. excuse a bare summons, because that would not constitute a filing;
- d. intend to overrule the Court of Appeals decision in *Parker v. Mack*, 61 N.Y.2d 114, 472 N.Y.S.2d 882, 460 N.E.2d 1316 (1984).

See Ferstendig Expert Commentary on the 2007 CPLR Amendments Clarifying Rules Regarding Filing of Papers to Commence Action.

The Facts in Miller. In *Miller*, the petitioner commenced a proceeding in the County Court seeking to find the respondent in contempt, both civilly and criminally, for violating a Court order in a prior criminal action. After hearings began, the respondent moved for summary judgment asserting, among other things, that the proceeding was never properly commenced. It was undisputed that the petitioner did not obtain an index number or pay the necessary filing fee *at the time of commencement* although the fee was later paid. Moreover, petitioners papers were improperly filed at the office of the administrative clerk of the Supreme and County Courts, rather than the Chemung County Clerk.

The Defect as to the Failure Timely to Pay the Index Number Fee Was Waived. The *Miller* court found that the respondent had waived his objection to the defect in filing with the wrong clerk:

Here, respondent acquiesced to these deficiencies by failing to object or move for dismissal on these grounds in his answer and by fully participating in the litigation on the merits, including filing of papers and participating in several hearings over the course of approximately two years before moving to dismiss. Accordingly, under the law as it existed in November 2006 when County Court rendered a decision on respondent's motion to dismiss, a finding that respondent waived objections to petitioner's failure to obtain an index number and timely pay the required fee was appropriate.

In addition, the court found that the amendment to CPLR 2001, passed August 15, 2007 and effective immediately, increased a courts discretion to forgive such filing errors. Courts now have discretion to permit a defect to be corrected, even where timely objected to, including the failure to purchase or acquire an index number or other mistake in the filing process.

853 N.Y.S.2d 183, 185.

But the Filing Defect was Non-Waivable. The petitioner was not out of the woods yet. There still was that nasty filing defect: the failure to file the papers with the proper clerk. Here, the *Miller* court found that the amendment to CPLR 2001 and the inherent discretion awarded a court to forgive errors did not apply to the filing defect. The court characterized such a defect as one that impacted the courts subject matter jurisdiction and, thus, was non-waivable. The court pointed to the sponsors memorandum which listed three cases: *Harris v. Niagara Falls Bd. of Educ.*, 6 N.Y.3d 155, 811 N.Y.S.2d 299, 844 N.E.2d 753 (2006), *Gershel v. Porr*, 89 N.Y.2d 327, 653 N.Y.S.2d 82, 675 N.E.2d 836 (1996), and *Fry v. Village of Tarrytown*, 89 N.Y.2d 714, 658 N.Y.S.2d 205, 680 N.E.2d 578 (1997). The court stated that each of these cases involved waivable commencement defects. Significantly, the court noted that the decision in *Mendon Ponds*, *supra*, was not mentioned. Moreover, the memorandum specifically stated that the legislation was not intended to overrule the Court of Appeals decision in *Parker v. Mack*, 61 N.Y.2d 114, 472 N.Y.S.2d 882, 460 N.E.2d 1316 (1984), where the Court found that the failure to include the requisite notice in a summons (a bare summons) was a nonwaivable defect which the *Miller* court again characterized as impacting the courts subject matter jurisdiction. While that characterization may be misplaced--the *Parker* majority expressly distinguished the commencement defect there from one going to subject matter jurisdiction--the *Miller* courts point was that a *Mendon Ponds* type defect was not the type of error the court could forgive even under the amended version of CPLR 2001.

But How About the *Mendon Ponds* Amendment? It would seem, however, that the amendments to CPLR 304, 306-a and 2102, expressly passed to resolve the *Mendon Ponds* type filing defect involved in the action, should have provided relief. However, the *Miller* court noted correctly in a footnote that the amendments were applicable only to actions or proceedings commenced on or after January 1, 2008, and thus could not save petitioners case.

Practice Considerations. Hopefully, *Miller* type situations will become rare as time passes and the *Mendon Ponds* amendment applies to more and more actions and proceedings. The two amendments passed in 2007 were intended to permit courts to look past commencement defects so that cases could be decided more properly on the merits.

For additional discussion of these issues, see *New York Civil Practice: CPLR P 304.01* (Action or Proceeding Commenced by Filing); *New York Civil Practice: CPLR P 304.02* (Action Commenced by Filing Summons; Special Proceeding Commenced by Filing); *New York Civil Practice: CPLR P 2102.01* (No General Filing Requirement); *New York Civil Practice: CPLR P 305.02* (Title Must Include Name of Court, Basis of Venue and Index Number); *New York Civil Practice: CPLR P 306-a.01* (Index Number Secured at Time of Filing); Weinstein, Korn & Miller *CPLR Manual* § 3.10-a (Commencing the action-filing and service); LexisNexis AnswerGuide New York Civil Litigation § 1.03 (Commencing Action by Filing in Supreme Court or County Court).

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Eli Wald on Sample v. Morgan, 935 A.2d 1046 (Del. Ch. 2007)

2008 Emerging Issues 2384

Eli Wald on Law Firms Exposure to Personal Jurisdiction in Delaware for Filing a Corporate Instrument in Delaware

By Eli Wald

June 12, 2008

SUMMARY: May a corporate lawyer and her law firm be sued in Delaware as to claims arising out of their actions in providing advice and services to a Delaware public corporation, its directors, and its managers regarding matters of Delaware corporate law? In *Sample v. Morgan* the Delaware court of chancery took a first step in answering the question in the affirmative. This Commentary studies the case and its implications for corporate lawyers.

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ARTICLE: Overview

May a corporate lawyer and her law firm be sued in Delaware as to claims arising out of their actions in providing advice and services to a Delaware public corporation, its directors, and its managers regarding matters of Delaware corporate law? In *Sample v. Morgan* the Delaware court of chancery took a first step in answering the question in the affirmative, holding that a law firm involved in filing a corporate instrument in Delaware is subject to personal jurisdiction in Delaware. This Commentary, written by Professor Eli Wald, a legal ethics expert and member of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct and the Colorado Bar Association Ethics Committee, studies the case and its implications for corporate lawyers.

Factual Background

Randall Bearings, Inc. (RBI) is an Ohio-headquartered bronze ball bearings entity incorporated in Delaware. Following the death of the entity's founder and largest stock-holder, the three Top Managers of RBI, concerned that the deceased's stock would fall into hands unfriendly to them, implemented a two-prong scheme to ensure their control over the entity. First, they arranged the sale of the deceased's 127,442 shares to an entity friendly to management. *Id.* at 1050-51. Second, the Top Managers had the entity distribute to them 200,000 shares at a nominal price of \$200. *Id.* at 1049-52. Taken together, the two measures placed a majority of RBI's voting power under the control and influence of

the Top Managers.

In executing the scheme to obtain voting control, the Top Managers were allegedly advised and aided by Mr. Boeckman, an attorney with the law firm of Baker & Hostetler, which was being paid at all relevant times by RBI to act as its outside counsel.

Importantly, when Mr. Boeckman advised the board regarding the scheme, he never disclosed the extent of his involvement with, and advice to the Top Managers. With regard to the sale of the late founders shares, Boeckman immersed himself in the negotiations over the terms of the sale and had the Top Managers execute a Term Sheet reflecting an agreement in principle with the sole owner of [the entity friendly to management]. Id. at 1050. The Term Sheet contained side arrangements meant to confer voting control on Top Management. Id. at 1051. When Mr. Boeckman reported the sale to the board, he vaguely stated that The companys participation in the transaction was solely to facilitate the transaction. Id. (*internal citation omitted*). The court noted: it is not clear how informed the only non-management director in attendance was about these side arrangements. Id.

Similarly, Mr. Boeckman advised the board to approve the distribution of shares. The court noted that When the Randall Bearings board approved the Certificate Amendment [a measure lowering the par value of the entitys stock from \$1.00 to \$000.1, to allow the Top Managers to receive the 200,000 share distribution at a cost of \$200 as opposed to \$200,000] and the Equity Incentive Plan [purporting to attract[] and retain[] key employees, Id. at 1051, but in fact authorizing shares designed to be distributed to the Top Managers] some months later, neither the Top Managers nor Boeckman--who was acting as the boards counsel--disclosed [Boeckmans involvement with and advice to the Top Managers]. Id. at 104849.

Subsequent to obtaining board approval of the two-prong scheme, Mr. Boeckman assisted the Top Managers obtain shareholder approval. Id. at 1051. Criticizing the deficient disclosure to the shareholders, the court tellingly observed:

The proxy statement is remarkable in what it did not say. It told the Randall Bearings stockholders that the purpose of the Equity Incentive Plan was to enable the company to attract[] and retain[] key employees. But it failed to mention that the Top Managers already contemplated that all 200,000 shares would be granted to the Top Managers, leaving no shares left for the attract[ion] of anyone, and no shares left to help retain[] any but the three Top Managers on the board itself. Likewise, the proxy statement failed to disclose anything about the contractual arrangements Randall Bearings had entered into with [the friendly entity] As important, the proxy statement did not disclose that [the friendly entity] and the Top Managers would, if their plans were implemented, control over 50% of the companys voting power.

Id. at 1051.

After the stockholders approved the scheme in a close vote, a Baker & Hostetler paralegal under the supervision of Mr. Boeckman drafted the necessary Certificate Amendment and a local service company engaged by Baker & Hostetler filed it in Delaware. Id. at 1052, 1054.

Procedural Background

Plaintiff-shareholder argued defendant-directors breached their fiduciary duty by implementing a scheme to entrench themselves in office and to self-enrich at the expense of the shareholders. Rejecting defendant-directors motion to dismiss, the court of chancery noted that defendant-directors scheme was facilitated by the advice of Boeckman. Id. at 1052. Subsequently, plaintiff sought to amend the complaint to state claims for aiding and abetting breaches of fiduciary duty against Boeckman and Baker & Hostetler. Boeckman and Baker & Hostetler moved to dismiss the claims against them based solely on the ground of lack of personal jurisdiction over them. Id. at 105253.

The Pertinent Question

May a corporate lawyer and her law firm be sued in Delaware as to claims arising out of their actions in providing advice and services to a Delaware public corporation, its directors, and its managers regarding matters of Delaware corporate law, and in particular in filing a corporate instrument in Delaware?

The Decision

The court explained that in considering a motion to dismiss for lack of personal jurisdiction it must address two questions: whether there is a statutory basis for serving the defendant with process; and whether the courts exercise of jurisdiction over the defendant would be consistent with the Due Process Clause of the Fourteenth Amendment. *Id.* at 1056.

(1) The statutory basis for exercising personal jurisdiction over an out-of-state law firm in Delaware. Mr. Boeckman and Baker & Holstetler were served under Delaware's long-arm statute, 10 Del. C. §3104. That statute provides in relevant part:

(c) As to a cause of action brought by any person arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nonresident who in person or through an agent:

(1) Transacts any business or performs any character of work or service in the State; [or]

(3) Causes tortious injury in the State by an act or omission in this State...

The Delaware Supreme Court has held that the long-arm statute is to be construed broadly. *Id.* at 1056 (citations omitted).

Defendant-law firm argued that it did not transact any business or perform any work in Delaware because all of the legal work it performed was done in its offices outside of Delaware. *Id.* at 1055. The court rejected this claim on the face of the facts, finding that [d]iscovery has since revealed that Boeckman and Baker & Holstetler themselves prepared and sent the Certificate Amendment to [a local service company] in Delaware for filing with the Secretary of State. *Id.* at 1057. As a matter of law, the court held that The involvement of a defendant in arranging, either directly or through an agent such as [a service company], for filing of a corporate instrument in Delaware that facilitated transactions under challenge in litigation in this court has been repeatedly recognized as sufficient to constitute the transaction of business under §3104(c)(1). *Id.* at 1057 (citations omitted).

In reaching its conclusion the court explicitly rejected the defendant-law firm argument that because the Certificate Amendment was formally filed by the corporation itself, and not by the law firm, it was immunized from liability. The court reasoned that the underlying conduct almost always involves formal action of the corporation itself, *Id.* at 1059, and concluded that [s]uch an accountability-destroying reading of the long-arm statute would itself be entirely disloyal to the statute's purpose. *Id.* at 1060.

Next, the court turned its attention to subsection §3104(c)(3). It found that the defendant-law firm's filing of the Certificate Amendment in Delaware injured RBI, a Delaware corporation, thus satisfying the long-arm statute. *Id.* at 1057. The court explained that when conspirators, for example, managers and their lawyers, commit a breach of a fiduciary duty against a Delaware corporation that causes cognizable injury to the entity, here the scheme to ensure voting control, the corporation was injured in its chosen home. *Id.* at 1057-58.

The defendant-law firm argued that case law in other jurisdictions supports the proposition that attorneys cannot be

sued simply for performing services for a client if all that the lawyers get out of those services is a fee. Id. at 106061. In other words, the law firm argued that lawyers acting in their official capacity as lawyers are incapable, as a matter of law, of conspiring with the corporation-client. Accordingly, the law firm could not have conspired with the Top Managers to cause a tortious injury in Delaware.

The court rejected the argument on two separate grounds. First, it held that while in some instances it makes little sense to describe the officers or agents of a corporation as conspiring with the entity, Id. at 1061, the conspiracy in this case was among the Top Managers, allegedly with the assistance of the law firm, and, importantly, did not include RBI itself. Thus, the entity did not conspire with its Top Managers, or with the law firm. Second, the court pointed out that the law firm was not acting within the appropriate scope of its agency. Id. at 1062. Rather than serving the interests of RBI as its outside counsel, the law firm was allegedly aiding the Top Managers at the expense of RBI.

Consequently, Mr. Boeckman and the law firm were appropriately served pursuant to §3104(c)(1) and §3104(c)(3).

(2) The Due Process constraint on the exercise of personal jurisdiction over an out-of-state law firm in Delaware.

The United Supreme Court has held that a long-arm statute may exercise personal jurisdiction over an out-of-state defendant when that defendant should have reasonably anticipated that his actions might result in the forum state exercising personal jurisdiction over him in order to adjudicate disputes arising from those actions. Id. at 106263. The test is not one of physical presence in the state, but rather one of reasonable foreseeability. Id.

Applying the test, the court found that the law firm should have reasonably anticipated being subject to personal jurisdiction in Delaware. The court noted that Baker & Holstetler advertised itself as a national and even international law firm with a coast-to-coast platform, regularly engaged in advising public corporations in matters of corporate and securities law, Id. at 1063, and, in particular, purported to provide a wide range of advice to the officers and board of a Delaware corporation about important issues of Delaware law. Id. at 1064. As a sophisticated practitioner of corporate law, the court opined, the law firm should have foreseen that Delaware would have an important interest in regulating the internal affairs of its corporations. Given these realities, the court concluded, it is difficult to conceive how it would shock the conscience to require the moving defendants to defend a lawsuit in Delaware. Id. Indeed, [f]or a sophisticated counsel to argue that they did not realize that acting as the de facto outside general counsel to a Delaware corporation and regularly providing advice about Delaware law about matters important to that corporation and its stockholders might expose it to this courts jurisdiction fails the straight-face test. Id. at 1065.

Analysis

The chancery court drafted its opinion narrowly. To be clear, it did not hold generally that a corporate lawyer and her law firm can be sued in Delaware as to claims arising out of their actions in providing advice and services to a Delaware public corporation, its directors, and its managers regarding matters of Delaware corporate law. Instead, the court limited its holding to circumstances where a law firm files a corporate instrument in Delaware and faces well-pled allegations of having aided and abetted top managers in breaching their fiduciary duties.

Indeed, the court explicitly stated that it did not believe its holding will deter out-of-state law firms from providing advice to Delaware corporations fearing that they will be regularly hauled into Delaware court. This is a highly unusual case stated the court. In most fiduciary duty cases, it will be exceedingly difficult for plaintiffs to state an aiding and abetting claim against corporate counsel. Id. at 1065.

The courts reassuring language notwithstanding, *Sample v. Morgan* does open the personal jurisdiction door and may give some out-of-state law firms pause regarding providing legal advice about Delaware corporate law to Delaware corporations. While the court is correct in pointing out that pleading lawyers aiding and abetting facts is usually a daunting task for plaintiffs, this pleading hurdle seems to be more applicable to §3104(c)(3), and less so to §3104(c)(1). On its face, all that subsection §3104(c)(1) requires is transaction of any business or performance of any service in

Delaware, and the courts broad reading of the states long-arm statute may mean that a corporate lawyer and her law firm can be sued in Delaware as to claims arising out of their actions in merely providing advice and services to a Delaware public corporation, its directors, and its managers regarding matters of Delaware corporate law, on the ground that providing legal advice about Delaware corporate law to a Delaware corporation constitutes the performance of service in the state.

The courts own analysis lends some support for this broad reading of personal jurisdiction. The court reasoned: [t]he precise circumstances when corporate advisors should be deemed responsible to the corporation or its stakeholders for their role in advising directors and officers should be determined by decisions addressing the merits of aiding and abetting claims, not by decisions about motions to dismiss for lack of personal jurisdiction. *Id.* at 1065. In other words, the court seems to be suggesting that the liability of lawyers for providing legal advice about Delaware law to a Delaware corporation, its officer and directors should be determined on the merits, not on the formalities of personal jurisdiction.

Practice Tip #1. The filing of a corporate instrument by an out-of-state law firm in Delaware avails it to personal jurisdiction in Delaware pursuant to the states long-arm statute, even if the law firm has no offices in Delaware and the drafting of the instrument took place outside of Delaware.

Practice Tip #2. The preparation, drafting of or arranging of Delaware corporate instruments by an out-of-state law firm avails it to personal jurisdiction in Delaware pursuant to the states long-arm statute, even if the law firm does not directly file the instrument but engages an agent to file the instrument in Delaware.

Practice Tip #3. A law firm advising a Delaware corporation, its officers and directors about Delaware corporate law may be subject to the risk of personal jurisdiction in Delaware. While *Sample v. Morgan* did not hold that mere advising on Delaware corporate law will subject an out-of-state law firm to personal jurisdiction in Delaware, the case indicates the willingness of Delaware courts to construe the states long-arm statute broadly, and decide the liability of the out-of-state law firm on the merits, as opposed to on the procedural ground of personal jurisdiction.

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Eli Wald on Hybrid Fee Arrangements

2008 Emerging Issues 2383

Eli Wald on Hybrid Fee Arrangements: Compton v. Kittleson, 171 P.3d 172 (Alaska 2007)

By Eli Wald

June 12, 2008

SUMMARY: In *Compton v. Kittleson* the Alaska Supreme Court explored the propriety of hybrid fee arrangements. This Commentary, written by Professor Eli Wald, a legal ethics expert and member of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct and the Colorado Bar Association Ethics Committee, summarizes the pertinent legal issues decided by the Court.

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ARTICLE: Overview

In *Compton v. Kittleson* the Alaska Supreme Court explored the propriety of hybrid fee arrangements. This Commentary, written by Professor Eli Wald, a legal ethics expert and member of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct and the Colorado Bar Association Ethics Committee, summarizes the pertinent legal issues decided by the Court.

Factual Background

Clients sought to retain Mr. Kittleson to represent them in a consumer protection action. Attorney Kittleson proposed a hybrid fee arrangement consisting of a contingency-fee and an hourly-fee. The default fee would be thirty-three percent of any recovery but would automatically convert to an hourly-fee if the clients were to settle the case for an amount that would compensate Mr. Kittleson less than \$175 per hour for time invested in the case. The clients agreed to the proposed fee agreement. *Compton*, at 174.

While the clients case was pending, Mr. Kittleson sought an informal ethics opinion from the Alaska Bar Association regarding the propriety of the hybrid fee arrangement. Bar Counsel opined that the arrangement, hinging on whether the clients agreed to settle, had the potential to significantly inhibit the clients exercise of his or her right to

settle a matter, and therefore would likely be reduced, by a fee arbitration panel in case of a dispute, to the contingency component of thirty-three percent of recovery. *Id.*

Shortly thereafter the defendant offered to settle the case for \$25,000. Mr. Kittleson explained to his clients that since his hourly fees to date exceeded \$30,000, acceptance of the settlement offer would trigger the hourly-fee component of the hybrid fee arrangement and would leave the clients with no recovery. While advising the clients about the Bar Associations informal opinion, Mr. Kittleson recommended they reject the settlement offer and the clients followed his advice. *Id.* at 17475.

In trial defendant prevailed on all counts. Moreover, since the clients rejected its pretrial offer, defendant successfully moved for award of costs and attorneys fees pursuant to Alaska Civil Rule of Procedure 68 and AS 09.30.065. The award forced clients to file for bankruptcy. *Id.* at 175.

Procedural Background

Bankruptcy Trustee Compton filed a malpractice lawsuit against Mr. Kittleson arguing that the hybrid fee arrangement was prohibited by Alaska law. The parties stipulated that no issues of fact were in dispute. Trustee Compton moved for summary judgment and Mr. Kittleson sought dismissal of the complaint. The trial court dismissed the case holding that the plain language of the hybrid fee agreement did not violate Alaska law. Trustee Compton appealed to the Alaska Supreme Court. *Id.*

Pertinent Legal Questions

- (1) Are hybrid fee agreements generally permissible under Alaska law?
- (2) May hybrid fee arrangements hinge on the clients decision to settle? In other words, may the clients decision to settle the case trigger a conversion from a contingency-fee to an hourly-fee?
- (3) May hybrid fee agreements, once converted from contingency-fee to hourly-fee, retroactively charge a client for work previously performed by the attorney?

The Decision

(1) Hybrid Fee Arrangements Are Permissible Under Alaska Law. The Court held that Alaska Rule of Professional Conduct 1.5, which regulates attorneys fees, implicitly authorizes hybrid fee arrangements. *Id.* at 176. Rule 1.5 states in relevant part: A fee agreement which is *in whole or in part contingent* shall be in writing and shall state the method by which the fee is to be determined *Alaska R. Prof. Conduct 1.5(c)* (emphasis added). The Court further noted that its holding allowing hybrid fee arrangements reflects the prevailing law in other jurisdictions. Compton, at 176 (citations omitted).

(2) Hybrid Fee Arrangements May Not Hinge On A Clients Decision to Settle. Assessing the particular type of the hybrid fee arrangement utilized by Mr. Kittleson, one in which the hourly-fee alternative was triggered by the clients decision to settle, the Court turned its attention to Rule 1.2, and held that a fundamental aspect of the attorney-client relationship is that the client, as principal, is responsible for setting the objectives of the relationship and has the ultimate authority over decisions relating to the relationship. In particular, a client has the right to decide whether to

settle a case, and an attorney cannot demand that the client relinquish that right. *Id.* at 176. Because the client has the right to determine whether to settle a case, courts have consistently declined to enforce fee arrangements that give lawyers control over settlement. *Id.* at 177-78. Consequently, hybrid fee agreements that hinge on a client's decision whether to settle a case are invalid.

(3) Hybrid Fee Arrangements May Not, Once Converted From Contingency-Fee To Hourly-Fee, Retroactively Charge A Client For Work Previously Performed. The Court further noted that the fee agreement in question was further tainted by the fact that once the conversion from contingency-fee to hourly-fee was triggered, it operated retroactively to encompass all work performed by Mr. Kittleson from the inception of the case. The impact of this fee surprise, the court held, is compounded by the predictable difficulty of forecasting the effects of the fee-conversion provision. *Id.* at 179. The client's lack of sophistication prevented them from appreciating the risks and benefits of the fee provision. The impact of the retroactive obligation to pay for work already performed by Mr. Kittleson but never before charged to the clients, an obligation largely incalculable at the inception of the attorney-client relationship, rendered the fee conversion provision at issue impermissible.

Analysis

Hybrid fee arrangements are generally permissible. *See, City of Burlington v. Dague*, 505 U.S. 557, 560 (1992) (Fees for legal services in litigation may be either certain or contingent (or some hybrid of the two)). As Professor Charles Silver has argued: [Rules of professional conduct] recognize that lawyers and clients employ diverse approaches to compensation, including hourly rates, contingent percentages, flat fees, salaries, and hybrid arrangements, and they admit the propriety of applying different criteria to different arrangements. *Charles Silver, Due Process and the Lodestar Method: You Can't Get There From Here*, 74 Tul. L. Rev. 1809, 1824 (2000). *See also, Peter D. Zeughauser, The Use of Alternative Fee Arrangements to Achieve Smart Results and Improve Outside Counsel Relationships*, 871 PLI/Corp 47, 71 (1994) (To optimize the value of alternative fee arrangements, so they provide incentives and allocate risk it is frequently best, and even necessary, to craft a hybrid fee arrangement. This can be done in litigation and transaction work). The propriety of hybrid fee arrangements is measured by the general reasonableness requirement. *See, e.g., American Bar Association Model Rules of Professional Conduct*, R. 1.5(a).

The Court's admonition that hybrid fee arrangements may not hinge on a client's decision whether to settle the case is consistent with the general principle that the client is responsible for the objectives of the attorney-client relationship. *See generally, American Bar Association Model Rules of Professional Conduct*, R. 1.2(a). Using the client's decision to settle the case as the fee-conversion trigger unduly deprives the client the ability to freely determine the objectives of the case. *See, Wis. State Bar Prof'l Ethics Comm., Formal Op. E-82-5 (1982); Neb. State Bar Assn Lawyers Advisory Comm., Formal Op. 95-1 (1995); Colo. Bar Assn Ethics Comm., Formal Op. 100 (1997).*

Practice Tip #1. Subject to the general reasonableness requirement, *see generally, American Bar Association Model Rules of Professional Conduct*, R. 1.5(a), attorneys may utilize hybrid fee arrangements. Hybrid fee agreements, however, may not hinge on the client's decision whether to settle the case because such a trigger infringes on the client's inherent authority over the objectives of the attorney-client relationship. *See generally, American Bar Association Model Rules of Professional Conduct*, R. 1.2(a).

The Alaska Supreme Court's holding in *Compton v. Kittleson* that a hybrid fee arrangement cannot, once converted from a contingency-fee to an hourly-fee, retroactively charge a client for work already performed by the attorney (while the attorney-client relationship was governed by the contingency-fee provision) is a reasonable, yet not inevitable under the Alaska and American Bar Association rules of professional conduct.

The Court found that it seems unlikely, too, that the attorney-client agreement between Kittleson and the [clients],

with a single sentence devoted to the fee-conversion, satisfies an attorneys duty to fully explain the terms of a fee agreement in such a way that the client can understand. Compton, at 179 (*citation omitted*). On the facts of the case, because the operation of the hybrid fee agreement, and, in particular, of the conversion formula, was not explained to the clients in sufficient detail, retroactively charging the clients an hourly-fee for work performed before the agreement converted to an hourly-fee arrangement was appropriately disallowed.

Generally, however, consistent with the doctrine of attorney-client communications, see, American Bar Association Model Rules of Professional Conduct, R. 1.4(b); Eli Wald, Taking Attorney-Client Communications (And Therefore Clients) Seriously, 42 U. S. F. L. Rev. 747 (2008), an attorney can explain a fee conversion formula to the client in sufficient detail and keep the client apprised of hours spent on the case even while the fee agreement is governed by a contingency-fee provision, such that in the event of conversion to an hourly-fee provision the client will not be surprised by the overall fees charged. Whether retroactively charging a client for hours worked once the fee arrangement converts from a contingency-fee to an hourly-fee is reasonable given specific facts thus becomes a question of fact. Relevant considerations include, inter alia, the extent of explanation provided by the attorney to the client regarding the hybrid fee formula and the clients level of sophistication.

Example #1. On January 1st client and attorney execute a hybrid fee agreement. On April 1st, pursuant to the provisions of the fee agreement, the fee converts from a contingency fee to an hourly-fee. Between January 1st and April 1st the lawyer spent 100 hours on the case. The lawyer may charge the client retroactively for the 100 hours she spent between January 1st and April 1st if: (1) the provisions of the fee agreement entitle the lawyer to charge for work performed prior to the conversion; (2) the provisions of the fee agreement were explained to the client in sufficient detail; (3) the client was kept apprised of the number of hours the lawyer worked in the case; and (4) the fee charged by the lawyer is reasonable given the circumstances.

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Vairo on ConnectU LLC v Zuckerberg

2008 Emerging Issues 2361

Vairo on ConnectU LLC v Zuckerberg

By Georgene Vairo

June 10, 2008

SUMMARY: In *ConnectU LLC v. Zuckerberg*, the First Circuit addresses whether an amended complaint that switches the basis of the district courts jurisdiction from diversity of citizenship to federal question confers jurisdiction when filed as of right before any jurisdictional challenge has been mounted. This Emerging Issues Analysis, by Moores Federal Practice Editorial Board member Georgene Vairo, discusses the opinions practical significance.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: *ConnectU LLC v. Zuckerberg*, 522 F.3d 82, 2008 U.S. App. LEXIS 7064 (1st Cir. Apr. 3, 2008), involves an arcane subject matter jurisdiction issue: whether an amended complaint that switches the basis of the district court's subject matter jurisdiction from diversity of citizenship (28 U.S.C. § 1332(a)(1)) to federal question (28 U.S.C. § 1331) confers jurisdiction when filed as of right before any jurisdictional challenge has been mounted. This is a significant case because it raises a question of first impression at the federal appellate level and because it sets two established subject matter jurisdictional principles on a collision course. Who knew that Facebook that spectacularly successful communications creature could create such a jurisdictional enigma, as the First Circuit labeled the problem before it?

Facts. In a Harvard College dormitory room, several undergraduates (the Founders), hatched the idea of creating a social networking website for college students. Unschooled in the programming expertise needed to develop their ideas, they asked Mark Zuckerberg to help them complete the proposed website's source code. Zuckerberg agreed. However, according to the Founders, he failed to carry out the assignment and, unbeknownst to them, stole their idea, business plan, and rudimentary source code to launch a competing social networking website. By the time that the Founders learned of what Zuckerberg had done, they had completed the source code through other means and inaugurated their own social networking website renamed connectU.com. Meanwhile, Zuckerberg's venture, known as facebook.com, had obtained a huge head start in user traffic.

Procedural Background. On September 2, 2004, ConnectU LLC, a Delaware limited liability company (the LLC) commenced an action in the federal district court alleging diversity of citizenship against Zuckerberg, five other defendants, and Facebook itself. The complaint asserted a gallimaufry of state-law claims arising from the alleged misappropriation and unauthorized use of the LLC's confidential source code and business plan.

On October 28, 2004 approximately two weeks after registering a copyright for its website's source code with the

United States Copyright Office and before any responsive pleading was filed by the defendants the LLC served an amended complaint. The amended complaint added a corporate affiliate of Facebook as a defendant and introduced two new statements of claim, including a federal-law claim for copyright infringement. The jurisdictional allegation now rested on the existence of a federal question over the newly asserted copyright infringement claim, and supplemental jurisdiction, under 28 U.S.C. § 1367(a), over the state-law claims.

Almost one year later, the defendants moved to dismiss for lack of subject matter jurisdiction, arguing that the parties to the original complaint were not completely diverse. According to the defendants, the only complaint that mattered was the original one alleging diversity jurisdiction, not the amended complaint that alleged federal question jurisdiction.

Comment. Although the subject matter jurisdiction was made a year after the case was initially filed, it was not untimely. An absence of subject matter jurisdiction can be raised by any party or the court at any time. Two rules suggested that the motion could be granted: First, the First Circuit, like most others, has ruled that the citizenship of a limited liability company is to be determined by the citizenship of all its members [see *Pramco, LLC v. San Juan Bay Marina, Inc.*, 435 F.3d 51 (1st Cir. 2006)]. Second, the Supreme Court has announced a time-of-filing rule: the existence of subject matter jurisdiction must be measured by the facts as existing at the time the complaint is filed [see *Grupo Dataflux v. Atlas Global Group L.P.*, 541 U.S. 567, 570-571, 124 S. Ct. 1920, 158 L. Ed. 2d 866 (2004)]. Because one of the Founders, who was a member of the LLC at the time the suit was originally filed, and the defendant Zuckerberg, were both alleged to be citizens of New York, there would be no diversity jurisdiction. After holding a protracted evidentiary hearing, the magistrate judge recommended that the motion to dismiss be granted, essentially agreeing with the defendants that the original complaint controlled. The district judge adopted the decision, dismissed the case and the appeal followed. So, the issue for the First Circuit was whether the original or the amended complaint controlled.

Was it an Amended or Supplemental Complaint? Before reaching the arcane subject matter jurisdiction issue, the First Circuit delved into an esoteric bit of nomenclature. There is an open question as to whether an amended complaint asserting a cause of action that arose only after the prior complaint was filed should be regarded as a "supplemental" rather than an "amended" complaint. An amended complaint relates to matters that had taken place prior to the date of the original pleading [see *Fed. R. Civ. P. 15(a)*]. A supplemental complaint, on the other hand, relates to transactions or occurrences or events which happened since the date of the original pleading [see *Fed. R. Civ. P. 15(d)*]. The distinction matters because, under *Fed. R. Civ. P. 15(a)*, an amended complaint can be filed "as a matter of course" under certain circumstances; while a supplemental complaint cannot. Because none of the parties or courts below noticed the nomenclature issue, however, the First Circuit ruled that any problem arising out of the possible status of the second pleading was waived.

Comment. The distinction may or may not have mattered had it been pursued in the district court. Although the copyright registration took place after the original complaint was filed, the rights may have preexisted the filing. Had the pleading actually been properly characterized as a supplemental pleading, the First Circuits subject matter jurisdiction analysis could have been quite different, as the discussion below demonstrates. The court adumbrates two lines of analysis to find that subject matter jurisdiction exists.

Should the Case be Viewed as a Diversity Case or a Federal Question Case? According to the plaintiff, the amended complaint superseded the original complaint and rendered it functus officio as the First Circuit put it. Unquestionably, an amended pleading may be filed "once as a matter of course at any time before a responsive pleading is served" [*Fed. R. Civ. P. 15(a)*]. Nonetheless, the defendants argued that an action originally filed under diversity jurisdiction must live or die from a jurisdictional standpoint as of the time of filing regardless of subsequent changes. The First Circuit agreed with the plaintiff that the amended complaint controlled and that its assertion of federal question jurisdiction sufficed.

The First Circuit found that its ruling was substantially supported by a recent Supreme Court decision. In *Rockwell*

International Corp. v. United States, 127 S. Ct. 1397, 1409, 167 L. Ed. 2d 190 (2007), the Court stated that "when a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction." However, the Court in *Rockwell* was dealing with totally different issues and it made the statement in a footnote, citing two lower court cases.

As the First Circuit realized, however, the issue was complicated by a line of authority headed by *Grupo Dataflux* which reaffirmed the time-of-filing rule. It ruled that the lower courts had stretched the meaning of *Grupo Dataflux*, a diversity case. It is black letter law that diversity jurisdiction requires complete diversity of citizenship, and that citizenship is determined as of the date of commencement of an action. However, according to the First Circuit, the time-of-filing rule was inapposite in this case where the plaintiffs amended a complaint asserting federal question jurisdiction. The First Circuit suggested that the letter and spirit of the time-of-filing rule apply most obviously in diversity cases, where there are heightened concerns about forum-shopping and strategic forum selection behavior. It then claimed that courts have not imported the time-of-filing rule into the federal question realm.

Comment. It is not at all clear that the First Circuit is correct that the time-of-filing rule has no relevance. The Supreme Court has uttered all kinds of pronouncements about jurisdiction when it exists; when it doesn't; what the meaning of jurisdiction is; whether and when jurisdictional defects can be cured and when not. A review of these cases does not support the idea that there are distinctions between diversity and federal question cases. It may well be that if *ConnectU* ends up being reviewed by the Supreme Court that it would affirm the First Circuit, however. The Court could, for example, implicitly agree with the forum shopping rationale advanced by the First Circuit by citing how Congress has always intended that diversity jurisdiction be limited.

The Importance of Amendment as of Right. The First Circuit's next explanation is on firmer footing. There is no authority for invoking the time-of-filing rule to bar a plaintiff from switching jurisdictional horses before any jurisdictional issue has been raised. The defendants argued that even if the time-of-filing rule does not apply, an amended complaint cannot relate back to an earlier pleading over which the court had no jurisdiction. However, [e]ven if that were so a matter on which we take no view the argument mixes plums with pomegranates. Rule 15(c)'s language about the relation back of amendments has no bearing here. The amended complaint did not purport to "cure" a jurisdictional defect by Rule 15(c)'s relation back mechanism. Rather, it replaced the original complaint at a point when the district court's jurisdiction had not yet been questioned. Moreover, this was not a case of a court exercising hypothetical jurisdiction [see *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)]. Indeed, as an initial matter, courts sometimes may constitutionally exercise jurisdiction over a case even though it does not secure solid jurisdictional footing until after the case has been brought [see, e.g., *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 73, 117 S. Ct. 467, 136 L. Ed. 2d 437 (1996) (curing wrongful exercise of removal jurisdiction); *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 837, 109 S. Ct. 2218, 104 L. Ed. 2d 893 (1989) (dropping party to cure diversity defect)].

More importantly, amendments as of right under Rule 15(a) operate "as a matter of course," and do not require a judicial imprimatur. Seen in this light, Rule 15(a)'s allowance of amendments as of right does not ask a court to make an end run around the requirement that jurisdiction be established as a threshold matter. The Rule simply creates a roadmap; where the time-of-filing rule does not obtain, it directs an inquiring court to evaluate an action (including its jurisdictional predicate) by reference to the amended complaint instead of the original complaint.

Comment. Judge Selyas' opinion must be read for at least two reasons. First of all, in this case involving all kinds of arcania, he employs an incredible array of interesting and unusual words. More importantly for most readers of this Commentary, he reminds us of the importance of paying attention. It is unclear whether the plaintiff was concerned about the jurisdictional basis before it filed the amended complaint. But, any plaintiff who wants to be in federal court who knows there may be some intricate diversity issue can cite this case if the plaintiff manages to cure whatever issues there is by filing an amended complaint as of right. This procedure is little known to most practitioners but can be put to good use in many contexts.

References. 3 Moore's Federal Practice (3d Ed.) § 15.17[3]; 15 Moore's Federal Practice (3d Ed.) § 102.16.

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Vairo on Katrina Canal Litigation Breaches

2008 Emerging Issues 2362

Vairo on Katrina Canal Litigation Breaches

By Georgene Vairo

June 10, 2008

SUMMARY: May a defendant remove under the Class Action Fairness Act if one of the plaintiffs is a state? In *In re Katrina Canal Litigation Breaches*, the Fifth Circuit addresses this question of first impression in the federal appellate courts. This commentary, by Moores Federal Practice Editorial Board member Georgene Vairo, discusses the opinions practical significance.

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ARTICLE: *In re Katrina Canal Litigation Breaches*, F.3d , 2008 U.S. App. LEXIS 7933 (5th Cir. Apr. 11, 2008) involves an issue of first impression under the Class Action Fairness Act (CAFA): May a defendant remove under CAFA if the plaintiff is a state? This is a significant opinion because general litigation on behalf of state citizens by state attorneys general has become increasingly important. The Fifth Circuit held that the State of Louisiana was not entitled to remand of a class action suit, which had been removed from state court based on the minimal diversity requirement of the Class Action Fairness Act, because the class of citizen plaintiffs was not entitled to any immunity that might otherwise protect the state from removal.

Facts and Procedural Background. The case is one of many spawned by Hurricane Katrina. Louisiana enacted the Road Home Program. In exchange for a partial assignment of the homeowners' claims against their insurers, the State of Louisiana advanced money to Louisiana homeowners to reconstruct homes damaged by Hurricanes Rita and Katrina. As the partial assignee of these claims, the State of Louisiana sued over 200 insurance companies for breach of contract in Louisiana state court. The State added a class of Louisiana citizens who had applied for funds from the program as plaintiffs. The defendants removed the case to federal court on the ground of diversity under the Class Action Fairness Act (CAFA) (28 U.S.C. §§ 1332(d)(2), 1453(b)) as well as under the Multiparty Multiforum Trial Jurisdiction Act (MMTJA) (28 U.S.C. §§ 1369, 1441(e)(1)(A)).

Louisiana argued that (1) CAFA did not apply; (2) even if CAFA applied by its terms, CAFA could not abrogate sovereign immunity from federal process, or at least Congress did not clearly do so in CAFA; and (3) MMTJA did not apply by its own terms. The district court denied Louisiana's motion to remand, and the Fifth Circuit affirmed. The courts dealt only with removal under CAFA.

Class of Citizen Plaintiffs Satisfied CAFA's Diversity Requirement. The Fifth Circuit agreed with Louisiana

that a state is not a citizen for diversity purposes, even under CAFA. However, Louisiana sought relief not only for itself, but also for the class of citizens joined as plaintiffs. This class of citizens satisfied the minimal diversity rules of CAFA, which require only that any member of a class of plaintiffs is a citizen of a State different from any defendant [see 28 U.S.C. § 1332(d)(2)]. Thus, the Fifth Circuit rejected Louisiana's argument that CAFA did not apply. CAFA defines class action as any civil action filed under *rule 23 of the Federal Rules of Civil Procedure* or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action [28 U.S.C. § 1332(d)(1)(B)]. Louisiana Code of Civil Procedure, Article 591, under which the state attorney general brought this suit, was such a statute [see La. Code Civ. Proc. Art. 591(A)].

The States argument that it should not be subject to CAFA jurisdiction was not without force. The United States Supreme Court has held that a state is not a person in several contexts [see *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 658, 666-667, 99 S. Ct. 2529, 61 L. Ed. 2d 153 (1979) (citing (*United States v. Cooper Corp.*, 312 U.S. 600, 604-605, 61 S. Ct. 742, 85 L. Ed. 1071 (1941)) (holding that under 25 U.S.C. § 194, applying to land disputes between a tribe and a "white person," a state was not a person but observing that "[t]here is nevertheless "no hard and fast rule of exclusion," . . . and much depends on the context, the subject matter, the legislative history, and executive interpretation")); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989) (finding that a state was not a "person" as defined by § 1983 because reading the term "person" to include "state" under the statutory language would "be a decidedly awkward way of expressing an intent to subject the States to liability")]. In essence, however, the Fifth Circuit found that it was irrelevant that the state might not be considered a person under CAFA because the statute only requires that the action be brought under Rule 23 or a state statute that *authorizes* class actions to be brought by a person. Louisiana's Article 591(A) is such a statute, as it permits "members of a class" to "sue or be sued as representative parties" [La. Code Civ. Proc. Art. 591(A)]. Congress considered and rejected an amendment that would have exempted class actions filed by an attorney general from removal under CAFA. Even CAFA's use of the term "citizen" did not bar its application. The statute refers to the citizenship of any class member and any defendant. Accordingly, in expanding federal jurisdiction over certain class actions filed in state court, CAFA eliminated the rule that citizenship of the named representative is controlling.

The court also rejected Louisianas argument that it was the real party in interest and as a state, it was not a citizen for purposes of diversity jurisdiction. The court agreed that a state is not a citizen under the diversity statutes, including CAFA. But in this case, Louisiana sought relief for both the State and the citizens as "recipients" of insurance. Accordingly, as partial assignees and assignors, both the State and the citizens were likely real parties in interest. CAFA only requires minimal diversity. Thus, CAFA supplies federal jurisdiction and a path to removal unless state sovereignty turns away its exercise.

Comment. The obvious practice pointer for state attorneys general here is that if they want to stay out of federal court, they ought not join a class of state citizens. The line of Supreme Court precedent suggesting that a state is not a person or a citizen would likely be controlling if the State of Louisiana had not amended its complaint. Before CAFA was enacted, the question whether a state plaintiff suing defendants over whom it has regulatory authority in state court under its own state laws may be removed to federal court on diversity grounds would not arise. The rule that a state is not a person for diversity purposes and the requirement of complete diversity always precluded the removal of a state's action on the ground of diversity. CAFA, with its minimal diversity requirements, however, pushes the question forward, because diversity jurisdiction may be based on minimal diversity, i.e., the citizenship of plaintiffs other than the state.

State Sovereignty Considerations The State. The Fifth Circuit noted that the case law and the debates over Article III when the Constitution was drafted all focused on the importance of protecting states as defendants, not as plaintiffs. Ultimately, however, the court concluded that it did not need to decide whether plaintiff states are entitled to protection from removal. Instead, the court based its decision on the narrower issue of whether any state immunity from removal extends to the class of private citizens.

State Immunity Inapplicable to Class of Citizens. For purposes of this appeal, the Fifth Circuit accepted that

states enjoy some measure of protection from removal. However, the court held that any such protection did not extend to the class of private citizens joined as plaintiffs. Thus, the Fifth Circuit affirmed, determining that the district court properly denied Louisiana's motion to remand the entire case to state court.

Comment. Although providing a federal forum is the goal of removal, the effect of removal is to deprive the state court of an action properly within its jurisdiction, which raises federalism concerns. There are a number of Supreme Court cases discussing states and removal [see 16 Moors Federal Practice (3d ed.) § 107.03] that the Fifth Circuit did not address. These cases are not directly on point but do provide the backdrop for understanding the Fifth Circuit's cautious approach. For example, under Eleventh Amendment jurisprudence, if a state has consented to suit in its own courts, but not in federal courts, any action brought against the state must be litigated in the state court and may not be removed to federal court under the general removal statute [see generally 17A Moors Federal Practice (3d ed.) Ch. 123, *Access to Courts: Eleventh Amendment and State Sovereign Immunity*]. However, in *Lapides v. Board of Regents*, 535 U.S. 613, 618-624, 122 S. Ct. 1640, 152 L. Ed. 2d 806 (2002), the Supreme Court held that if the state itself removes the case, the state's Eleventh Amendment immunity is waived. This ruling is in line with Supreme Court precedent holding that a state's voluntary appearance in federal court amounts to a waiver of its Eleventh Amendment immunity.

Although *Lapides* involved the state as voluntary federal court plaintiff, under the Supreme Court's decision in *Wisconsin Department of Corrections v. Schacht* [see *Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, 397-398, 118 S. Ct. 2047, 141 L. Ed. 2d 364 (1998)], a case against a state defendant and state officials is removable. The fact that the claim against the state or state entity may not be removable on Eleventh Amendment grounds does not mean that the claims against the individuals are not removable. Applying this analysis to the Fifth Circuit case, it would be the claims of the class members that provide federal jurisdiction, making the case removable under the converse of the argument in *Schacht*.

Possible Partial Remand. In the lower court, the plaintiffs had raised the possibility of splitting the action in two, leaving the plaintiff class to pursue the class action in federal court, and ordering a remand of the States portion of the case to state court. There also was a suggestion of then staying the federal case to await the decision of the Louisiana courts. The district court considered this approach but decided to deny the remand motion instead. The Fifth Circuit discussed the approach at the end of its opinion when it decided to remand the case.

Comment. Clearly the Fifth Circuit was mindful of two important principles. On the one hand, it tried to avoid stepping on the toes of the district court by making plain that it wished that its observations would be viewed against the backdrop of the settled power of the district courts. It complimented that district court as an able manager of this complex litigation. On the other hand, the Fifth Circuit sent a strong signal that its caution about the state sovereignty issues raised by the case should prompt the district court to explore anew the plaintiffs proposed approach. In this day and age of the New Federalism, the Fifth Circuit provides an appropriate balance.

References. 5 Moore's Federal Practice (3d Ed.) § 23.63A[1]; 15 Moore's Federal Practice (3d Ed.) § 102.26[1][b][i], [2]; 16 Moore's Federal Practice (3d Ed.) §§ 107.03; 107.14[2][c][vii].

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Rabiej on Preserving & Searching Stored Information on a Computer

2008 Emerging Issues 2320

Rabiej on Preserving & Searching Stored Information on a Computer

By John K. Rabiej

May 27, 2008

SUMMARY: Data in RAM is impermanent and may exist for less than a second. The court in *Columbia Pictures Indus. v. Bunnell* ordered the defendant to preserve certain data in RAM, which was crucial to the plaintiff's copyright infringement claims. John Rabiej discusses how the court's ruling should be limited to the peculiar facts in the case and should not be viewed as setting a general precedent, requiring a party to preserve or search data in RAM.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: In *Columbia Pictures Industries v. Bunnell*, 2007 U.S. Dist. LEXIS 46364 (C.D. Cal. May 29, 2007), a magistrate judge ordered the defendant to preserve certain electronically stored information (ESI) that existed only for a limited time in its web server's Random Access Memory (RAM). The data was critical to proving the plaintiff's copyright infringement claims. The magistrate judge's ruling, upheld on appeal by the district court, created an immediate firestorm of criticism (245 F.R.D. 443 (C.D. Cal. 2007)). Some found the ruling naive, while others scathingly attacked the ruling for displaying a profound ignorance of how computers work and establishing an unworkable precedent, which would require parties to retain all RAM data. Was the court's ruling so off-base?

Facts. The defendant operated a web site that provided a search engine that could locate, upload, and download files, including digital movies, stored in the computers of persons who were accessing the web server at any single point in time. The web site supported a peer-to-peer network, providing an opportunity for persons to swap files, including movies, without incurring an expense. Motion picture studios, which were suffering major revenue losses from copyright infringements, had successfully taken legal action to suspend the operations of similar web sites in the past. The software programs used in these other web sites contained a logging function that automatically retained certain data in a file, including the IP address of the user's computer and the name of the file downloaded. As soon as this identifying data was produced in discovery during litigation, the game was effectively over and the web site was ordered shut down (see *Interscope Records v. DOES 1-14*, 2007 U.S. Dist. LEXIS 73627 (D. Kan. Oct. 1, 2007) (ex parte expedited discovery request for server log data retained by defendant who maintained software program that captured and downloaded the data from information held in RAM); see also *Warner Bros. Records Inc. v. Does 1-6*, 2007 U.S. Dist. LEXIS 86431 (D.D.C. Nov. 26, 2007) (request for expedited discovery under Rule 45 for server log data retained by third party internet service provider)).

Bunnell operated a similar web site, but unlike the others, Bunnell turned off and deactivated the web server's

program logging function. Absent the logging data, there was no way to show whether movies were being downloaded and no way to prove a copyright infringement claim. Bunnell argued that there was no preservation obligation to create new data by activating the logging function because the data existed solely in RAM and it was too ephemeral to fall within the meaning of electronically stored information as defined under *Rule 34 of the Federal Rules of Civil Procedure*. Under Bunnell's theory, RAM data could not be realistically stored because it was dynamic, possibly existing for less than a second. If the data could not be stored, Bunnell contended that Rule 34 would not apply, and he should be allowed to continue to operate the web site. Bunnell also contended that a court's finding that RAM data was discoverable would impose intolerable burdens and costs on parties in all future litigation to preserve and search such data, a virtually impossible task.

The magistrate judge declined Bunnell's invitation, reasoning that the definition of ESI under Rule 34 was very broad and included RAM. The magistrate judge emphasized the rulings limited effect, requiring Bunnell to preserve only the logging data. The ruling did not require Bunnell to preserve any movie files that might be downloaded during the web site's operations. The magistrate judge dismissed the defendant's privacy, First Amendment, and other claims and defenses. But the magistrate judge declined to sanction Bunnell for failing to preserve RAM data lost before the entry of the court's order because the issues were novel and the plaintiff's request did not specifically identify the RAM data. Faced with the magistrate judge's ruling as approved by the district court, Bunnell suspended operations in the United States. The court eventually entered a default judgment against the defendant for intentional destruction of incriminating evidence not involving RAM data (2007 U.S. Dist. LEXIS 96360 (C.D. Cal. Dec. 13, 2007)).

What Is RAM? RAM is defined as the computers primary storage unit for instructions and data, representing the computer's memory. It is very fast and impermanent. It is designed to promote a computer's efficiency. The computer's memory is activated and operates whenever a software program is running. As soon as the operation of the program ends, all the data that was generated, reviewed, or used while running the program is lost unless the program contains a storage function, which transfers the RAM data to the computer's hard disk drive (see 7 Moores Federal Practice, § 37A.05[6]).

How does RAM relate to the *Bunnell* case? RAM data existed during the time a user's computer was interfacing with Bunnells web server and downloading data. The web site was accessed by many outside users, and RAM data was being generated as soon as the web server connected with the user's computer and terminated when the connection ceased. In addition, information in RAM was being updated constantly when memory buffers were cleared or refreshed many times per second. Thus, certain RAM data may have been in existence for less than a second. When the connection between the user's computer and the web server was cut, all RAM data was irretrievably lost including logging data and any movies actually downloaded.

Ruling's Implications. Setting to one side the magistrate judges legal analysis, the courts decision was clearly reasonable and reflected a common-sense resolution. Activating the web server's logging function was not burdensome nor was storing the logging data. A contrary ruling would have offered a free pass to anyone flouting the copyright infringement laws.

So why the firestorm? The court's ruling was challenged not for its common-sense judgment, but for its analytical and legal justification and its potential precedential effect. Critics argued that the ruling greatly expanded the definition of reasonably accessible under Rule 26 to include temporary stored data that is not kept in the usual course of business.

If ESI as defined under Rule 34 includes RAM data, critics argued that parties would have an intolerable burden to preserve and search all such data in all cases. RAM data is dynamic and ephemeral and as shown in the *Bunnell* case it can be voluminous, especially if it includes movie images, which require enormous storage space. Storing and retrieving all RAM data would be a herculean task. For example, Bunnell claimed that capturing RAM data would consume 30-40 gigabytes of storage space, vastly exceeding the web server's capacity.

RAM Data Is ESI. RAM data, though dynamic, is clearly ESI as defined under Rule 34 (see 7 Moores Federal

Practice, § 37A.05[6]). The Committee Note to Rule 34 and the background information discussing the 2006 amendments to Rule 34 make it abundantly clear that the rule was intended to apply to all information that was electronic in nature, which would apply to RAM data. In crafting Rule 34, the Advisory Committee on Civil Rules deliberately fashioned a broad definition of ESI broad enough to capture information stored in exotic mediums developed under new technologies, including chemical and biologic, which would store data in organic matter (see minutes of April 14-15, 2005, Civil Rules Committee meeting at <www.uscourts.gov/rules/Minutes/CRAC0405.pdf>). Despite this broad definition, the defendant contended that the fleeting nature of RAM data was inconsistent with the notion of stored data. There is no time duration limit placed on ESI in Rule 34, nor was any intended. The Committee Note to Rule 34 expressly recognizes that ESI may be temporary when it observes that ESI may exist in dynamic databases.

The magistrate judge was certainly correct in her ruling that RAM data is ESI. Once the Rule 34 issue was lost, Bunnell could only argue that the cost and burden associated in producing the RAM data outweighed its benefits under the Rule 26(b)(2)(C) proportionality test. But the plaintiff eliminated this option by significantly narrowing the scope of the discovery request.

Search Obligations. What are a party's search duties regarding RAM data?

A party is not obligated to search electronically stored information from sources that the party identifies as not reasonably accessible (*Fed. R. Civ. P. 26(b)(2)(B)*). *Zubulake* and its progeny teach us that the medium on which information is stored usually determines whether the information is accessible (see 7 Moors Federal Practice, § 37A.36[3]). For example, information on an active database ordinarily is accessible, while information stored on a backup tape ordinarily is inaccessible. RAM data in the *Bunnell* case was run on an active database. But as acknowledged in *Zubulake*, though the storage medium is an important factor, the decisive factor distinguishing accessible from inaccessible information is the cost and burden in locating and retrieving it (see 7 Moors Federal Practice, § 37A.35[1][a]).

The critics of the court's ruling are certainly correct that the costs and burdens associated with searching all data in RAM would be enormous in most cases, because the database is dynamic and information is constantly generated and lost. Attempting to capture and retain all such data would require special software programs and large storage capacity. Despite these concerns, the court in *Bunnell* ruled that RAM data was reasonably accessible.

The court's finding that RAM data is reasonably accessible is explained by the plaintiff's adjustments in its discovery request. Rule 26 provides that a requesting party may file a motion to compel production of information, which the responding party asserts is not reasonably accessible. A court may order that such information be produced, however, if the requesting party makes a good cause showing that the likely benefit of the requested information outweighs the costs and burden in retrieving it under the Rule 26(b)(2)(C) proportionality test. Had the plaintiff filed such a motion, the case would have been decided under a standard Rule 26 proportionality analysis like hundreds of other similar cases (see 7 Moors Federal Practice, § 37A.33 and 7 Moors Federal Practice, § 37A.34). Instead, the plaintiff properly followed the guidance given in the Committee Note to Rule 26 before filing the motion and discussed with Bunnell the burdens and costs of accessing and retrieving the information, the needs that may establish good cause for requiring all or part of the requested discovery even if the information sought is not reasonably accessible, and conditions on obtaining and producing the information that may be appropriate. It became clear to the plaintiff that all the data in the web site server's RAM was not material, much of it containing digital movies that were not essential to its case. In accordance with the guidance in the Committee Note, the plaintiff set conditions on obtaining and producing the information, which significantly limited production costs and burden. The plaintiff targeted only the logging data in RAM, which could be easily stored and retrieved. By narrowing the scope of the requested information, the plaintiff simplified the issue for the court.

The plaintiff narrowed its discovery request, asking the court to determine whether only the defendant's logging data in RAM was reasonably accessible. Having framed the issue in this way, the burden shifted to the defendant to

show that the logging data was not reasonably accessible because of undue burden or cost (see 7 Moors Federal Practice, § 37A.35[1][c]). Bunnell could not meet this burden. In fact, activating the logging function on the defendant's web server entailed little burden. Requiring the defendant to store only the logging data and prospectively enforcing the order set reasonable limits. Instead of 30-40 gigabytes of RAM data that the defendant initially claimed would be needed to store all the RAM data, the plaintiff was seeking data that only required storage of one-hundredth of the volume or 300-400 megabytes.

It is important to note that the court did not hold that all RAM data was accessible. It held that only the small subset of RAM data containing the logging data was relevant and accessible because the cost and burden in retrieving the specified data was relatively modest. There was no need to engage the proportionality test under Rule 26(b)(2)(C), because the defendant failed to meet its initial burden, demonstrating undue production costs and burden. The court highlighted the limited scope of its ruling: In response to amici's concerns over the potentially devastating impact of this decision on the record-keeping obligations of businesses and individuals, this Court notes that the decision does not impose an additional burden on any website operator or party outside the case. It simply requires that the defendants in this case, as part of this litigation, after the issuance of a court order, and following a careful evaluation of the burden to these defendants of preserving and producing the specific information requested in light of its relevance and lack of other available means to obtain it, begin preserving and subsequently produce a particular subset of the data in RAM under defendant's control. (245 F.R.D. 443, 448.)

Preservation Duty. The court did not sanction Bunnell for failing to preserve the RAM logging data. Rule 37(e) provides a safe harbor against sanctions if ESI is lost as a result of the good faith operation of computer equipment. The rule is intended to allow routine computer operations, which are designed to make the computer efficient, e.g., deletion of e-mails after a period of time to prevent overloading the computer's storage capacity, debilitating its efficiency. The rule does not permit a party, however, to exploit the safe harbor and allow destruction of ESI if the party knows or should know that the ESI is relevant and is not available from another source. The Committee Note to Rule 37(e) requires a party to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation.

The magistrate judge did not sanction Bunnell for failing to preserve the ESI logging data before the entry of the court order because the plaintiff had not explicitly asked for it. The courts justification is not persuasive. The plaintiff expressly asked for the logging data in its preservation notice. [P]laintiffs' counsel wrote to defense counsel "to formally remind [him] of [his] clients' obligation to preserve all potentially discoverable evidence related to the litigation" including "[a]ll logs, including without limitation web server access logs"... A party requesting relevant information is not obligated, nor should it be, to identify the precise location of the requested information. Bunnell understood where the logging data was located. He had the responsibility to place a litigation hold to retain the information once the litigation commenced. Bunnell understood that the continued deactivation of the web server's logging function prevented the storage of the information. Bunnell also understood that the logging data was relevant, indeed critical, to the plaintiff's claim and not available from other sources.

The magistrate judge was generous in not imposing sanctions. Most likely, the plaintiff was more interested in immediately suspending the defendant's operations and establishing a precedent against similar future operations. In addition, though evidence of potential copyright infringement was lost, the ongoing operation of the web site provided similar evidence that could substantiate the plaintiffs copyright infringement claims. Having satisfied the plaintiff's main interests without undermining the plaintiffs ability to prove its case and acknowledging the novel status of the case, the magistrate judge's decision not to sanction Bunnell can hardly be criticized.

Consequences. The magistrate judge's order was reasonable and consistent with Rule 26 and Rule 34. The case provides a good blueprint for parties to follow in future cases in which RAM data may be relevant. The court took special pains to limit the effect of its ruling to the instant facts in *Bunnell*. In most cases, relevant ESI will be stored in a computer's hard disk drive. Only in exceptional cases, like *Bunnell*, will RAM information be relevant and unavailable from another source. Though the federal discovery rules do not expressly refer to RAM ESI data, the rules' general

provisions provide guidance on how to address such data. In most cases, a party need not search RAM data because it is not reasonably accessible. Only in very peculiar circumstances will a party be obligated to take steps to store RAM data when the party knows or should know that the data is relevant, not available from other sources, and its benefit outweighs the costs and burdens in producing it. In such presumably rare cases, the cost-benefit analysis under Rule 26(b)(2)(C) will determine whether all or only a limited segment of the ESI in the RAM is subject to preservation and discovery (*see* 7 Moores Federal Practice, § 37A.05[6]).

The lesson for the practitioner is to identify early in the case whether RAM data is relevant and not available from other sources, and, if so, to narrow the scope of the requested discovery within reasonable limits.

ABOUT THE AUTHOR(S):

John K. Rabiej is the chief of the Rules Committee Support Office of the Administrative Office of the United States Courts. His office staffs the Advisory Committees of Appellate, Bankruptcy, Civil, Criminal, and Evidence Rules and the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. He has served as chief since 1992. As chief of the office he works directly with the rules committees' chairs and reporters on drafts of proposed rule amendments and prepares reports to the Judicial Conference and Congress on the amendments. He is a graduate of the University of Illinois College of Law. He was inducted into the American Law Institute in May 2004.

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Arthur Best on United States v. Ary

2008 Emerging Issues 2324

Arthur Best on United States v. Ary, 518 F.3d 775 (10th Cir. 2008)

By Arthur Best

May 23, 2008

SUMMARY: Is work product privilege waived if six weeks pass before counsel asserts the privilege? Arthur Best, Professor of Law at the University of Denver Sturm College of Law, comments on *United States v. Ary*, 518 F.3d 775 (10th Cir. 2008).

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Overview

The defendant was convicted of numerous counts of fraud, theft and money laundering in connection with the sale of space artifacts that had come into his possession while he was President and Chief Executive Officer of the Kansas Cosmosphere and Space Museum. Defense counsel reviewed discovery materials and found that material seized by the government that was possibly protected by attorney-client or work product privileges was being used in the defendants prosecution. Because counsel waited six weeks to assert privilege claims about these materials, the claims were waived. The case also considers whether inventory records can be admitted under the business records hearsay exception if they are based on data in invoices that were prepared by individuals not employed by the enterprise that kept the inventory records.

Summary of the case

The defendant learned he was under investigation in connection with artifacts missing from the Kansas Cosmosphere and Space Museum where he had been President and Chief Executive Officer for many years. He obtained legal counsel and prepared notes and summaries of his involvement with sales of artifacts, on instructions from his lawyer.

A search warrant was executed at the defendants home. The defendants lawyer then wrote to the Assistant United States Attorney (AUSA) working on the case, claiming that computer and other files containing privileged communications had been seized. In response, the AUSA stated that a taint team had identified privileged material and insured that it would not be reviewed or examined as part of the investigation of the defendant. More than one year

later, the defendants lawyer went to the United States Attorneys office to review Rule 16 discovery materials. They included what the court called a black box containing print-outs from computer files with index titles by the defendant such as court case and [Attorney] Information. About six weeks later, the attorney moved to suppress these materials on grounds of privilege. The trial judge denied that motion, on the basis that because the attorney failed to raise the issue when he first saw those materials, he waived the protection of the attorney-client and work product privileges.

At trial, certain Cosmosphere computer records were introduced to show that the United States or the museum had been the owner of particular items. The prosecution showed that these records were maintained in the usual course of the museums operations. Some of their data was derived from invoices prepared by individuals not employed by the museum. The defendant objected to their admission on hearsay grounds, arguing that this double hearsay was outside the coverage of the business records exception. The trial judge admitted the evidence.

The defendant was convicted. On appeal, he claimed that the trial judge had erred in connection with the privilege and hearsay rulings.

Pertinent Legal Principles

Attorney-Client Privilege. The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. It protects communications between a client and the clients attorney from use in litigation. It is recognized only when "the communication between the client and the attorney is made in confidence of the relationship and under circumstances from which it may reasonably be assumed that the communication will remain in confidence." *In re Qwest Communs. Int'l*, 450 F.3d 1179, 1185 (10th Cir. 2006) (quotation omitted). Confidentiality is critical to the privilege, so the privilege is lost if the holder reveals a confidential communication to a third party. If a communication is revealed involuntarily, waiver may or may not be the consequence, depending on overall circumstances.

Work-Product Privilege. The work-product doctrine was recognized by the Supreme Court in *Hickman v. Taylor*, 329 U.S. 495, 509-11, 67 S. Ct. 385, 91 L. Ed. 451 (1947). It protects against disclosure of the mental processes of an attorney in analyzing and preparing a client's case. The doctrine is codified in *Fed. R. Civ. P. 26(b)(3)*. It covers material assembled by an attorney in preparation for impending litigation, and materials prepared by an attorney's agent, if that agent acts at the attorney's direction in creating the documents. The voluntary production of work-product material during discovery may waive a work-product objection. *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 668-69 (10th Cir. 2006).

Involuntary Disclosure and Loss of Attorney-Client or Work Product Privileges. The attorney-client privilege and work-product doctrine are distinct, but courts have treated them identically when considering involuntary disclosure. *See In re Grand Jury (Impounded)*, 138 F.3d 978, 981 (3d Cir. 1998) (applying attorney-client waiver case law to a work-product issue). Prior to this case, the Tenth Circuit had not decided whether protection is lost when material has been involuntarily disclosed, but other courts have treated this question by focusing on three aspects: (1) the specificity with which the defendant identifies the material; (2) the expediency by which the defendant informs the government that it seized protected material; and (3) the expediency by which the defendant seeks judicial action to enforce the protection.

For analysis of privilege waiver in the criminal context, see 1 -16 Courtroom Criminal Evidence § 1611. For related discussion of loss of privilege through accidental disclosure in the civil context, see 30-809 Moore's Federal Practice -- Civil § 809.03.

Business Records Hearsay Exception. Rule 803(6) of the Federal Rules of Evidence allows admission of business records if they are "kept in the course of regularly conducted business activity, and if it was the regular practice of that business activity to make the . . . record." To satisfy Rule 803(6) the records must (1) have been prepared in the normal course of business; (2) have been made at or near the time of the events recorded; and (3) be based on the personal

knowledge of the entrant or of a person who had a business duty to transmit the information to the entrant. Circumstances must indicate that the sources, methods and circumstances by which the record was made were trustworthy. The proponent of the document must also lay this foundation for its admission.

For discussion of the hearsay exception for records of regularly conducted activity (business records), see 5-803 Weinstein's Federal Evidence § 803.08

The Tenth Circuits Decision

Waiver. The court adopted the three-factor analysis other courts have applied to consider whether involuntary disclosure of privileged material constitutes a waiver of the privilege. The court treated attorney-client and work product privileges identically for this purpose.

Identifying the Privileged Material. The first factor the court adopted is the specificity with which the defendant identifies the material. This factor cut against the defendant in this case because the defendant never specified the particular black box contents to which privilege claims might apply.

Expediency in Notifying Government and Seeking Enforcement of Privilege. The second factor is the expediency with which the defendant notifies the government of the privilege issues, and the third factor is the expediency with which the defendant seeks judicial action to enforce the protection. The Court noted:

When a party delays in asserting protection, however, the adverse party is free to continue to use the material, thereby negating its confidential character. *See In re Grand Jury (Impounded)*, 138 F.3d at 982. The government's investigation may irreparably rely on the protected information, thereby tainting the investigation. *Id.* By failing to minimize the damage caused by the breach of confidentiality, the defendant is prohibited from using the privilege or doctrine to prohibit the government's use of the information. *See de la Jara*, 973 F.2d at 750.

Thus, in the case of an involuntary disclosure, the party asserting the work-product doctrine or attorney-client privilege must pursue all reasonable means to preserve the confidentiality of the material.

United States v. Ary, 518 F.3d 775, 784 (10th Cir. 2008).

In this case, the defendant did not inform the government of the privilege issues and the defendant waited more than six weeks after discovering the problem to seek judicial action. This delay, the Tenth Circuit concluded, was a failure to assert protection in a timely fashion. *United States v. Ary*, 518 F.3d 775, 785 (10th Cir. 2008).

Counsel should note the Courts definition of timely and understand that seeking a remedy within days of discovering an involuntary disclosure is the wisest course. Also, unlike the defendants actions in this case, communicating to the government immediately upon discovering a privilege problem is the surest way to preserve the privilege rights.

Business Records Exception to the Hearsay Exclusionary Rule. The court recognized that there was a double hearsay issue with regard to the inventory records. Testimony showed that some of the computerized entries were derived from documents prepared by individuals outside the employ of the entity that made the records. The Tenth Circuit stated that because the outside documents were invoices, those who provided them were under a duty to provide accurate information.

Comments

This case is one of first impression in the Tenth Circuit. In adopting the three-factor test for determining the consequences of involuntary disclosure of privileged material, the Court made it clear that immediate remedial efforts must be made once a disclosure is identified by a defendant. The delay in this case, described as involving six weeks, was so long that it precluded application of privilege. This application of the three-part test puts great responsibility on the victims of improper searches and seizures, and is consistent with some courts general disinclination to give broad application to privileges.

With regard to the business records exception, the Courts analysis can fairly be characterized as pro-admissibility. Ordinarily, the business record exception is justified by pointing to the internal needs of organizations to maintain accurate records and to the likelihood that errors in records will come to light during the normal operation of an enterprise. To apply those ideas to a third-party who submits a bill to an organization may represent an extension of the policies that support the exception. It is certainly consistent with a common-sense approach to hearsay and with the overall pro-admissibility orientation of the Federal Rules of Evidence.

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Arthur Best is a Professor of Law at the University of Denver Sturm College of Law. Prior to entering teaching, he served in the general counsels office of the Federal Communications Commission, was a litigator for the Federal Trade Commission, was a project director for Ralph Naders Center for Study of Responsive Law, and was a Deputy Commissioner of the New York City Department of Consumer Affairs. His books include the widely-used evidence text *Evidence: Examples and Explanations*, the semi-annual Supplement volumes to *Wigmore on Evidence*, and *Basic Tort Law* (co-authored), a popular law school casebook.

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Arthur Best on Flood v. Mercantile Adjustment Bureau

2008 Emerging Issues 2325

Arthur Best on Flood v. Mercantile Adjustment Bureau, LLC, 176 P.3d 769 (Colo. 2008)

By Arthur Best

May 23, 2008

SUMMARY: Does a letter sent by a debt collector to a debtor, suggesting the debtor contact the debt collector, violate the Colorado Fair Debt Collection Practices Act? Arthur Best, Professor of Law at the University of Denver Sturm College of Law, comments on the Colorado Supreme Courts decision in *Flood v. Mercantile Adjustment Bureau, LLC*, 176 P.3d 769 (Colo. 2008).

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Overview

The Colorado Fair Debt Collection Practices Act, C. R. S. 12-14-101 to 12-14-137, requires a debt collector to inform a debtor about his or her right to make a written demand that the collection agency verify the alleged debt. Also, it prohibits communications between a debt collector and third parties. In *Flood v. Mercantile Adjustment Bureau, LLC*, 176 P.3d 769 (Colo. 2008), a debt collector sent a letter to a debtor that included a telephone number and a suggestion that the debtor contact the debt collector, but communicated the verification right only in small print below the letters signature. The Court concluded that the letters reference to the verification right was not clear enough to satisfy the statute. The debt collection company used a third-party to provide automated production and mailing of its debt collection letters. This communication to third parties was de minimus and therefore did not violate the statutes confidentiality provision.

Summary of the Case

The defendant debt collection company used a third-party mailing service to send the plaintiff a letter that stated:

Your account with CITI FINANCIAL-TRANSOUTH has been listed with our office for collection. The balance due is \$ 5604.45. If you don't agree with the balance it is important that you contact our office to discuss this matter.

Please be advised that our client has authorized us to offer you substantial savings to settle this account. We will accept \$ 2522.00 if payment is received by 08-21-04. Contact our office for more information.

Respectfully,

J. Dial

Mercantile Adjustment Bureau, LLC

P.O. Box 9315A

Rochester, NY 14604

1-877-230-8414

There Will Be A \$ 20.00 Fee Added On All Returned Checks.

This Communication Is From A Debt Collector This Is An Attempt To Collect A Debt.

Any Information Obtained Will Be Used For That Purpose.

Unless you notify this office within 30 days after receiving this notice that you dispute the validity of the debt or any portion thereof, this office will assume the debt is valid. If you notify this office in writing within 30 days from receiving this notice, this office will: obtain verification of the debt or obtain a copy of a judgment and mail you a copy of such judgment or verification. If you request this office in writing within 30 days after receiving this notice, this office will provide you with the name and address of the original creditor, if different from the current creditor.

For more information about the colorado fair debt collection act visit [www. Ago. State. Co. Us/cab.htm](http://www.Ago.State.Co.Us/cab.htm).

The plaintiff sued the defendant under the Colorado Fair Debt Collection Practices Act, claiming that the communication did not include required information, was contradictory about her rights, and that the defendant had impermissibly communicated with a third party. She sought damages, costs, and attorneys fees. The defendant won at county court, and won an appeal to a district court. The Supreme Court granted certiorari.

Pertinent Legal Principles

Colorado Fair Debt Collection Practices Act, § 12-14-109. This section establishes requirements for a collection agency's communications with a debtor. It provides:

Validation of debts. (1) Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector or collection agency shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice with the disclosures specified in paragraphs (a) to (e) of this subsection (1). If such disclosures are placed on the back of the notice, the front of the notice shall contain a statement notifying consumers of that fact. Such disclosures shall state:

(a) The amount of the debt;

(b) The name of the creditor to whom the debt is owed;

(c) That, unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector or collection agency;

(d) That, if the consumer notifies the debt collector or collection agency in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector or collection agency will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector or collection agency;

(e) That upon the consumer's written request within the thirty-day period, the debt collector or collection agency will provide the consumer with the name and address of the original creditor, if different from the current creditor.

(2) If the consumer notifies the debt collector or collection agency in writing within the thirty-day period described in paragraph (c) of subsection (1) of this section that the debt, or any portion thereof, is disputed or that the consumer requests the name and address of the original creditor, the debt collector or collection agency shall cease collection of the debt, or any disputed portion thereof, until the debt collection or collection agency obtains verification of the debt or a copy of a judgment or the name and address of the original creditor and mails a copy of such verification or judgment or name and address of the original creditor to the consumer.

Colorado Fair Debt Collection Practices Act, § 12-14-105(2). This provision prohibits communications between a debt collector and third parties, with some exceptions. It is parallel to a federal provision that has been described as intended to protect a consumer's reputation and privacy, as well as to prevent loss of jobs resulting from a debt collector's communication with a consumer's employer concerning the collection of a debt." *West v. Costen*, 558 F. Supp. 564, 575 (W.D. Va. 1983) (citations omitted).

See Debtor-Creditor Law § 8.01 and *Banking Law* § 155.01 for overviews of the federal statute on which the Colorado statute is based.

Least Sophisticated Consumer Standard. In construing compliance with a consumer protection statute, courts often use a least sophisticated consumer standard, to determine the likely meaning of a communication to a consumer, or to determine if a communication to consumers is misleading. See *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993), where the court stated that The basic purpose of the least-sophisticated-consumer standard is to ensure that the [federal Fair Debt Collection Practices statute] protects all consumers, the gullible as well as the shrewd. This standard is consistent with the norms that courts have traditionally applied in consumer-protection law."

The Supreme Courts Decision

Majority, Concurring and Dissenting Opinions. This case resolved two issues the adequacy of the defendants disclosures and the legitimacy of the defendants use of a third-party mailing service. With regard to the disclosures, the court was split with four justices in the majority and three dissenting. With regard to the use of a mailing service, the court was unanimous.

Disclosure of Verification Right. The court held that the defendants letter failed to provide an adequate disclosure of the verification right, because it contained contradictions that could confuse an unsophisticated consumer about what was required in order to dispute the debt. It also noted that the disclosure of the need to contact the debt collector in writing was buried in the fine print appended to the bottom of the communication. *Flood v. Mercantile Adjustment Bureau, LLC*, 176 P.3d 769, 774 (Colo. 2008).

The court stated that the letter gives the impression that contacting the debt collector by phone is the only necessary means to dispute the debt and that there would be no deadline for doing so, when in fact the statute requires a consumer to make a written request to invoke the verification right.

Indicative of the courts application of the least sophisticated consumer standard is its analysis that because the letter used the expression respectfully above the signature, the letter conveyed the idea that its writer was dedicated to protecting all of the recipients rights. The court also noted that the name used below respectfully is fictitious, although it did not explicitly link that fact to its conclusion that the letters overall message failed to satisfy the statutory requirements.

Significantly, the court stated that the letter included a deadline for accepting its reduced payment offer, but that this deadline was longer than the deadline applicable to the consumers right to require verification.

Because of the use of fine print, the implication that a phone call was all that was required, and the communication of a deadline that was later than the statutory deadline for asserting rights, the court held that the letter violated the statute. It concluded, While the statute provides that the collection agency may make the required section 12-14-109 disclosures on the back of the notice if the front of the notice contains a statement notifying consumers of that fact, see § 12-14-109(1), the statute does not authorize the collection agency to couch, conceal, veil, contradict, or minimize the required disclosures so as to confuse or mislead the consumer into foregoing her rights. *Flood v. Mercantile Adjustment Bureau, LLC.*, 176 P.3d 769, 776 (Colo. 2008).

Third-party Communications. The plaintiff had claimed that the defendant violated C. R. S. section 12-14-105(2) by using a mailing service to prepare and mail its communications. The court affirmed the lower courts conclusion that this use of a third party was consistent with the statute. It reviewed a parallel federal statute that contains a nearly identical provision, 15 U.S.C. § 1692c(b) (2007). The purpose of that statute has been described as to protection of a consumer's reputation, privacy, and job security. See *West v. Costen*, 558 F. Supp. 564, 575 (W.D. Va. 1983). The court found that the defendants use of a service that was entirely automated and that relied on electronic submission of data from the defendant to the service did not entail the risk that a consumer would be coerced into paying a debt because of contacts with his or her employer, family, or other third parties. For that reason, it held that the challenged communications were de minimus and not a violation of the statute.

Comments

The majority opinion represents a pro-consumer analysis of the statutory requirements. This case was far from clear-cut. The required disclosures did appear in the communication. Use of the word respectfully may not convey to many people the meaning ascribed to it by the majority. And the majoritys critique of the letters use of a pseudonymous signature may not be well-grounded in the statute.

Nevertheless, this opinion is consistent with many consumer protection opinions that give a generous pro-consumer interpretation of consumer protections statute. Counsel should be aware that the statute provides for payment of attorneys fees as one way of encouraging enforcement of the statutory requirements.

Practice Tip. As is true in various instances of documents provided to lay people, providing the clearest and most straightforward disclosures increases the likelihood that the documents will be given effect or found to comply with statutory requirements.

ABOUT THE AUTHOR(S):

Arthur Best is a Professor of Law at the University of Denver Sturm College of Law. Prior to entering teaching, he served in the general counsels office of the Federal Communications Commission, was a litigator for the Federal Trade Commission, was a project director for Ralph Naders Center for Study of Responsive Law, and was a Deputy Commissioner of the New York City Department of Consumer Affairs. His books include the widely-used evidence text *Evidence: Examples and Explanations*, the semi-annual Supplement volumes to *Wigmore on Evidence*, and *Basic Tort Law* (co-authored), a popular law school casebook.

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O'Sullivan on Nelson v. Appleway Chevrolet

2008 Emerging Issues 2304

Kathleen M. O'Sullivan on Class Certification Under CR 23(b)(2) in *Nelson v. Appleway Chevrolet, Inc.*

By Kathleen M. O'Sullivan

May 15, 2008

SUMMARY: Kathleen O'Sullivan comments on *Nelson v. Appleway Chevrolet, Inc.*, in which the Washington Supreme Court evaluated the standard for certifying a class under Washington Civil Rule 23(b)(2), which provides for class certification when "final injunctive relief or corresponding declaratory relief with respect to the class as a whole" is an "appropriate" remedy.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Cite as: O'Sullivan, Kathleen M. Class Certification Under CR 23(b)(2) in *Nelson v. Appleway Chevrolet, Inc.*. LexisNexis Expert Commentary, (*Insert date you accessed the document online*).

Overview of Standards for Certifying a CR 23(b)(2) Class in Washington. In *Nelson v. Appleway Chevrolet, Inc.* [160 Wn.2d 173, 157 P.3d 847 (2007)], the Washington Supreme Court evaluated the standard for certifying a class under Washington Civil Rule 23(b)(2), which provides for class certification when "final injunctive relief or corresponding declaratory relief with respect to the class as a whole" is an "appropriate" remedy. In doing so, the Court said that it was not changing the CR 23(b)(2) standard it had previously adopted, but was simply enforcing the rule the Court announced in *Eriks v. Denver* [118 Wn.2d 451, 824 P.2d 1207 (1992)], that when the declaratory relief sought "merely forms the basis for monetary relief, a CR 23(b)(2) action is not appropriate" [*Eriks*, 118 Wn.2d at 466]. The Court insists in *Nelson* that certification under CR 23(b)(2) "is inappropriate if the claim relates 'exclusively or predominantly' to monetary damages," and is appropriate only if the monetary relief is "incidental" to the declaratory relief [*Nelson*, 160 Wn.2d at 189190].

That said, the outcome in the *Nelson* case is somewhat surprising given that (according to the dealership's appellate brief), the plaintiff class consisted of at least tens of thousands of class members (purchasers of automobiles) [*Nelson*, petitioners' brief at 48] who were seeking to collect from an automobile dealership the business and occupation (B&O) tax that the dealership had itemized and passed on to them. The Court's opinion never addresses the issue of the size of the class, and simply dismisses the dealer's argument that the plaintiff class seeks millions of dollars by observing that the named plaintiff sought only \$79.23, which "is not millions of dollars," and also dismisses the dealer's argument that the determination of class members' individual damages would not be a simple exercise [*Nelson*, 160 Wn.2d at 190]. For these reasons, the Court concludes that "Nelson's claim for monetary relief does not dominate his claim for declaratory relief" [*Nelson*, 160 Wn.2d at 190].

Procedural Stance of *Nelson v. Appleway Chevrolet, Inc.* Appleway Chevrolet, an automobile dealer, sold a used car to plaintiff Herbert Nelson. Nelson alleged that after the parties had negotiated a final price, Appleway added \$79.23 for Washington's B&O tax. Appleway disclosed the pass-through of the tax at four places in the sales contract. Nelson paid the tax under protest and then sued the dealership.

Nelson filed a class action seeking declaratory relief that the dealer's collection of B&O tax, and the sales tax on the B&O tax, was a violation of Washington's B&O tax statute. He also sought injunctive relief barring the dealer from collecting the B&O tax from future customers and monetary relief on a claim of unjust enrichment. The trial court granted summary judgment in favor of Nelson on all relief requested, and certified a class under CR 23(b)(2). The Court of Appeals, and then the Washington Supreme Court, affirmed the class certification and the judgment in favor of the plaintiff class.

Before the Supreme Court, the two primary issues in *Nelson* addressed by the Court did not involve class certification. First, the Court ruled that the Washington B&O tax statute barred the dealership from passing through the B&O tax to its customers under the facts presented, when the B&O charge was added "*after* Appleway and Nelson negotiated and agreed upon a final purchase price" [*Nelson*, 160 Wn.2d at 181 (emphasis in original)]. Second, the Court ruled that Nelson had standing to seek a declaratory judgment under Washington's B&O tax statute, that the case involved a justiciable controversy, and that the source of plaintiff's right to sue was the unjust enrichment claim (in and of itself, an important substantive development).

Supreme Court Addresses Class Certification Issue Last. "Finally," after addressing these tax and procedural issues, the Supreme Court turned to the class certification issue [*Nelson*, 160 Wn.2d at 188]. The class action issue in *Nelson* was whether the trial court had properly certified a CR 23(b)(2) class (the only class that plaintiff sought to be certified). The defendant automobile dealer argued that a CR 23(b)(2) class should not have been certified because the class claims sought "predominantly" monetary relief; plaintiff Nelson argued that the monetary relief claim was not predominant at all, but was merely incidental to its "primary" claims for declaratory and injunctive relief. The auto dealer lost. As Justice Sanders wrote for the Court, "incidental damages 'flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief'" [*Nelson*, 160 Wn.2d at 189 (quoting *Molski v. Gleich*, 318 F.3d 937, 949 (9th Cir. 2002) (emphasis in *Nelson* decision))], and that these damages must be "cognizable by objective standards" [*Nelson*, 160 Wn.2d at 189]. The Court was convinced that adding up the amount of B&O tax that the dealer charged each class member above the purchase price of his or her car was precisely the kind of objectively determinable damages that flow directly from liability to the class as a whole, thus warranting certification under CR 23(b)(2).

What Does the *Nelson* Decision Mean? At least one commentator has concluded that "*Nelson* substantially increases the availability of CR 23(b)(2) certification . . . for cases involving money claims. . ." [Washington State Bar Association CLE, 24th Annual Antitrust and Consumer Protection Seminar, Ch. 6, "Recent Developments in Class Actions in Washington," November 2007 (Daniel J. Dunne)]. My view is that the jury is still out on this one. If we are to take the Washington Supreme Court at its word, the Court was not creating a new standard for CR 23(b)(2) certification at all, but was merely enforcing the existing standard: plaintiffs seeking "exclusively or predominantly" monetary relief will not be able to have a CR 23(b)(2) class certified; those seeking monetary relief that is "merely incidental" to their "primary claim" for declaratory or injunctive claim will be able to have a CR 23(b)(2) class certified.

But actions speak louder than words, so three aspects of the Supreme Court's decision warrant particular attention. First, the Court hastily rejected the defendant's argument that the significant cumulative sum of money the class sought--as opposed to the small amount sought by the named plaintiff--transformed the case from one primarily about declaratory relief to one primarily about monetary relief [*Nelson*, 160 Wn.2d at 190].

Second, the Court was not persuaded by the defendant's argument that the calculation of damages for potentially tens of thousands of class members could not be determined simply by reference to their individual sales agreements because of the haggling that likely went on at the dealership regarding the B&O tax pass-through [*Nelson*, 160 Wn.2d at

189 ("computing the monetary relief is simple and relies entirely on objective facts, without need for individual assessments of each class member's circumstances"]].

Third, although Washington's CR 23(b)(2) jurisprudence (i.e., the predominantly/ incidental test in *Eriks v. Denver* [118 Wn.2d 451, 824 P.2d 1207 (1992)] and *Sitton v. State Farm Mut. Auto. Ins. Co.* [116 Wn. App. 245, 63 P.3d 198 (2003)]) is based on the Ninth Circuit's decision in *Molski v. Gleich* [318 F.3d 937, 949 (9th Cir. 2002)], the Washington Supreme Court did not look to the Ninth Circuit for guidance on how to decide which cases fall on the "predominantly" monetary divide and which fall on the "incidental" monetary divide. In *Molski*, the Ninth Circuit said that although this process will entail an "ad hoc balancing" test (that bane of predictability), at a minimum, a trial court should find that for declaratory and injunctive relief claims to be predominant, (1) "reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought" "even in the absence of possible monetary recovery," and (2) "the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits" [*Molski*, 318 F.3d at 950 n.15 (emphasis added)]. Is it "reasonable" to sue an auto dealer to "declare" a practice illegal when there is no chance to recover any money if the practice is deemed illegal? Perhaps, but a court (probably the trial court), not a commentator, should have answered that question.

These factors may be troubling for companies potentially subject to class action suits in Washington. Why should those companies (and plaintiffs' lawyers) care? They should care because a CR 23(b)(2) class (1) requires no notice (meaning plaintiffs can avoid potentially costly notice to class members), (2) is a "mandatory class" (meaning class members cannot opt out of the class to pursue individual litigation), and (3) has a less rigorous test for class certification than under CR 23(b)(3). As the United States Supreme Court recognized in *Ortiz v. Fibreboard Corp.* [527 U.S. 815, 844-846, 864, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999)], mandatory classes raise due process concerns when monetary damages are sought. In *Nelson*, those concerns did not trouble the Washington Supreme Court because of its conclusion that the request for monetary relief was simply the tail on the declaratory/injunctive-relief-seeking dog. Going forward, plaintiffs will presumably ask Washington courts to "declare" more statutes or even business practices "illegal" and then attempt to get a CR 23(b)(2) class certified on the basis that the monetary claim for a refund of the illegal fee or practice is merely "incidental" to their predominant request for declaratory or injunctive relief.

In sum, in light of the *Nelson* decision, expect to see more--not fewer--disputes as to whether a proposed class's request for monetary relief is "predominant" or "incidental."

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Joseph B. McDonnell on Evans v. Doherty Construction, Inc.

2008 Emerging Issues 2316

Joseph B. McDonnell on Evans v. Doherty Construction, Inc., 2008 Ill. App. LEXIS 382 (April 25, 2008)

By Joseph B. McDonnell

May 15, 2008

SUMMARY: The Illinois Workers Compensation Act requires an employer who has obtained reimbursement of compensation benefits paid to an employee to pay the employees attorney 25 % of the amount reimbursed, plus a pro-rata share of employees litigation expenses. *Evans v. Doherty Construction* holds that an employer cannot avoid this obligation by selling the right to reimbursement to the defendants sued by the employee and being dismissed from the case.

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ARTICLE: Sale of Workers Compensation Lien Rights Did Not Relieve Employer of Obligation to Pay Attorneys Fees and Expenses

Statutory Scheme for Reimbursement, Cost Sharing and Fees. An employee who is injured in a work-related accident has the right, under Sec. 5(b) of the Illinois Workers Compensation Act, to sue a third party who may be legally liable for damages. 820 ILCS 305/5(b) (first paragraph). If a recovery is made against that third party, either by suit or settlement, the employee is required to reimburse the employer the amount of the compensation paid or to be paid by the employer to the employee. 820 ILCS 305/5(b) (second paragraph); *Ramsey v. Morrison* 175 Ill.2d 218 (1997); *Wilson v. Hoffman Group, Inc.*, 131 Ill.2d 308 (1989). Out of the reimbursement, the employer is required to pay a *pro rata* share of the costs and expenses of the action; and if the services of the employees attorney have contributed to the procurement of the proceeds out of which the employer is reimbursed, then, in the absence of any other agreement between them, the employer must pay to the employees attorney 25% of the gross amount of the reimbursement. 820 ILCS 305/5(b) (second paragraph); *Silva v. Electrical Systems, Inc.*, 183 Ill.2d 356 (1998); *Reno v. Maryland Casualty Co.* 27 Ill.2d 245 (1962).

In *Evans v. Doherty Construction, Inc.*, the First District considered whether a sale or an assignment by the employer of its lien rights relieved it of its obligation under Sec. 5(b) to pay attorneys fees and a *pro rata* share of the plaintiffs litigation expenses. Ashta, plaintiffs employer, had been third-partied in plaintiffs action against several defendants, and had reached an agreement with the third parties to sell its lien rights to them for \$90,000.00. (The amount of its lien was \$152,000.00). It claimed thereafter that it had no liability to the plaintiff for fees and expenses

because it had not received reimbursement, within the meaning of Sec. 5(b), from any settlement made with the plaintiff. The trial judge disagreed and ordered payment by the employer of \$22,500 in fees out of the \$90,000 received by the employer plus a proportionate share of the plaintiffs litigation expenses. Ashta appealed.

History and Rationale. Until 1957, there was no provision in the Illinois Workers Compensation Act for payment of attorneys fees by the employer even if the lien was enforced and reimbursement was obtained by the employer. The employer was entitled to full reimbursement without deduction for fees or costs incurred by the employee and the employees attorney in procuring the recovery. *Hardwick v. Munsterman*, 15 Ill.2d at 567 (1959). To remedy this inequity, the legislature added the second paragraph of Sec. 5(b) which requires the employer to contribute to the necessary costs of the employees recovery against a negligent third party *where the employer is to receive reimbursement* from the recovery for workmens compensation payments made or to be made to the employee. *Reno v. Maryland Casualty Co.*, 27 Ill.2d 245 (1962) (construing amendment by Laws 1957, p. 610, Sec. 1, eff. July 11, 1957; emphasis added). The provision was based on the belief that the employer should share in the fees and costs associated with the employees lawsuit because the litigation benefits the employer by providing a fund *from which the employer can obtain reimbursement of its workers compensation payments*. *Silva v. Electrical Systems, Inc.*, 183 Ill.2d 356 (1998) (emphasis added).

In *Silva*, the Illinois Supreme Court, in construing Sec. 5(b), pointed out that the obligation to pay attorneys fees under the statute arises where an employer is able to obtain reimbursement for the workers compensation benefits it has paid. *Silva v. Electrical Systems, Inc.*, 183 Ill.2d at 363 (1998). The principle behind the fee provision of the statute, the Court continued, is that employers should pay their fair share of the cost of their employees tort recoveries against third parties because those recoveries benefit the employers by enabling them to receive reimbursement for their workers compensation payments. *Silva*, 183 Ill.2d at 364.

In 1957, when Sec. 5(b) was amended to provide for employers contribution to a plaintiffs recovery by payment of fees and expenses out of the employers reimbursement, there was no right of action for contribution against the employer by defendants sued by the plaintiff-employee. Thus, there was no occasion in those days for an employer to sell or assign its lien for compensation benefits paid. Even where more than one non-employer defendant was sued by the employee, there was no right of contribution between them; joint and several liability was the order of the day. Even so, the operative phrase used in the 1957 statute to describe the liability of the employer for fees and expenses was out of any reimbursement. The legislature did not specify the source of such reimbursement and did not place any qualifications on the employers obligation to contribute to the plaintiffs fees and litigation expenses. All that was necessary was that the employer receive reimbursement of the statutory benefits paid by it to its employee.

In *Evans*, both the trial judge and the appellate court recognized that the vital element in the statute which triggers the employers obligation to share in the payment of fees and expenses is reimbursement. The legislature has determined that it is appropriate that the employer be responsible for payment of some portion of the fees and expenses incurred by its employee in pursuing rights against one or more third parties. Otherwise, the employer would be made completely whole by recovering the entire amount of its mandated workers compensation payments, even though the employee and the employees attorneys efforts may have been largely responsible for the recovery. Thus, the employer would be unjustly enriched--precisely the evil that the 1957 amendment was designed to overcome. *Reno, supra*, 27 Ill.2d at 248. Guided by the cardinal rule of statutory construction that the primary goal is to ascertain and give effect to the intent of the legislature, both the trial court and the appellate court in *Evans* properly determined that the sale or assignment of the employers lien rights was ineffective to extinguish the employers liability under Sec. 5(b) for fees and expenses.

Non-delegable duties. Ashta made an effort in the trial court to transfer its liability for fees and expenses to the principal defendants pursuant to the assignment. That effort went nowhere. It is elementary contract law that a valid

delegation of duties does not relieve the delegator of obligations under the contract. (*Cf.*, *e.g.*, Sec. 2-210 of the Uniform Commercial Code which, although applicable to contracts for the sale of goods, specifies that a party may perform his duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract. 810 ILCS 5/2-210). All the more inappropriate would be an attempted delegation of duties specifically imposed on an employer by statute, and in which an employee, as plaintiff, has a substantial interest.

Practice Strategy. Where the legislature has addressed a perceived inequity and has prescribed a specific procedure to cure that inequity, courts are loath to allow an evasion of the legislative mandate by artful and imaginative transactions that have the effect of eliminating the remedy or emasculating the obligation. There is, of course, a recognized method of avoiding the obligation of the employer to pay the attorneys fees and expenses: by a waiver of the compensation lien. A waiver by the employer of its statutory right to reimbursement of benefits paid to its employee discharges the employer from liability to any other tortfeasor under the Contribution Act. The amount of the waiver is then deducted from any judgment against such other tortfeasor. *Sec. 2(c), Joint Tortfeasor Contribution Act* (740 ILCS 100/2(c); *Kotecki v. Cyclops Welding Corp.*, 146 Ill.2d 155 (1991), *Wilson v. Hoffman Group, Inc.*, 131 Ill.2d 308 (1989). Where the employer waives its statutory right to reimbursement of the compensation benefits paid, there has been no reimbursement to the employer from which attorneys fees may be paid, and the employer is therefore not liable for the payment of such fees. *Sec. 5(b), Workers Compensation Act*, 820 ILCS 305/5(b); *LaFever v. Kemlite Co.*, 185 Ill.2d 380 (1998).

This may be the prudent course to take on behalf of the employer where its liability in contribution may negate its right of reimbursement for compensation benefits paid. Its liability for contribution is capped by the total amount of compensation benefits paid (*Kotecki v. Cyclops Welding Corp.*, 146 Ill.2d 155 (1991)), and it can avoid any liability for contribution to any other tortfeasor (*Higginbottom v. Pillsbury Co.*, 232 Ill.App.3d 240 (5th Dist. 1992)) as well as the statutory obligation for plaintiffs fees and expenses, by waiving its right to reimbursement of benefits paid. *LaFever v. Kemlite Co.*, 185 Ill.2d 380 (1998). The plaintiff will not suffer, because the plaintiff is relieved of the obligation of repayment of the compensation benefits under Sec. 5(b), and the principal defendants, in turn, will benefit from the set-off of the amount of the compensation benefits paid by the employer. *Wilson v. Hoffman Group, Inc.*, 131 Ill.2d 308 (1989).

For additional discussion of employee and employer rights in the context of third party suits, see Illinois Jurisprudence, Workers' Compensation, Chapter 9 THIRD PARTY SUITS-INDEMNITY, CONTRIBUTION AND SUBROGATION

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Mike Wilson on Edwards v. Hickman, 237 S.W.3d 183 (Ky. 2007)

2008 Emerging Issues 2309

Mike Wilson on Edwards v. Hickman, 237 S.W.3d 183 (Ky. 2007)

By Mike Wilson

May 13, 2008

SUMMARY: Can Rule 34 be used to compel production of records owned by entities that are not named parties? The Kentucky Supreme Court ruled in *Edwards v. Hickman, 237 S.W.3d 183 (Ky. 2007)* that if a party has control over records that belong to an alter-ego non-party, production of the records can be compelled from that party. This commentary, written by Mike Wilson, explores the implications of this important decision.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Why make a Rule 34 request for documents that do not belong to a party? *Edwards v. Hickman* involved brothers, Stephen and Mark Edwards, who disputed ownership of various businesses. To understand how non-parties came to have documents that were sought from parties under Rule 34, a description of the creation of the various businesses is required.

Bill Edwards, the father of the two brothers, incorporated Edwards House Movers, Inc. Initially, 90% of the shares were owned by Bill, the father, 5% by Bills wife, and 5% by the son Stephen. A few years later, during the midst of a divorce, Bill, the father, transferred his 90% ownership to the son Mark. The dispute between the brothers arose from Stephens claim that the 90% ownership transferred by his father to Mark was in trust and that Mark was supposed to divide the ownership equally between the three siblings (Mark, Stephen, and Lynn) after certain conditions had occurred. This division was never made.

Instead, in 1992, the company was renamed and restructured, resulting in the creation of Edwards Holdings, Inc. and Edwards Moving & Rigging, Inc., which was wholly owned by Edwards Holdings. Edwards Holdings was owned 90% by Mark, 5% by Stephen, and 5% by Lynn, his sister.

In 1999, Mark incorporated Fireside Properties, Inc., and issued all of its stock to himself. Fireside became the sole general partner in two limited partnerships, Cleo Housing, Ltd. and Cleo Housing II, Ltd., created in 1999 and 2003. Stephen claimed these entities were created with assets from the Edwards companies in which Stephen had an ownership interest, and, therefore, gave him an ownership interest in Fireside Properties and the Cleo partnerships.

Stephen sued Mark and the two Edwards companies intervened to join as parties. In the course of discovery, Stephen requested that Mark produce documents for non-parties Fireside and the two Cleo partnerships. Fireside and the Cleo partnerships then intervened for the limited purpose of opposing the Rule 34 request. The trial court ordered that the Mark produce the records and the non-parties sought a writ of prohibition, claiming that the trial court lacked jurisdiction to order production of documents by non-parties. The Court of Appeals agreed. The Supreme Court reversed the Court of Appeals on this point, stating that the Court of Appeals had misconceived the issue.

Control is the issue. Orders sustaining the requests to produce were directed at parties, not at the non-parties, the Supreme Court noted. [T]he issue is not whether the affected business entities were parties to the lawsuit, but whether the documents sought were in the possession, custody or control of the party upon whom the request is served. *Edwards*, p. 189.

The Supreme Courts decision in this case seemed influenced by two factors. First, Mark was the sole officer and incorporator of Fireside, which, in turn, was the sole general partner in both Cleo partnerships. This, the Supreme Court said, meant Mark had possession, custody, or control of the business and financial records of Fireside Properties and, by extension, the Cleo partnerships. *Edwards*, p. 190. In fact, in this case Mark had actually permitted inspection of some of the requested documents.

Second, the court said that immunizing the documents from Rule 34 would require courts to succumb to transactional sleight-of-hand and

allow the owner of such a closely held business to increase the complexity and cost of litigation by forcing the party seeking discovery to resort to an alternative such as a deposition combined with a subpoena under CR 45 despite the fact that the sole owner of the business entity in question is a named party and exercises complete control over the business's records.

Edwards, p. 189. This, said the Court, would be at odds with the notion that Civil Rules are to be construed to secure the just, speedy, and inexpensive determination of every action. *Edwards*, at p. 189, citing *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 814 (Ky. 2004).

Must the non-party be an alter-ego? *Edwards*, citing *Metropolitan Property & Cas. Ins. Co. v. Overstreet*, 103 S.W.3d 31, 45 (Ky.2003) says that control is the legal right to obtain the documents requested upon demand and that

[o]rdinarily, a mere shareholder or partner will not exercise such a degree of control over corporate records sufficient to satisfy the requirement of having a legal right to obtain them on demand, unless the relationship between the shareholder or partner and the business is so close as to make the business little more than an alter-ego.

Edwards, p. 190.

Strategic considerations. Where practitioners seek Rule 34 production of records of non-party entities owned 100% by a party, *Edwards* should be sufficient authority to obtain the production under the alter-ego analogy. It is not clear what the result would be in other situations. If the party owns a controlling interest but is not sole owner, must he or she use the controlling position to demand the documents? If a minority owner, can the party be compelled to exercise rights to demand inspection of certain corporate records under KRS 271B.16-020(2) or partnership records under KRS 362.408?

Counsel arguing to prohibit disclosure can cite the alter-ego language in the *Edwards* opinion and characterize demand as meaning an unqualified right exercisable without others having any say in the matter. Counsel seeking disclosure can point out that in *Edwards* disclosure of records for the Cleo limited partnerships was required, although the party controlled only Fireside, the general partner in the Cleo partnerships.

Counsel seeking to avoid the application of Rule 34 to interrelated companies through the use of nondisclosure

agreements should be aware of *Ice Corp. v. Hamilton Sundstrand Corp.*, 245 F.R.D. 513 (D.Kan.,2007), which held that the ability to obtain documents on demand is not affected by the source's retention of ownership or its unilaterally imposed restriction on disclosure.

For additional discussion of Rule 34, see Caldwell's Kentucky Form Book § 84.00 Practice Context for Discovery-Requests for Production of Documents and Things or for Inspection of Property and Caldwell's Kentucky Form Book Form 84.01 Form 84.01 Request for Production of Documents, Etc., Under Rule 34 (Form 19).

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Hedges on Access or Confidentiality: The Sunshine in Litigation Act of 2008

2008 Emerging Issues 2285

Hedges on Access or Confidentiality: The Sunshine in Litigation Act of 2008

By Ronald J. Hedges

May 12, 2008

SUMMARY: Will the Sunshine in Litigation Act strike the appropriate balance between privacy and openness or would it make civil litigation more expensive, more burdensome, and less accessible? Find out what Ronald J. Hedges of Nixon Peabody LLP in New York and former U.S. Magistrate Judge has to say about the potential impact of this proposed legislation.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Introduction. Rule 26(c) of the Federal Rules of Civil Procedure authorizes the United States District Courts to issue protective orders which, among other things, limit disclosure of information produced in discovery. Courts have developed balancing tests to determine whether such orders should issue. n1 These judge-crafted balancing tests, as well as the broad discretion afforded judges to enter protective orders, will be affected should the Sunshine in Litigation Act of 2008 (the Act) be enacted into law. n2 The Act will also address the sealing of settlements and court records.

Legislative Purpose. I rise today to introduce the Sunshine in Litigation Act of ***, a bill to curb the ongoing abuse of secrecy orders in Federal courts. The result of this abuse, which often comes in the form of sealed settlement agreements, is to keep important health and safety information from the public. Floor Statement of Senator Kohl, 154 Cong. Rec. S15140 (Dec. 11, 2007).

Senator Kohl continued on to explain what he perceives to be a decades-long problem, which frequently arises in areas such as products liability where individual plaintiffs are pitted against large corporate defendants:

Facing a formidable opponent and mounting medical bills, plaintiffs often have no choice but to settle the litigation. In exchange for the award he or she was seeking, the victim is forced to agree to a provision that prohibits him or her from revealing information disclosed during the litigation.

Id. at S15140. The individual plaintiff is compensated, and the defendant is able to keep damaging information from becoming public. *Id.* However, according to Senator Kohl, the private gain of the parties is offset by the costs paid by the American public as a result of remaining unaware of critical public health and safety information that could potentially save lives. *Id.*

The Act is clearly not intended to prevent the use of protective orders in situations involving trade secrets and other truly confidential company information. *Id.* Senator Kohl explicitly limited the focus of the Act to instances where protective orders are used for the sole purpose of hiding damaging information from the public to protect a company's reputation or profit margin. *Id.* Senator Kohl concluded:

The Sunshine in Litigation Act is a modest proposal that would require Federal judges to perform a simple balancing test to ensure that the defendant's interest in secrecy truly outweighs the public interest in information related to public health and safety. *Id.* at S15141.

Whatever the merits of these statements may be and there are certainly arguments pro and con -- the Act deserves broad attention by the legal community for what it will do *if* it is enacted.

New Section 1660 Would Be Added to U.S. Code. The Act would amend Title 28 of the United States Code to add a new Section 1660. n4 Section 1660(a)(1) would prohibit a court from entering an order restricting the disclosure of information obtained through discovery ***, approving a settlement agreement that would restrict the disclosure of such information, or *** restricting access to court records in a civil case unless the Court has made findings of fact that

(A) Such Order would not restrict the disclosure of information which is relevant to the protection of public health or safety; or

(B) (i) the public interest in the disclosure of potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question; and

(ii) the requested protective order is no broader than necessary to protect the privacy interest asserted.

Section 1660(a)(2) would provide that no protective order entered under (a)(1), other than an order approving a settlement agreement, shall continue in effect after the entry of final judgment unless a separate finding of fact was made that the requirements of (a)(1) have been met. Section 1660(a)(3) would allocate the burden of proof to the party seeking the order.

The Act would restrict party agreements. Section 1660(a)(4)(B) would apply the (a)(1) standards even if an order *** is requested by application pursuant to the stipulation of the parties. Section 1660(a)(5)(B) would prohibit a party from requesting, as a condition for the production of discovery, that another party stipulate to an order that would violate this section.

Section 1660(a)(5)(A) would provide that, [t]he provisions of this section shall not constitute grounds for the withholding of information in discovery that is otherwise discoverable. Section 1660(b)(1) would bar a court from approving or enforcing any provision of an agreement or order that prohibits or otherwise restricts a party from disclosing any information *** to any Federal or State agency with authority to enforce laws regulating an activity related to such information. However, as provided by Section 1660(b)(2), [a]ny such information disclosed to a Federal or State agency shall be confidential to the extent provided by law.

Section 1660(c)(1) would prohibit enforcement of any provision of a settlement agreement described under *** [Section 1660(a)(1)] that prohibits a party from:

(A) disclosing that a settlement was reached or the terms of such settlement, other than the amount of money paid; or

(B) discussing a case, or evidence produced in the case, that involves matters related to public health or safety.

This prohibition would not apply if a court made findings of fact that the public interest in the disclosure of potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality

of the information. Section 1660(c)(2).

Finally, Section 1660(d) would establish a rebuttable presumption that, [w]hen weighing the interest in maintaining confidentiality, the interest in protecting personally identifiable information relating to financial, health or similar information of an individual outweighs the public interest in disclosure. n5

If the Act Becomes Law. What should the litigator and the client expect should the Act become law? How will the federal courts respond to the Act? Here are some observations and possible practice tips.

1) Key Phrases Left Undefined. First, and most elementary, the phrases public health or safety and potential health or safety hazards are *not* defined in the Act. Regulatory agencies appear to agonize over such definitions. Also omitted from the Act is any guidance regarding the steps a party must take to prove that neither of the foregoing conditions will be negatively affected or exacerbated by the proposed order. Should a *prima facie* showing be sufficient? Should a court conduct a hearing and expect the parties to present expert testimony? If so, should this be done at what might be the earliest stage of litigation (say, the initial Rule 16(b) pretrial conference) before discovery has even been conducted? Will (or should) a party's reliance on a protective order entered before discovery started be a factor in a subsequent motion to dissolve or modify the order once a hazard is revealed in later discovery?

2) Stipulated Confidentiality Orders Prohibited. Second, the Act would prohibit stipulated confidentiality orders. n6 Will courts accept a *prima facie* showing that the requirements of Section 1660(a)(1) have been met, perhaps one agreed to by parties who are not in disagreement as to the need for an order? Would this be a stipulated protective order barred by the Act? If a *prima facie* showing will not be accepted, the day of the umbrella protective order in complex litigation that somehow affects public health or safety may become a relic of judicial history usable in some types of civil litigation but not in others. Is that in the public interest, when the costs of litigation (in the depletion of the resources of courts and parties) appear to be increasing exponentially due to discovery of electronically stored information?

By removing the ability of parties to bargain for the inclusion of a stipulated confidentiality order in a settlement agreement, it may be that the Act will discourage settlement for the party in the superior bargaining position by way of its ability to absorb litigation costs. Without a confidentiality order protecting their secrets, it may be more appealing for large corporate defendants to fully litigate claims brought by individuals, since there will be no way for corporate defendants to avoid damage to their reputation through the disclosure of sensitive information involved in the claim.

3) Burdens of Proof Conflated. Third, the Act conflates two very different burdens of proof. There is a fundamental distinction between confidentiality orders, which apply to the discovery process and the so-called fruits of discovery, and sealing orders, which purport to restrict access to materials filed with courts. n7 First amendment and federal common law standards already exist among the circuits which address the sealing of materials filed with courts. It is unclear where the balancing test required by the Act fits among this preexisting framework. Will the Act confuse the existing tests? It is a possibility that, without any instruction to the contrary, federal courts may simply use the Act's required balancing test to create a third, all-encompassing standard that combines the prior two? Only time (and adoption of the Act) will tell, as will the affect on judicial and party resources.

Additional References. For information about sealing orders generally, see *Moore's Federal Practice* (3d ed.) § 26.106 and *Benders Forms of Discovery* § 1.75. For information about sealing of settlement agreements in class action matters, see *Moore's Federal Practice* (3d ed.) § 23.194. For information about intervention to seek access to sealed documents, see *Moore's Federal Practice* (3d ed.) § 24.11.

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n1 . See, e.g., *Pansy v. Burrough of Stroudsburg*, 23 F.3d 772, 787 (3d Cir. 1994); *Phillips v. General Motors Corp.*, 307 F.3d 1206, 1210-11 (9th Cir. 2002); see generally *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases* (Mar. 2007) (hereinafter, *The Sedona Guidelines*), available at <http://www.thesedonaconference.org> (follow link to Publications).

n2 . S. 2449, 110th Cong.. § 1 (2007). S. 2449 was introduced on December 11, 2007 by Senator Kohl for himself and Senator Leahy. It was reported out of the Senate Judiciary Committee with amendment favorably by a 12-6 vote on March 6, 2008. THOMAS (Library of Congress), http://thomas.loc.gov/home/bills_res.html (follow Search Bill Summary, Status hyperlink; search for S. 2449 by bill number; then follow hyperlink for All Congressional Actions).

n3

[3]. See testimony before the Subcommittee on Antitrust, Competition Policy and Consumer Rights of the Senate Judiciary Committee on December 11, 2007, by Johnny Bradley, the Honorable Joseph F. Anderson, Jr., USDJ, Robert N. Weiner, Leslie A. Bailey, and Richard Zitran, and Stephen G. Morrison, available at <http://judiciary.senate.gov/hearing.cfm?id=3053>

n4

[4]. Unless otherwise noted, references will be to proposed U.S.C. §1660 rather than to S. 2449 itself. S. 2449 has three sections. Section 1 is the short title. Section 2 is titled, Restrictions on Protective Orders and Sealing of Cases and Settlements, and contains proposed U.S.C. §1660. Section 3 addresses the effective date of the Act.

n5

[5]. The final substantive provision of Section 1660 would address disclosure of classified information. Section 1660(e).

n6

[6]. Incidentally, such orders are already banned by the Third Circuit. See *Pansy*, 23 F.3d at 786.

For a discussion of the use of umbrella and particularized protective orders in complex litigation, see *Manual for Complex Litigation, Fourth*, § 11.432 (Federal Judicial Center: 2004).

n7

[7]. See, for this distinction, The Sedona Guidelines, *supra* n. 2, at 7, 16-17.

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Ronald J. Hedges is counsel to Nixon Peabody LLP in its New York City office. He served as a United States Magistrate Judge in the United States District Court for the District of New Jersey from 1986 to 2007. Among other things, Mr. Hedges was a member of the Editorial Team for The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases (Mar. 2007). He was also the drafter of Local Civil Rule 5.3 of the United States District Court for the District of New Jersey, which established procedures for protective and sealing orders. For more information, or to contact Mr. Hedges, go to http://www.nixonpeabody.com/attorneys_detail1.asp?ID=1324. Mr. Hedges would like to thank Nixon Peabody associate Luis A. Casillas for his dedicated assistance on this project. Mr. Casillas is an associate in the firms Business Litigation Group, and is a recent graduate of the Benjamin N. Cardozo School of Law.

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Sua Sponte Remand: Vairo on Ellenburg v. Spartan Motors Chassis, Inc.

2008 Emerging Issues 2286

Sua Sponte Remand: Vairo on Ellenburg v. Spartan Motors Chassis, Inc.

By Georgene Vairo

May 12, 2008

SUMMARY: In *Ellenburg*, the Fourth Circuit has held that a court of appeals has jurisdiction to review a sua sponte remand predicated on a procedural defect. This commentary, written by Georgene Vairo, Professor and author of several books, including several chapters in *Moores Federal Practice*, explains how the court reached this holding notwithstanding 28 U.S.C. § 1447(d).

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 2008 U.S. App. LEXIS 5076 (4th Cir. Mar. 10, 2008), involves two removal issues: 1) Whether the court of appeals has jurisdiction to review a sua sponte remand predicated on a procedural defect; and 2) Whether a district may sua sponte remand based on a procedural defect. The Fourth Circuit joined the majority view with respect to the second issue, holding that a district court exceeded its authority in remanding a case sua sponte based on a perceived procedural error in the notice of remand.

Facts and Procedural Background. Plaintiff filed a state court action seeking actual, incidental, consequential, and punitive damages and replacement of a vehicle or refund of its purchase price. No dollar amount was stated for the vehicle's value or the amount of damages. The defendants removed the case to federal court, alleging that the parties were diverse and that the value of the matter in controversy exceeded the sum of \$75,000. Six days later, sua sponte and without notice to the parties, the district court remanded the case to state court on the ground that the notice of removal failed to allege facts adequate to establish the jurisdictional amount. Nowhere in its opinion did the court actually address or find that subject matter jurisdiction over this case did not exist. Instead the opinion stated that the Notice of Removal alleging that the value of the matter in controversy exceeded \$ 75,000 was insufficient "to establish that the jurisdictional amount ha[d] been satisfied."

The defendants timely filed a motion to alter or amend the court's order pursuant to *Fed. R. Civ. P. 59(e)*, arguing that they could unquestionably demonstrate that the amount in controversy exceeded the jurisdictional threshold. They attached to their motion an affidavit from one of defendants employees, as well as the bill of sale for *Ellenburg's* recreational vehicle, together clearly establishing that the sales price of the vehicle in question was \$327,669. Without mentioning that it had failed to provide defendants the opportunity to oppose the order, the district court nonetheless denied the motion because a Rule 59(e) motion cannot be used to raise arguments which could have been raised prior to the issuance of the judgment. The district court then reiterated that the Notice of Removal failed to present a sufficient

factual basis on which the Court could make an informed decision as to whether Plaintiff can or cannot recover damages in excess of \$ 75,000 in this case.

Spartan appealed, presenting the single issue of whether the district court erred in remanding the case. The Fourth Circuit reversed the district court's order of remand and remanded the case to the district court for further proceedings.

Sua Sponte Remand Based on Procedural Insufficiency Is Reviewable. The Fourth Circuit first held that 28 U.S.C. § 1447(d) did not bar review of the remand order. That section prohibits review of remand orders within the scope of § 1447(c). Section 1447(c) provides for remands based on: (1) lack of subject matter jurisdiction, which may be raised at any time, or (2) a defect in removal procedure a procedural defect as opposed to a lack of subject matter jurisdiction raised by motion no more than 30 days after the filing of the notice of appeal.

The Fourth Circuit began with a review of the applicable Supreme Court pronouncements on § 1447(d). That section precludes review of a remand order even if the appellate court believes the order is erroneous because Congress wanted to limit the forum selection battle. It noted, however, that even though that policy is important, the protection against delay caused by review has been tightly circumscribed by the Supreme Courts strict approach to what § 1447(d) proscribes. Section 1447(d) bars review of only remand orders within the scope of § 1447(c), i.e., those based on (1) a district court's lack of subject matter jurisdiction or (2) a defect in removal "other than lack of subject matter jurisdiction" that was raised by the motion of a party within 30 days after the notice of removal was filed.

When remand is based on a lack of subject matter jurisdiction, the remand order may be entered at any time, and the lack of subject matter jurisdiction may be noticed by the district court *sua sponte* or by any party. A remand order based on a lack of subject matter jurisdiction, whether *sua sponte* or not, falls within the scope of § 1447(c) and therefore, pursuant to § 1447(d), is not reviewable by a court of appeals. But when a remand would be justified by a defect in removal other than a lack of subject matter jurisdiction, the Fourth Circuit reads § 1447(c) to require that the defect must be asserted by a party's motion to remand filed within 30 days.

Here, the district court, considering remand without having a motion to remand before it, stated that the case was before it "for a determination as to whether it ha[d] jurisdiction over the matter." But then the court ruled not that it lacked subject matter jurisdiction, but rather that the defendants' allegations of diversity jurisdiction were "inadequate" and that their Notice of Removal failed "to establish that the amount in controversy exceeds the jurisdictional amount." Even though the defendants alleged in their Notice of Removal that the value of the matter in controversy exceeded \$ 75,000, the district court concluded that that allegation alone was insufficient and that the defendants had to make a *factual showing*. In other words, the district court applied a particular *standard* for assessing the *sufficiency* of the filing, but did not consider whether subject matter jurisdiction in fact existed. Accordingly, the district court's selection and application of a legal standard for pleading in a notice of removal remained reviewable as a "conceptual antecedent" to the remand order.

Comment. Finding that appellate jurisdiction exists here is a bit of a stretch, but is consistent with the court of appeals practice of finding ways of reviewing even when at first glance it would appear that 28 U.S.C. § 1447(d) should bar review. No good deed goes unpunished surely Congress intended to end the forum selection battle as soon as possible. And, the Fourth Circuit correctly noted that Congress understood that this would mean that there would be no review of a remanded case even when the appellate court knows that the case should remain in the federal court. And, looking at it on a case-by-case basis, surely the appellate courts are not unhappy about being spared the job of monitoring district court remands. However, an interpretation of § 1447(d) that would deprive the appellate courts of the opportunity to stop the wholesale inappropriate remand by district courts of cases that should be in federal court is a real problem. Like the district court in the *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 351, 96 S. Ct. 584, 46 L. Ed. 2d 542 (1976), who remanded because it was too busy to hear the case, the district court in *Ellenburg* went over the magic line by being a bit too hasty and obvious in trying to ditch the case.

Being too busy is not a ground for remand under § 1447(c), said the Supreme Court in *Thermtron*. So, the Fourth

Circuit cloaked itself in the *Thermtron* limiting approach to § 1447(d) with some heavy duty language: We may review a conceptual antecedent ruling even if it was an essential precursor to a remand order that is itself unreviewable under § 1447(d). In other words, an otherwise reviewable ruling is not necessarily shielded from review merely because it is a constituent aspect of a remand order that appears to be on an appropriate ground under § 1447(c). The Fourth Circuit's approach is another example of an interpretation of § 1447(d) that interpret[s] § 1447(d) to cover less than the words alone suggest. *Powerex Corp. v. Reliant Energy Servs., Inc.*, 127 S. Ct. 2411, 2415, 168 L. Ed. 2d 112 (2007).

So, an analysis that may seem to strain or push the boundary of § 1447(d) is not unusual and is necessary to ensure a proper policing of district court remand orders. As the Fourth Circuit put it: When considering § 1447(d), we are instructed not to extinguish the power of an appellate court to correct a district court that has not merely erred in applying the requisite provision for remand but has remanded a case on grounds not specified in the statute and not touching the propriety of the removal. (quoting *Thermtron*, 423 U.S. at 352.) Indeed, the Fourth Circuit began the next section by noting that its decision to review the remand order forecasted its ruling on the merits of the remand order.

Sua Sponte Remand Exceeded District Court's Authority. The rest was easy. The fact that the district court's remand fell outside the scope of Section 1447(c) led the Fourth Circuit to conclude that it also fell outside the district court's authority to order remand sua sponte. Section 1447(c) assigns the responsibility of policing non-jurisdictional questions regarding the propriety of removal to the parties, not to the court. The parties may assert procedural defects if they wish, but they may ignore such defects if they prefer to remain in federal court.

Comment. Circuits are split regarding whether the district court may raise procedural defects sua sponte. The Fourth Circuit joined the majority of sister circuits in holding that in the absence of a motion from a party, a district court may not remand a case based on a procedural defect. See *Moore's Federal Practice* § 107.41[1][a][ii] (collecting cases). The majority view is the preferable view. Some plaintiffs may not mind having their cases removed to federal court. Maybe the district court judge is preferable to them than the state court judge that has been assigned to the case. For whatever reason, once properly in federal court because subject matter jurisdiction exists, a plaintiff has a right to remain there even if there was a procedural defect in the removal process itself. By sua sponte remanding on a procedural ground, the district court deprived the plaintiff of this right to remain in federal court.

Jurisdictional Allegations in Removal Notice Were Sufficient. As an additional ground for reversal, the Fourth Circuit held that the unchallenged allegations in the removal notice were sufficient to establish diversity jurisdiction. Section 1446(a) requires only a short and plain statement of the grounds for removal and that it be signed pursuant to Rule 11. The Fourth Circuit noted that this language is deliberately parallel to the requirements for notice pleading in *Federal Rule of Civil Procedure* 8(a). Therefore, the district court should not have required the defendants to meet a higher pleading standard in the removal notice than the one imposed on plaintiffs with respect to an initial complaint. A notice that alleges that the parties are of diverse citizenship and that [t]he matter in controversy exceeds, exclusive of interest and costs, the sum specified by 28 U.S.C. § 1332 is sufficient to establish jurisdictional grounds for removal. See *Fed. R. Civ. P. 84*; *Fed. R. Civ. P. app. Form 2(a)*. The Fourth Circuit acknowledged that if the jurisdictional allegations are challenged, the removing party must demonstrate the jurisdictional basis for removal, but even then the burden is no greater than that required to establish federal jurisdiction as alleged in a complaint.

Instructions on Remand. The Fourth Circuit specified that on remand, the district court may sua sponte inquire whether it has subject matter jurisdiction and may impose on the defendants the burden of demonstrating jurisdiction. Alternatively, it may invite a motion to remand based on a lack of subject matter jurisdiction and resolve that motion as it would any other motion, again imposing the burden of demonstrating jurisdiction on the defendants. If the court concludes that it does not have subject matter jurisdiction, then it must remand the case to state court.

References. 16 *Moore's Federal Practice* (3d Ed.) §§ 107.14[2][g][v], 107.41[1][a][ii], 107.44[2][b]; 19 *Moore's Federal Practice* (3d Ed.) § 202.11[5].

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Stream of Commerce: Vairo on Steinbuch v. Culter

2008 Emerging Issues 2287

Stream of Commerce: Vairo on Steinbuch v. Culter

By Georgene Vairo

May 12, 2008

SUMMARY: In *Steinbuch*, a case alleging invasion of privacy and intentional infliction of emotional distress, the Eighth Circuit applied the stream-of-commerce theory to support general jurisdiction. This commentary, written by Georgene Vairo, Professor and author of several books, including several chapters in *Moores Federal Practice*, addresses the Eighth Circuit's noteworthy analysis.

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ARTICLE: *Steinbuch v. Cutler*, 518 F.3d 580, 2008 U.S. App. LEXIS 4809 (8th Cir. Mar. 6, 2008), involves a possibly expansive use of stream-of-commerce theory to support general jurisdiction. The Eighth Circuit held that the district court erred by not providing the plaintiff with limited discovery to support the assertion of general personal jurisdiction over a publisher who delivered its products to a regional distributor with an expectation that the distributor would penetrate the forum state. *Steinbuch* is important because stream-of-commerce theory is usually applied to support specific jurisdiction as opposed to general jurisdiction.

Background. Generally, the stream-of-commerce (SOC) Theory is used in product liability and similar personal injury cases in which the plaintiff claims injury due to a defective product that is manufactured somewhere in the world, causing injury in a particular state. The *Steinbuch* case involves considerably more colorful facts. The plaintiff, Robert Rob Steinbuch sued his former colleague, Jessica Cutler, and several corporate defendants who published or were involved in the distribution of Cutler's book, alleging invasion of privacy and intentional infliction of emotional distress. While Steinbuch was counsel to the U.S. Senate Judiciary Committee in Washington, the plaintiff had had a sexual relationship with Cutler, who also served as a congressional staff member at the time. Unbeknownst to him, she had detailed this relationship and her relationships with several other men on her weblog.

Steinbuch was not named in the weblog, but he was identified by his initials, and sometimes referred to as Rob. Various postings also included personal information, such as his place of employment, religious affiliation, and physical attributes. For example, she wrote that: "RS looks just like George Clooney when he takes off his glasses." Steinbuch admitted that he had a brief liaison with Cutler but denied particular statements she made in her weblog about some of his alleged sexual preferences and practices. He apparently had no problem with the George Clooney look-alike comment. About a year later, she published a fictionalized book based on her website, which was distributed throughout the United States. The other defendants were the book publisher and its parent company, and a television company that

had purchased an option to make a television series based on the book, along with its parent company.

Steinbuch, having moved on and taken a position as a professor of law at the University of Arkansas, filed suit in Arkansas. None of the defendants resided, were incorporated, or had their principal place of business in Arkansas. The district court dismissed the claims against the publisher and its parent for lack of personal jurisdiction, and dismissed the television company and its parent based on failure to state a claim. The claims against the individual defendant were stayed after she filed for bankruptcy and were not involved in the appeal.

Jurisdictional Standards. The party asserting jurisdiction bears the burden of establishing a prima facie case. *Johnson v. Woodcock*, 444 F.3d 953, 955 (8th Cir. 2006). To survive a motion to dismiss, the plaintiff must state sufficient facts in the complaint to support a reasonable inference that defendants may be subjected to jurisdiction in the forum state. *Denver v. Hentzen Coatings, Inc.*, 380 F.3d 1070, 1072 (8th Cir. 2004).

Due process requires minimum contacts"" between a nonresident defendant and the forum state, such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."" *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-292, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980). This inquiry focuses on whether the defendant purposely availed itself of the privilege of conducting activities within the forum state and thereby invoked the benefits and protections of its laws. *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958). Personal jurisdiction may be either general, if the defendant's connections with the forum state are continuous and systematic, or specific, if the injury giving rise to the suit occurred within or had some connection to the forum state, meaning that the defendant purposely directed its activities at the forum state and the claim arose out of or relates to those activities. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) (specific jurisdiction); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984) (general jurisdiction).

To evaluate the sufficiency of a defendant's contacts, a court considers five factors, affording the first three primary importance: (1) the nature and quality of the defendant's contacts with the forum state, (2) the quantity of such contacts, (3) the relation of the cause of action to the contacts, (4) the interests of the forum state in providing a forum for its residents, and (5) the convenience of the parties. *Burlington Industries, Inc. v. Maples Industries, Inc.*, 97 F.3d 1100, 1102 (8th Cir. 1996). The third factor applies only in the specific jurisdiction context and is immaterial in a general jurisdictional inquiry. *Johnson v. Woodcock*, 444 F.3d 953, 956 (8th Cir. 2006).

Specific Personal Jurisdiction Was Not Shown. The plaintiff argued that specific jurisdiction could be exercised over the publisher under the *Calder* effects test because the publisher knew that the brunt of the harm would be felt by him in the state in which he lived and worked. See *Calder v. Jones*, 465 U.S. 783, 789-790, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984). This was unlikely, as the publication of the book occurred around the same time the plaintiff moved to Arkansas. In any event, the plaintiff had not alleged in his complaint that he resided in Arkansas at the time of publication, nor had he provided an affidavit in the district court to that effect. Accordingly, he had not met his burden of proving specific personal jurisdiction.

Remand Was Required on General Jurisdiction Issue. The plaintiff argued that general personal jurisdiction existed with respect to the publisher because the publisher purposely availed itself of the protections of the forum state laws by continuously and deliberately exploiting the Arkansas market. In support of this argument, he produced a list of approximately 30 different titles from the publisher available in a particular Arkansas bookstore, affidavits by several individuals who purchased the book in Arkansas, and an affidavit declaring that the book was available at all major bookstores in Arkansas, as well as through the state's central public library system.

The district court had found that general jurisdiction was not present, emphasizing the relatively small numbers of the book sold in Arkansas and the lack of a substantial advertising campaign there. In a general jurisdiction inquiry,

however, the court looks to the defendant's general presence in the forum and is not limited to contacts related to the case. The focus lies on whether the contacts are continuous and systematic. Because the affidavits by individuals who purchased the book in Arkansas implied that the publisher had profited from the sale of its books in the state, the inquiry centered on whether the publisher's forum contacts were such that it purposely availed itself of the privilege of conducting business in the state and should therefore have reasonably anticipated being haled into court.

While mere placement of a product into the stream of commerce, without more, is insufficient to constitute purposeful availment, a court may exercise jurisdiction over a seller who delivered its products to a regional distributor with an expectation that the distributor would penetrate the forum state. The publisher here granted the distributor the exclusive right and sole responsibility for distribution of its publications throughout the U.S. and did not explicitly target specific states or regions, but it did require written monthly sales reports. This fact would permit an inference that the publisher had reasonable expectations and knowledge that its products were going to be offered in the Arkansas market.

There was also evidence that the publisher was actively involved in marketing plans and promotions of books placed in stores. The publisher's agreement with the distributor provided that they would consult with respect to establishing marketing plans, sales forecasting, determining appropriate print runs, and planning advertising and promotional campaigns. The publisher may have been involved in the promotion and marketing of its books and might have reasonably expected their distribution in Arkansas.

This evidence was not sufficient to show a prima facie case of general personal jurisdiction over the publisher, as it did not show enough specifics about the quality and quantity of the publisher's contacts with Arkansas or the publisher's exploitation of the Arkansas market. However, the district court had denied discovery on jurisdiction. Because the current record reflected that the plaintiff had offered documentary evidence, and not merely speculations or conclusory allegations, about the publisher's contacts with Arkansas, the district court should not have dismissed his action without permitting him to take some jurisdictional discovery to establish whether general personal jurisdiction would be justified. Consequently, the Eighth Circuit remanded the claim against the publisher for an opportunity for tailored discovery to elicit whether its contacts with Arkansas were so continuous and systematic as to warrant general personal jurisdiction.

The publisher's parent company, on the other hand, argued that it was separate from its subsidiary and did not publish or distribute the book. The plaintiff contended that the parent engaged in continuous and systematic business activity in Arkansas, pointing to its cable television programs in the state. However, the plaintiff failed to meet his burden of proving jurisdiction by providing any affidavits, testimony, or documents in response to the parent's affidavit denying control over the publisher and denying that it had continuous and systematic contacts in the state. Nor did the district court abuse its discretion by granting a stay of discovery against the parent when the plaintiff failed to rebut its affidavits and offered only speculative and conclusory assertions about the parent's contacts with the forum state.

Dismissal for Failure to State Claim Was Affirmed. The Eighth Circuit also affirmed the dismissal of the television company and its parent based on failure to state a claim. This company had acquired an option to develop a television series based on the book, but had done nothing yet and therefore had not invaded the plaintiff's privacy or caused him emotional distress. The complaint was devoid of any factual support for the allegation that the plaintiff had been injured by the yet undeveloped television series.

References. 16 Moore's Federal Practice (3d Ed.) §§ 108.41, 108.42.

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Bisceglie on Fischbarg v. Doucet, 9 N.Y.3d 375, 849 N.Y.S.2d 501 (2007)

2008 Emerging Issues 2292

Bisceglie on Fischbarg v. Doucet, 9 N.Y.3d 375, 849 N.Y.S.2d 501 (2007)

By Kyle C. Bisceglie

May 12, 2008

SUMMARY: In *Fischbarg v. Doucet*, the Court of Appeals ruled that a clients hiring and subsequent communications with a lawyer in New York to litigate a case in Oregon supported long-arm jurisdiction in the lawyers subsequent suit for non-payment. Kyle C. Bisceglie, explains how *Fischbarg v. Doucet*, extends the reach of New Yorks long-arm statute for attorneys and other service professionals involved in disputes over fees.

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ARTICLE: Formation of Attorney-Client Relationship and Subsequent Communication with Lawyer in New York Sufficient for Long-Arm Jurisdiction

In *Fischbarg v. Doucet*, 9 N.Y.3d 375, 849 N.Y.S.2d 501 (2007), six judges of the New York Court of Appeals (with Judge Smith abstaining) unanimously upheld the exercise of jurisdiction under CPLR 302(a)(1) over two defendant-residents of California who retained and communicated with a lawyer in New York to represent their interest in a suit in Oregon. During the eleven-month representation, the lawyer never traveled to Oregon or California, and allegedly worked 238.4 hours from New York for a fee claimed to be \$57,096.05. The clients, now defendants, never traveled to New York but communicated with the attorney via email, telephone, fax and U.S. mail. The Court noted that, during the representation, plaintiff and defendants spoke twice a week by telephone; defendants sent 31 emails and three faxes to plaintiff; and defendants sent documents by email or mail seven times. *Id.*, 9 N.Y.3d at 378, 849 N.Y.S.2d at 504. The Court characterized this course of communication as regular and frequent.

After a dispute over the terms of engagement, *Fischbarg* resigned as attorney and sued for his fees in Oregon. The Oregon court denied his application for a fee while the underlying Oregon case was still pending. Shortly after the Oregon case settled, *Fischbarg* filed suit in New York. Defendants moved to dismiss for lack of personal jurisdiction under CPLR 3211(a)(8). The Supreme Court, and the Appellate Division in a 3-2 decision, denied the motion.

The Court of Appeals affirmed. The Court found that a defendant need not physically enter New York so long as the defendants activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted. *Id.*, 9 N.Y.3d at 380, 849 N.Y.S.2d at 505 (citations omitted). Purposeful activity requires a defendant to

avail[] itself of the privilege of conducting activities within the forum State, thus invoking the privileges and benefits of its laws. *Id.* (citations omitted).

The defendants acts of reaching into New York to hire an attorney and their frequent communications with him in this state were sufficient to confer long-arm jurisdiction over the defendants. In a footnote, the Court noted that defendants benefited from New Yorks Client Bill of Rights found in 22 NYCRR 1210.1, which includes the right to a reasonable fee. That is the only benefit noted in *Fischbarg*. In fact, clients often receive additional benefits in New York. These include receipt of an engagement letter for representations likely to involve a fee in excess of \$3,000, pursuant to 22 NYCRR 1215, and the right to arbitration, pursuant to Part 137 of the Rules of the Chief Administrator of the State of New York. The *Fischbarg* defendants apparently did not receive either of these benefits. *See Fischbarg v. Doucet*, 38 A.D.3d 270, 276; 832 N.Y.S.2d 164, 169-170 (1st Dept. 2007) (dissenting opinion) (Plaintiff did not prepare a retainer statement; the corporate defendant wrote to plaintiff to confirm the arrangement.).

In finding that defendants availed themselves of the benefits and protections of New Yorks laws governing lawyers by *project[ing]* themselves into New York via telephone to establish a continuing attorney-client relationship and repeatedly *projecting* themselves into New York via telephone, mail, e-mail and facsimile, the Court ruled that requiring defendants to defend a suit arising out of these contacts properly comport[ed] with traditional notions of fair play and substantial justice. *Fischbarg*, 9 N.Y.3d at 385, 849 N.Y.S.2d at 509.

Haar Distinguished. *Fischbarg* surprised some observers in light of *Haar v. Armendoris Corp.*, 31 N.Y.2d 1040, 342 N.Y.S.2d 70 (1973). In *Haar*, the Court of Appeals denied jurisdiction in a lawsuit filed by a New York licensed lawyer hired in Massachusetts by a Delaware Corporation to represent it in a transaction in New York. This representation by plaintiff was defendants only connection with New York. The *Haar* Court, however, found an agent cannot rely on its own activities in a forum to sue its principal. Adopting the dissenting decision of the Appellate Division, the Court of Appeals in *Haar* found that the present plaintiff is relying on his own activities within the State, rather than on defendants *independent* activities. *Haar v. Armendoris Corp.*, 40 A.D.2d 769, 770, 337 N.Y.S.2d 285, 288 (1st Dept. 1972) (dissenting opinion).

Would the defendant in *Haar* find itself subject to suit in New York if it had emailed, called and/or faxed its attorney while he negotiated the transaction in New York? What if the attorney filed and litigated a prolonged lawsuit here? The *Fischbarg* Court concluded that the defendant in *Haar* had no New York contacts in connection with the plaintiffs representation of it. Its contacts were with its attorney in Massachusetts. What the *Fischbarg* Court meant by no New York contacts is unclear as the record in *Haar* makes no mention if the client communicated with its counsel in New York or not. *See Haar*, 40 A.D.2d 769, 337 N.Y.2d 285. In any event, the practice of law in the 21st Century involves much greater and more active communication through mobile phone and PDA-enabled electronic mail than existed in 1973. These telecommunication advances make facts as existed in *Haar* increasingly uncommon (*viz.*, obtaining client instruction in one state and, then, going into New York as an advocate *incommunicado* with client).

Read together, *Haar* and *Fischbarg* suggest that the location of the lawyer hired affects the clients subsequent amenability to suit in New York. They also raise significant questions about how much location matters and the limits of these decisions. Practitioners seek meaningful practical guidance for prospective matters. Yet, like so many cases and courts before it, the *Fischbarg* Court reminds us that it is impossible to precisely fix those acts that constitute a transaction of business. This view begets more questions. Would the Court in *Fischbarg* find jurisdiction based solely on the New York engagement in circumstances where the lawyer traveled to Oregon and most of the communications took place there? Illustrating the same idea, what if most of the communications were outgoing from New York rather than directed into the forum?

New York precedent to date suggests no jurisdiction in these circumstances. Lower court decisions addressing the question typically involve qualitatively greater contacts with New York. For example, the Appellate Division found

jurisdiction where the defendant hired a New York lawyer to represent it in New York litigation, hired other New York lawyers and participated in the proceeding through an agent. *Colucci & Umans v. 1 Mark, Inc.*, 224 A.D.2d 243, 637 N.Y.S.2d 705 (1st Dept. 1996). Likewise, jurisdiction was found where defendant participated actively in bankruptcy and other proceedings venued here. *Otterbourg, Steindler, Houston & Rosen v. Shreve City Apts. Ltd.*, 147 A.D.2d 327, 543 N.Y.S.2d 978 (1989). The court in *Otterbourg* identified the issue which *Fischbarg* leaves unaddressed: We need not, however, reach the issue of whether the retention of New York counsel to provide services in connection with legal proceedings in this State, without more, is sufficient to confer jurisdiction on the courts of this State in any action brought by the attorneys to recover their fees. *Id.*, 147 A.D.2d at 332, 543 N.Y.S.2d at 981.

In *Otterbourg*, the Appellate Division observed that the defendants did more than merely retain plaintiff, noting 93 telephone calls, letters, settlement negotiations, settlements applying New York law, and retention of other attorneys among other activity directed at or in New York. *Id.* Likewise, the underlying matter in *Otterbourg* was venued in New York. The *Fischbarg* decision certainly demands far fewer purposeful acts than *Otterbourg*. *Kaczorowski v. Black and Adams*, 293 A.D.2d 358, 741 N.Y.S.2d 28 (1st Dept. 2002) potentially required even less. In *Kaczorowski*, the court found jurisdiction where plaintiff was retained and repeatedly consulted in New York on the matter. Unfortunately, the single-page decision does not expound on what is meant by repeatedly consulted. *Id.*, 741 N.Y.S.2d at 29.

Physical Presence and Single-Transaction Jurisdiction. There has been considerable discussion whether or not a single act of particular quality or nature is enough to establish long-arm jurisdiction in New York. See, e.g., *Hi Fashion Wigs, Inc. v. Hammond Adver., Inc.*, 32 N.Y.2d 583, 347 N.Y.S.2d 47 (1973); *Reiner & Co., Inc. v. Schwartz*, 41 N.Y.2d 648, 651-52, 394 N.Y.S.2d 844, 846 (1977). The clearest and perhaps only case for single-transaction jurisdiction involves physical presence. See *Reiner*, 41 N.Y.2d 648, 394 N.Y.S.2d 844. As a result, physical presence continues to be an important element of New York jurisdictional analysis. At the same time, physical presence is decreasingly relevant to the facts of professional services disputes which have, since the telecommunications revolution, increasingly been consummated and maintained without the professional and client ever meeting face-to-face. *Fischbarg* provides guidance on the type of non-physical contact sufficient to sustain long-arm jurisdiction.

The *Fischbarg* Court emphasized the quality of the defendants New York contacts. The Court noted that, after establishing an attorney-client relationship, defendants were communicating with plaintiff regularly, frequent[ly], and repeatedly. Additionally, plaintiff never left the state during the entirety of the representation. This necessarily increased the quality (and quantity) of contacts with New York.

Conclusions to be drawn from *Fischbarg*. First conclusion: telecommunication has come of age. The Court treated each email and telephone call as a significant, qualitative contact with New York. In particular, the attorney in *Fischbarg* was rendering services in an action pending in Oregon. The only activity in New York noted by the Court was a retention that did not even yield an engagement agreement and limited communication which of greatest significance included 31 emails and weekly telephone calls. Yet, in an age where it is not exceptional for people to exchange 31 electronic messages in a single day, New York now finds this sufficient to assert statutory jurisdiction. This is a significant development in the evolution of New Yorks jurisdictional law. Certainly not without basis, *Fischbarg* moves New York away from the importance of physical presence and, at the same time, gives greater legal consequence to acts of telecommunication. The *Fischbarg* Court analogized the facts of the case to the similar facts in *Reiner* yet noted the lack of physical presence in *Fischbarg* was immaterial, which is not something the *Reiner* Court was willing to say. The Court of Appeals, in effect, ruled that, where the dispute arises out a professional services contract, 31 emails and weekly telephone calls are the jurisdictional equivalent of one visit to New York.

Second conclusion: despite *Fischbarg*s emphasis on quality, the quantity of non-physical contacts still matters. In the context of professional services contracts, one federal court observed that New York is a retention-plus jurisdiction meaning jurisdiction is normally upheld if the defendant has additional contacts with the state in addition to, and relating to, the retainer agreement. *Winston & Strawn v. Dong Won Secs. Co., Ltd.*, 02 Civ. 0183, 2002 U.S. Dist. LEXIS 20952, at *9-10 (S.D.N.Y. November 1, 2002). Keeping in mind the principle that New Yorks long-arm statute does not extend to the limits of due process, *Ehrenfeld v. Bin Mahfouz*, 9 N.Y.3d 501, 512, 851 N.Y.S.2d 381 (2007), *Fischbarg*

requires more than hiring a New York attorney to give rise to personal jurisdiction, but not much more. One, two or three emails would not be enough. Indeed, while New York claims to be a jurisdiction where a single contact is sufficient to uphold jurisdiction, see *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 467, 527 N.Y.S.2d 195 (1988), few significant cases involve a single contact as the basis for jurisdiction. Primarily, we look to *Reiner*, 41 N.Y.2d 648, 394 N.Y.S.2d 551, as a case where the exercise of personal jurisdiction was based on what can be called a single transaction, namely the negotiation and signing at plaintiffs Albany, New York headquarters of an employment agreement as a salesman in New England that gave rise to the cause of action.

Otherwise, beginning with *Longines-Wittnauer Watch Co. v. Barnes & Reinecke*, 15 N.Y.2d 443, 261 N.Y.S.2d 8 (1965), the Court of Appeals has avoided reliance on a single transaction and instead found a combination of contacts met the statutory and constitutional standard. *Parke-Bernet Galleries, Inc. v. Franklyn*, 26 N.Y.2d 13, 308 N.Y.S.2d 337 (1970), held a non-paying customer amenable to suit based not only on his participation in an auction through an open telephone line but also his letters in setting up the line and use of one of plaintiffs employees as an agent for purposes of the auction. *Hi-Fashion Wigs, Inc. v. Peter Hammond Advertising, Inc.*, 32 N.Y.2d 583, 347 N.Y.S.2d 47, found jurisdiction not only on the delivery of a personal guarantee in New York, but also based on a company that did business in New York and a contract that called for all services to be rendered in New York. *Ehrlich-Bober & Co. v. Univ. of Houston*, 49 N.Y.2d 574, 427 N.Y.S.2d 604 (1980), involved suit by a broker-dealer arising from two reverse repurchase agreements with defendant. On two separate occasions, an individual claiming to represent the defendant called plaintiff in New York and delivered the purchase price to a bank there. Additionally, in a four-month period, defendant entered at least 22 separate transactions with New York institutions for an aggregate value of \$44 million. *Id.*, 49 N.Y.2d at 577, 427 N.Y.S.2d at 606. The Court of Appeals in *Kreutter* held the defendants amenable to suit based on the acts of its agent. *Kreutter*, 71 N.Y.2d 460, 527 N.Y.S.2d 195.

Most recently before *Fischbarg*, the Court of Appeals in *Deutsche Bank Sec., Inc. v. Montana Bd. of Invs.*, 7 N.Y.3d 65, 71, 818 N.Y.S.2d 164 (2006), upheld the exercise of jurisdiction based on the defendants use of instant messaging service on the Bloomberg Message System. The Court was careful to note, however, that in the thirteen months prior to the trade at issue, the counterparty executed eight other bond trades with the plaintiff, as part of \$471 million in trades the defendant placed the preceding year with banks in New York. *Id.*, 7 N.Y.3d at 77 n.2, 818 N.Y.S.2d at 167 n.2.

As the case law discussed here suggests, while New York theoretically permits one qualitatively-sufficient transaction to support long-arm jurisdiction, the Court of Appeals usually grounds its decision upon more. *Fischbarg* merely extends this concept to the context of a professional services contract.

Lessons to be learned. *Fischbarg* recognizes that an attorney-client relationship is, by its very nature, continuing until terminated. Yet, *Fischbarg* did not base its decision solely on the on-going attorney-client relationship. Rather, *Fischbarg* relied upon additional purposeful acts beyond retention to uphold jurisdiction. At the same time, *Fischbarg* leaves no doubt that telephone, mail e-mail and facsimile are qualitatively sufficient additional acts, and, thereby, further eviscerated the requirement of physical presence. *Fischbarg* found jurisdiction based on an eleven month relationship, 31 emails and weekly telephone calls. By its logic, even fewer purposeful acts are necessary for jurisdiction. Given the types of contracts involved in the precedent relied upon by *Fischbarg* (purchase agreements, repo trades and salesman contracts), courts will subsequently extend the rule from the professional services agreement in *Fischbarg* to all types of contract disputes, and beyond. See, e.g., *Pryor Personnel Agency Inc. v. Waage Law Firm*, 14148/06, 2008 N.Y. Misc. LEXIS 1930 (Sup. Ct. Nassau Co. February 28, 2008) (applying *Fischbarg* to an employment agency contract to uphold jurisdiction).

Cross-References

For a general overview of the exercise of long-arm jurisdiction under CPLR 302(a)(1), see 2-3 New York Civil Practice: CPLR P 302; 1-3 Weinstein, Korn & Miller *CPLR Manual* § 3.05; 1-2 LexisNexis AnswerGuide New

York Civil Litigation § 2.03; and 1-2 LexisNexis AnswerGuide New York Civil Litigation § 2.05.

For scholarly analysis of the impact of electronic interstate communications and activities on the application of long-arm jurisdiction, see Jeffrey A. Van Detta, *Extraterritorial Personal Jurisdiction for the Twenty-First Century: A Case Study Reconceptualizing the Typical Long-Arm Statute to Codify and Refine International Shoe After its First Sixty Years*, 3 *Seton Hall Circuit Rev.* 339 (Spring 2007) **(discussing the need for an overhaul of the current long-arm jurisdiction regime, given the 21st-century realities of electronic interstate communications and activities)**; Louis U. Gasparini, *Comment: The Internet and Personal Jurisdiction: Traditional Jurisprudence for the Twenty-First Century under the New York CPLR*, 12 *Alb. L.J. Sci. & Tech.* 191 (2001).

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Mike Wilson on Witten v. Pack, 237 S.W.3d 133 (Ky. 2007)

2008 Emerging Issues 2301

Mike Wilson on Witten v. Pack, 237 S.W.3d 133 (Ky. 2007)

By Mike Wilson

May 12, 2008

SUMMARY: A comparison of the Supreme Courts opinion in *Witten v. Pack, 237 S.W.3d 133 (Ky. 2007)* with the Court of Appeals opinion in the same case suggests that the Supreme Courts decision may impliedly overrule in part a case that as recently as 1992 the Court called the leading Kentucky case on the law of judicial admissions. This commentary, written by Mike Wilson, explores the implications of this important decision.

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ARTICLE: In *Witten v. Pack, 237 S.W.3d 133 (Ky. 2007)*, Dr. Witten performed a hip replacement. After doing so, while holding onto the patients leg, the doctor slipped and fell. Both the Court of Appeals and the Supreme Court agreed that the doctor unequivocally admitted slipping. The patient contended, and the Court of Appeals unanimously agreed, that the doctors admission, in light of surrounding circumstances, constituted a judicial admission of negligence that caused the hip to dislocate. The Supreme Court unanimously disagreed. Both opinions cited *Bell v. Harmon, 284 S.W.2d 812 (Ky. 1955)* as authority. Why the disagreement?

The Court of Appeals cited *Hamby v. University of Kentucky Medical Center, 844 SW2d 431 (Ky. App. 1993)*, stating that the conclusiveness of a judicial admission should be determined in light of all the conditions and circumstances proven in the case. This principal traces back through a line of cases to *Sutherland v. Davis, 151 SW2d 1021 (Ky 1941)*, described below as the *Sutherland* test.

The Supreme Court, however, stated that judicial admissions should be narrowly construed, citing *Lewis v. Kenady, 894 S.W.2d 619, 622 (Ky.1994)*. The language of narrow construction first appears in *Goldsmith v. Allied Building Components, 833 S.W.2d 378 (Ky. 1992)* but traces back to *Bell*, also discussed below, which held that judicial admission should be applied cautiously and only in exceptional cases. The Supreme Court also emphasized contradictory evidence that made the substance of the alleged admission in *Witten* a disputed issue, described below as the *Halbert* test.

The Sutherland Test. The conflict grows out of *Sutherland*, recognized by the Supreme Court in *Goldsmith* (1992) as the leading Kentucky decision on the law of judicial admissions. *Sutherland* held at 1024:

We believe the law to be that admissions fatal to his cause given in the testimony of a party to an action on the trial

of the case should be viewed in the light of all the conditions and circumstances proven in the case; and *unless all such circumstances and conditions give rise to the probability of error in the party's own testimony, he should not be permitted to avert the consequences of his testimony by the introduction of, or reliance on, other evidence in the case.*

(emphasis added). *Sutherland* gives a checklist of circumstances to be weighed in determining whether judicial admission has occurred, only one of which is whether the party's alleged admission was contradicted by other witnesses. Under *Sutherland*, contradictory evidence can not prevent a judicial admission unless circumstances prove the party's own admission was probably in error.

The Halbert Test. Over time, cases eroded the liberal application of judicial admission that *Sutherland* seems to permit. *Halbert v. Lange*, 233 SW2d 278 (Ky. 1950) held at p. 280:

[A]dmissions will be conclusive only as long as they are allowed to stand. This conclusiveness, however, is destroyed if and when the party corrects his statements, explains them, or introduces other testimony showing that he could have been mistaken as to the facts.

Note that *Halbert* says "could have been mistaken" where *Sutherland* said "probability" of mistake.

Halbert held at p. 280:

It appears difficult to lay down an ironclad or entirely satisfactory rule. The true test seems to be whether the party's testimony is merely a narrative of events observed or participated in, wherein there is always present the obvious possibility that he, like any other witness, could be mistaken, or whether he was testifying to facts peculiarly within his own knowledge.

In other words, *Halbert* seemed to say that, except for facts uniquely known only to the party, such as motive or state of mind, if there is evidence conflicting with the alleged judicial admission, the jury decides the issue.

Bell and a Divided Court. In 1955, *Bell* seemed to revive the *Sutherland* test, stating:

unless all circumstances and conditions give rise to the probability of error in the party's own testimony, the party should not be permitted to avert the consequences of his or her testimony by the introduction of, or reliance on, other evidence in the case.

Bell, p. 817. *Bell* also states at p. 815, citing *Sutherland*, that we have recognized that even though contradicted, testimony of the plaintiff may constitute a judicial admission. In *Bell*, the court found a judicial admission occurred and that a verdict should have been directed.

But *Bell* also seems to controvert *Halbert*, which says contradictory evidence can nullify a judicial admission, and *Bell*'s own statement elsewhere in the opinion that a judicial admission must be deliberate and unequivocal and unexplained or uncontradicted.

Bell's dissenting opinion, at p. 817, stated the dilemma bluntly:

The majority opinion treats [*Sutherland*] as authority for the principle that a party's contradicted testimony may constitute a judicial admission. With this conclusion I am unable to agree.

Witten Emphasizes Conflicting Evidence. Recent cases leading up to *Witten* disfavor judicial admissions. *Lewis*, at 622, stated that allowing explanation of the facts and context surrounding [the alleged judicial] admissions was a perfectly reasonable exercise of the trial court's discretion and that judicial admissions should be narrowly construed. *Goldsmith v. Allied Building Components*, 833 S.W.2d 378 (Ky. 1992), at p. 380 held the determination by a court that a party may not contradict an admission is strong medicine and should be sparingly administered.

Strategic Considerations after *Witten*. Attorneys should notice two things about the *Witten* opinion. First, it emphasizes evidence that makes the substance of the alleged judicial admission disputed and judicial admission, therefore, inappropriate. Second, unlike the Court of Appeals, it does NOT include the *Sutherland* test language about judicial admissions being conclusive unless circumstances and conditions give rise to the probability of error in the party's own testimony.

Witten and the cases discussed above suggest that, notwithstanding *Sutherland*, judicial admissions can be avoided by explaining or presenting contradictory evidence sufficient to create an issue of fact. Attorneys should be alert to any statement by a client during trial that, considered in isolation, might sound like an admission and be sure to introduce proof directly contradicting the admission or the inferences that could be drawn from the admission. For example, Q: You testified that you were sorry you struck the plaintiff's vehicle and caused her injury. What caused you to strike her vehicle? A: She pulled out in front of me.

As argued in this commentary, the *Sutherland* test seems no longer to be favored. However, there are three points to comfort attorneys who would prefer that the *Sutherland* test control. First, the analysis in this commentary does not appear in either *Witten* opinion. Second, the Supreme Court's interpretation of the *Witten* record greatly differed with that of the Court of Appeals, thus the Supreme Court arguably saw the facts, rather than the law, differently than did the Court of Appeals. Third, *Sutherland* has not been overruled and in *Goldsmith* (1992) was hailed by the Supreme Court as the leading case on judicial admissions.

For sample forms for a motion for summary judgment based on judicial admission, see Caldwell's Kentucky Form Book Form 335.04 Motion for Summary Judgment in Action for Injuries from Crossing Accident and Caldwell's Kentucky Form Book Form 335.05 Summary Judgment in Action for Injuries from Crossing Accident.

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Jefferson James Davis on Vibratech, Inc. v. Frost, 2008 Ga. App. LEXIS 385

2008 Emerging Issues 2303

Jefferson James Davis on Vibratech, Inc. v. Frost, 2008 Ga. App. LEXIS 385 (Ga. Ct. App. 2008)

By Jefferson James Davis

May 12, 2008

SUMMARY: Vibratech, Inc. v. Frost confirms that the Georgia courts have effectively expanded statutory long arm jurisdiction to its maximum limits in cases arising out of business transactions. This changes the way that litigators should approach the personal jurisdiction issue in this state. This commentary, written by Jefferson James Davis, explores the implications of this important decision.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Seeking Jurisdiction over Nonresidents. The plaintiffs succeeded in keeping alive their wrongful death suits against a defunct manufacturer that had never purposefully marketed its products for use specifically in Georgia. This decision confirms that the Georgia courts have effectively expanded statutory long arm jurisdiction to its maximum limits in cases arising out of business transactions, including cases involving torts. This now-settled rule of expansion changes the way that litigators should approach the personal jurisdiction issue in this state.

In late 2004, a pilot and four passengers died in the Tennessee crash of a Cessna owned by the Georgia Cumberland Conference of Seventh-Day Adventists. The Conference and the decedents estates filed six companion suits in Gwinnett County State Court against multiple defendants. Among those defendants was Vibratech, Inc., a defunct Delaware corporation whose principal place of business had been in New York. Vibratech had manufactured a viscous damper (a mechanism designed to reduce engine vibration) that ended up in the plane that crashed.

An Unsuccessful Response. In each suit, Vibratech failed to file an answer to the complaint for almost three months after service. Ultimately, the company also filed in each case a motion to open the default and a motion to dismiss the suit. As to dismissal, it argued that there was no personal jurisdiction, that service was insufficient, and that the suits were a violation of the automatic stay of litigation for bankruptcy proceedings. The trial court denied Vibratech's two motions, and the company applied for interlocutory appeal in each case.

The Court of Appeals granted the applications and consolidated the cases into a single appeal. In the present decision, a panel of the Court affirmed the order denying Vibratech's motion to dismiss, first finding that Georgia courts have personal jurisdiction of Vibratech, that the bankruptcy proceedings do not stay the suits (there appears to be applicable insurance coverage, and it is not an asset protected by the automatic stay), and that the plaintiffs effected adequate service on the company under the circumstances (the company or its bankruptcy trustee failed to take the

requisite steps to alter its registered agent for service, which accepted the papers, albeit mistakenly).

The Court also concluded that the company cannot open the default by right, since it failed to timely answer the original complaints when the plaintiffs amended them, and that the trial court did not abuse its discretion in refusing to open the default. Since the ruling on personal jurisdiction concerns a vitally important issue that recurs quite frequently, this Commentary focuses only on it.

Jurisdictional Foundations. The factual predicate for the personal jurisdiction holding is this: Vibratex made the damper at its New York factory and sold it to Teledyne Continental Motors, Inc. (TCM), which installed the damper in a rebuilt Cessna engine that it sold through a Texas company to the Georgia Cumberland Conference, which then had a company in Rome, Georgia, install the engine in the Conference's Cessna aircraft. The Court of Appeals noted Vibratex's contention that it never transacted any business in the State of Georgia, in that it had no office, took no orders, made no sales, delivered no products and solicited no business here. *Vibratex* at 9. It also noted, however, that the shipment of the damper to Mobile in this case was not an isolated transaction:

The two parties apparently entered into a supply contract, under which Vibratex sold as many as several hundred dampers per year to TCM for incorporation into its airplane engines. In addition, the two parties entered into a side agreement in which TCM agreed to indemnify Vibratex and to carry the company as an additional insured on an aviation liability policy. The certification of insurance to Vibratex under this agreement indicates that the geographical limit of the coverage is Worldwide.

Vibratex at 16.

The legal predicate for the personal jurisdiction holding includes, first, the federal due process requirement that a nonresident defendant have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, 102 (1945).

Consistently with this principle, a state may constitutionally assert personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98, 100 S. Ct. 559, 567, 62 L. Ed. 2d 490, 502 (1980). However,

[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.

Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty., 480 U.S. 102, 112, 107 S. Ct. 1026, 1032, 94 L. Ed. 2d 92, 104 (1987).

Just as importantly, Georgia's long arm statute provides, insofar as pertinent here, that the state's courts may exercise personal jurisdiction over a nonresident, as to a cause of action arising from any of the acts, omissions, ownership, use, or possession enumerated in the statute, if the nonresident:

- (1) Transacts any business within this state;
- (2) Commits a tortious act or omission within this state...; [or]

(3) Commits a tortious injury in this state caused by an act or omission outside this state if the tortfeasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state...

O.C.G.A. § 9-10-91.

The Decision. The Court of Appeals first recognized that the law that controls the case is subsection (1) of the long-arm statute, but it acknowledged that our appellate courts have not considered the application of subsection (1) to the specific factual situation before us, where the manufacturer of an aviation component ships to an intermediary like TCM, who installs the part into an aviation engine and then ships the engine into Georgia. *Vibratech* at 12. It then noted that we cannot limit our analysis to a strictly literal reading of the subsection's language, but must consider Vibratech's intangible contacts with the state in determining whether the company transacted any business, subject to the limits of due process. *Id.*

To frame this consideration, the Court adopted a test that originated during the *ancien regime*, in *Davis Metals, Inc. v. Allen*, 230 Ga. 623, 625 198 S.E.2d 285, 287 (1973): personal jurisdiction exists if (1) the nonresident defendant has purposefully done some act or consummated some transaction in this state, (2) if the cause of action arises from or is connected with such act or transaction, and (3) if the exercise of jurisdiction by the courts of this state does not offend traditional fairness and substantial justice. *Vibratech* at 13, quoting *Aero Toy Store v. Grieves*, 279 Ga. App. 515, 517-18, 631 S.E.2d 734, 737 (2006). The Court found that jurisdiction existed here on two grounds: Vibratech's conduct in selling the damper to TCM in New York for installation (in Mobile) in engines for re-sale in other locales across the country was such that the company should have reasonably anticipated being haled into court here, and fairness requires that the Georgia plaintiffs be able to seek redress here rather than in New York or Delaware. *Vibratech* at 17, 18.

The Rationale. For subsection (1) of the long arm statute to apply to the facts here, the Court had to give that statutory text two meanings that are not at all obvious on its face. First, the Court relied on *Innovative Clinical & Consulting Servs. v. First Natl Bank*, 279 Ga. 672, 620 S.E.2d 352 (2005), for the construction that this subsection applies to cases of any type, including those tort cases described in subsections (2) and (3) of the statute. *Vibratech* at 10.

The Supreme Court unanimously held in *Innovative Clinical* that this construction of subsection (1) was required by the literal language of the statute (279 Ga. at 675, 620 S.E.2d at 355), although the construction seems to result from considering the literal language of subsection (1) in a vacuum, rather than in the context of the whole statute. *Innovative Clinical* thus rejected the longstanding rule that, in enacting subsection (1) as part of the original long-arm statute in 1966,

[t]he Georgia legislature could have defined transactions of business as including both contractual and tortious actions, as other states have done... But they chose not to do so. By including tortious action under... separate subsection[s]... the legislature could not have meant for a cause of action in tort to arise from the transaction of business, under [subsection (1)] as well. Otherwise, [the tort subsections] would have been redundant and unnecessary.

Whitaker v. Krestmark of Alabama, Inc., 157 Ga. App. 536, 537-38, 278 S.E.2d 116, 118 (Ga. App. 1981), quoting *Scott v. Crescent Tool Co.*, 296 F. Supp. 147, 153 (N.D. Ga. 1969) (diversity case). With the *Innovative Clinical* construction, the plaintiffs in the present case are able to avoid the disqualifying limitations of subsection (3) -- the subsection that otherwise seems to be the closest fit with the facts here.

Second, the Court of Appeals construed subsection (1)'s transacts any business within this state language to include a broad swath of business that is transacted outside the state -- like Vibratech's. To do so, it used a stream-of-commerce analysis to find that the minimum-contacts requirement was satisfied because Vibratech's actions in selling a product to TCM in Alabama with the intention of deriving an economic benefit from its sale in other states, were purposeful actions which should have led Vibratech to reasonably anticipate being haled into court in those states, especially a

border state such as Georgia. *Vibratech* at 17.

Answered and Unanswered Questions. This decision answers the question of how closely the Court of Appeals will follow *Innovative Clinical* as to the meaning of subsection (1) in a tort case: the Court will follow it enthusiastically, to the very limits of due process. Following such a dramatic change of law so closely is no small thing, because by doing so the Court helps to avoid uncertainty and litigation over the preliminary issue of the forum's competence. *Burnham v. Superior Court of Cal., Cty. of Marin*, 495 U.S. 604, 626, 110 S. Ct. 2105, 2119, 109 L. Ed. 2d 631, 649 (1990).

But this decision raises some questions, too, and these questions must be answered so that practitioners will know how to proceed. First, why does the Courts intangible contacts finding seem to reflect just the foreseeability theme of *World-Wide Volkswagen*, instead of both that and the subsequently decided *Asahi*'s additional requirement for the defendant to engage in purposeful conduct directed specifically toward serving the forum states market? The answer must be that *World-Wide Volkswagen* sweeps more widely than *Asahi*, bringing more nonresident defendants into Georgia courts a good thing for the Courts goal of protecting Georgias interest in providing an effective means of redress for citizens whose health and welfare has been injured by defective products which our commercial laws permit to be imported into the State. *Vibratech* at 18, quoting *Showa Denko K. K. v. Pangle*, 202 Ga. App. 245, 250, 414 S.E.2d 658, 663 (1991). In fact, the Court in *Showa Denko* rejects the splintered view of *Asahi* in favor of *World-Wide Volkswagens* analysis. 202 Ga. App. at 250, 414 S.E.2d at 662.

Second, why does the Courts characterization of its construction of subsection (1) of the long arm statute seem to contradict the Supreme Courts description in *Innovative Clinical* of its own construction of that same subsection? For sure, both courts end up at the same place: in giving effect to subsection (1), both will consider intangible contacts in determining whether the defendant has transacted business in Georgia. But the Supreme Court says that it will do so *because* of the literal meaning of the statutory language (279 Ga. at 675, 620 S.E.2d at 355), while the Court of Appeals says that it will do so *despite* the literal meaning of the same language. *Vibratech* at 12.

Given the identical outcomes, is this a distinction without a difference? No, because dueling rationales undercut confidence in the correctness and durability of this construction, leading practitioners to wonder whether the Supreme Court will change the construction, or whether the General Assembly will rewrite subsection (1).

The answer to both questions probably is no. The Supreme Court will probably not change this construction because, as the Court stated in *Innovative Clinical*, [f]or over 17 years the justices of this Court and the judges of the Court of Appeals have urged the Legislature to amend Georgia's long-arm statute so as to provide the maximum protection for Georgia residents damaged by the out-of-state acts or omissions committed by nonresident tortfeasors. 279 Ga. at 674, 620 S.E.2d at 355. In *Innovative Clinical* and now in *Vibratech*, the courts themselves have accomplished that task as to subsection (1). Moreover, since *Innovative Clinical*, several legislative sessions have passed without the General Assemblys enacting amendatory language for subsection (1). The plain fact is that in Georgia, as in every other jurisdiction, the cause of protecting the interests of nonresident defendants has no constituency.

Citations and Cross References. The long arm statute is O.C.G.A. §§ 9-10-90 to 9-10-94. The history and application of the courts construction of O.C.G.A. § 9-10-91 are explicated in Gregory, *Georgia Civil Practice* (3d ed. 2003) §§ 10.01 to 10.03. Forms for contesting personal jurisdiction are located in Jenkins and Pitts, *Georgia Civil Procedure Forms* (1988), Forms 9-11-12(b).13 to 9-11-12(b).17.

Practice Tips

Because the rule expanding personal jurisdiction in all types of cases now appears settled, counsel for nonresident defendants should expend the time and effort to contest this issue only in the rare case where the facts give the

defendant a realistic chance of escaping the rules broad sweep. Plaintiffs counsel can, in carrying out their own strategy, redirect their energies to other issues in almost all cases.

On the other hand, defense counsel for a nonresident now should more carefully scrutinize the service-of-process issue, which, if it ends in a defense victory, will prevent the court from exercising personal jurisdiction over the defendant. For the same reason, plaintiffs counsel should take greater care now to assure that service is accomplished properly on the nonresident a task that is often harder than it looks.

Where both sides of a controversy have a claim against the other but only one side is in Georgia as in a dispute between a large corporation and a recent employee over a noncompetition clause and the final compensation owed, for instance the Georgia side should race to the courthouse even faster than before, since the Georgia court will now have personal jurisdiction over the nonresident opponent in most cases.

ABOUT THE AUTHOR(S):

Jefferson James Davis graduated in 1973 from the University of Texas School of Law in Austin, where he was an Associate Editor of the Texas Law Review. After serving three years in the Army Judge Advocate General's Corps, he was an Assistant Attorney General for the State of Georgia from 1976 to 1979. From 1979 to 2007, he was in private practice in Decatur, Georgia, specializing in civil litigation at the trial and appellate levels in state and federal courts. He litigated business, domestic, and personal injury cases for private clients, and as a Special Assistant Attorney General for the State of Georgia he served as lead trial and appellate counsel in litigation involving constitutional, mental health, contract, bidding, ad valorem taxation, tort claim, and administrative law. He has coauthored two books and authored numerous articles on Georgia trial law and legal history. He is admitted to practice in the Georgia and Texas state courts as well as in the Northern and Middle Districts of Georgia, the Fifth and Eleventh Circuit Courts of Appeal, and the United States Supreme Court. He is a member of the Supreme Court Historical Society and the Georgia Legal History Foundation.

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Cathcart on Discovery Issues in Qualcomm, Inc v. Broadcom Corp.

2008 Emerging Issues 2289

Patrick A. Cathcart on the Disciplinary and Ethical Issues Arising From Discovery in Qualcomm, Inc. v. Broadcom Corp.

By Patrick A. Cathcart

May 7, 2008

SUMMARY: Experienced Southern California litigator Patrick A. Cathcart provides a litigator's practical perspective on the sanctions imposed as a result of discovery abuses in Qualcomm, Inc. v. Broadcom Corp., and discusses the lessons of this case regarding the dangers inherent in conducting discovery in any complex litigation and in taking a careless or nonresponsive approach in responding to discovery requests.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: *Qualcomm Inc. v. Broadcom Corp. (S.D. Cal. Jan 7, 2008) Case No. 05-CV1958-B (BLM) 2008 U.S. Dist. LEXIS 911* n1, is a case that should strike fear in the hearts of most corporate litigators at major law firms who specialize in complex litigation. Large complex cases, with literally millions of documents produced in boxes and on electronic databases, handled by dozens of lawyers and usually with more than one law firm per side, dangerously precipitate a complacent approach to document searches and production: There's always another lawyer or a partner responsible for decisions.

In *Qualcomm*, this attitude, and perhaps a more sinister motive or behavioral approach to discovery, resulted in an Exceptional Case Finding and an award of attorneys fees requiring Qualcomm to pay Broadcom \$9,259,985.09 in attorneys fees and costs, as well as post-judgment interest on the final fee award of \$8,568,633.24, at 4.91% accruing from August 6, 2007, which the Court reduced essentially to a fine of approximately \$8,500,000, and referred to the California State Bar six attorneys for discovery misconduct. These attorneys, and the others actively participating in the litigation, were highly educated, highly intelligent attorneys at well known law firms. They attended Franklin and Marshall, UCLA, UC Berkeley, New York University, Trinity University, Cornell, Oxford University in England, Carnegie Mellon, Duquesne University, Stanford, Harvard, Grinnell College, and other well known top drawer schools. Caught up in high exposure, big case litigation, they and their clients pay a heavy price for hardball litigation that attempted to hide documents rather than be forthright, win at all costs without recognizing adverse facts and inferences staring them in the face.

1. The Dispute and the Discovery Battle

The case involved a complaint and cross-complaint concerning Broadcom's alleged infringement of Qualcomms

patents, and Qualcomms alleged inequitable conduct and waiver making the patents unenforceable. Broadcoms defense that Qualcomm waived enforceability of its patent was predicated on Qualcomms participation in a Joint Video Team (JVT) in 2000 and early 2003. The JVT is the standards-setting body that created a standard, released in May 2003, that governs video coding. Broadcom requested, through numerous interrogatories and multiple Rule 30(b)(6) deposition notices, information concerning Qualcomms attendance at JVT meetings. Qualcomm responded that it had attended meetings, that it had submitted four proposals to the JVT in 2006, but had no earlier involvement. Qualcomm produced deposition witnesses who had not been fully prepared or did not have the information necessary to testify consistent with documents that were produced. Qualcomm produced a second witness not much better prepared. Qualcomm did not search the computers for documents or emails, or provide information to the witnesses to help them prepare for their testimony.

(a) Qualcomms Argument: It Did Not Participate In The Meetings Of The Standards-Setting Body, the JVT.

As the case progressed, Qualcomm became increasingly aggressive in its argument that it did not participate in the JVT during the time that the JVT was creating relevant standards for video coding. Qualcomm submitted an expert declaration confirming the absence of any corporate records indicating that Qualcomm had participated in the JVT. Qualcomm filed a motion for summary judgment and supporting evidence, supporting evidence in a reply, that sought to establish Qualcomms non-participation in the JVT during the relevant period. Qualcomm filed a motion *in limine* to exclude evidence relating to among other things Qualcomms participation in the JVT, and a Memorandum of Contentions of Fact and Law in which it similarly asserted its lack of involvement in the standardization process. At trial, Qualcomms lead trial attorney stated that Qualcomm only participated in the JVT after its standard was produced.

(b) Discovery of E-mails Contradicting Qualcomms Position. A Qualcomm witness, Viji Raveendran, testified at trial. During Raveendrangs preparation, one of the trial attorneys (an associate at one of the law firms) discovered a 2002 email to the witness that welcomed her to a mailing list that related to JVT meetings. On searching Raveendrangs laptop, the attorney discovered 21 separate emails relating to the JVT process. The Qualcomm trial team decided not to produce these emails, claiming they were not responsive to Qualcomms discovery requests. The attorneys ignored the fact that the presence of the emails on Raveendrangs computer undercut Qualcomms premier argument that it had not participated in the JVT in 2002. The Qualcomm trial team failed to conduct any investigation to determine whether they were more emails that also had not been produced.

2. Denial of the Emails and the Contrary Facts

(a) At Trial. Another trial attorney stated to the court during a sidebar discussion, arguing against the admission of the December 2002 list reflecting recipients of these emails: Actually, there are no emails there are no emails theres no evidence that any email was actually sent to this list. This is just a list of email addresses. Theres no evidence of anything being sent. None of the Qualcomm attorneys present during the sidebar mentioned that there were 21 other emails found on Raveendrangs computer a few days earlier.

The jury returned verdicts in favor of Broadcom on the non-infringement of two patents, and in favor of Qualcomm regarding the validity and non-obviousness of the patents. The jury also returned a unanimous advisory verdict in favor of Broadcom that the patent was unenforceable due to inequitable conduct and waiver.

In arguing for a waiver, Broadcom relied on the email to Raveendran noting that Raveendran was invited to participate in the JVT process in 2002 to show that Qualcomm had in fact participated.

(b) Post-trial Proceedings: Qualcomm Denies Relevancy of E-mails. In post-trial proceedings, Qualcomm continued to dispute the relevancy and responsiveness of the 21 emails. Trial attorneys told Broadcom in correspondence that they had continued to believe that Qualcomm performed a reasonable search of Qualcomms documents during discovery and that the 21 unsolicited emails were not responsive to any valid discovery obligation.

Subsequently the attorney told Broadcom that Broadcom's negative characterization of Qualcomm's compliance with its discovery obligation was wholly without merit, but agreed to search the current and archived emails of five trial witnesses. Subsequently the Qualcomm trial team admitted to the court that Qualcomm had thousands of relevant unproduced documents and that their review of the documents revealed facts that appear to be inconsistent with certain arguments that [counsel][sic] made on Qualcomm's behalf at trial and in the equitable hearing following trial.

3. Courts Ruling

(a) Standards For Determining Compliance With Discovery Obligations. The *Qualcomm v. Broadcom* opinion discusses the standards for determining compliance with *Fed Rules Civ. Proc. Rule 26* and *Rule 37* discovery obligations, and denotes that the rule requires the court to award reasonable attorneys fees to the prevailing party on motions to compel unless the court finds the losing parties position was substantially justified or other circumstances that make such an award unjust. The court noted there is no requirement under this rule that the failure be willful or reckless; sanctions may be imposed even for negligent failures to provide discovery. *Fjelstad v. American Honda Motor Co., Inc.*, 762 F.2d 1334, 1343 (9th Cir. 1985). The rules also provide for sanctions against individual attorneys who are remiss in complying with their discovery obligations. Sanctions are available as a matter of rule under *Fed. Rules Civ. Proc. Rule 26*, including the payment of attorneys fees [see *Fed. Rules Civ. Proc. Rule 37(c)(1)*]. Such sanctions can be sufficient to be commensurate with the discovery harm [see *Chambers v. NASCO, Inc.*, 501 U.S. 32, 51, 111 S. Ct. 2133, 114 L. Ed. 2d 27 (1991)]. The courts may also use their inherent power to sanction litigants to prevent abuse of the judicial process [*Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-46, 111 S. Ct. 2133, 114 L. Ed. 2d 27 (1991)]. Citing *Chambers*, the Qualcomm opinion noted that all federal courts are vested with inherent powers enabling them to manage their cases and courtrooms effectively and to ensure obedience to their orders.

(b) Application of the Standards to Qualcomm's Conduct. Qualcomm argued that Broadcom had not made any motion to compel discovery. The Qualcomm court dismissed that argument, noting that Qualcomm had responded it would produce non-privileged relevant responsive documents, that it was committed to producing responsive non-privileged documents that were given to or received from the standards-setting body responsible for the video coding standard, and yet did not produce over 46,000 responsive documents, many of which directly contradict the non-participation argument that Qualcomm repeatedly made. As the court noted, Broadcom had no reason to file a motion to compel. Further, the argument was indicative of the gamesmanship Qualcomm engaged in throughout this litigation. Why should Broadcom file a motion to compel when Qualcomm agreed to produce the documents? What would the court have compelled: Qualcomm to do what it already said it would do? As the court noted, this dilemma highlighted another problem with Qualcomm's conduct of the case: Qualcomm was required to conduct and respond to discovery in good faith; producing 1.2 million pages of marginally relevant documents while hiding 46,000 critically important emails and other documents does not constitute good faith and does not satisfy either the clients or attorneys discovery obligations. And, [s]imilarly, agreeing to produce certain categories of documents and then not producing all of the documents that fit within such a category is unacceptable.

Qualcomm's conduct involved egregious mistakes. Qualcomm did not present any evidence attempting to explain or justify its failure to produce the documents. Qualcomm did not establish that it searched the computers or email databases of individuals who testified on Qualcomm's behalf at trial or in depositions as Qualcomm's most knowledgeable corporate witnesses. In fact, it indicates that it did not conduct any such search. Qualcomm intentionally withheld the documents: (1) when it discovered the 21 emails, it did not produce them and did not engage in any type of review to determine whether they were additional relevant responsive and unproduced documents; (2) Qualcomm did not conduct an internal investigation to determine if there were additional unproduced documents in addition after trial; and (3) Qualcomm spent its time opposing Broadcom's efforts to force such a search, insisting, without any factual basis, that Qualcomm's search was reasonable.

Qualcomm claimed it had inadvertently failed to find and produce the withheld documents. Such claims were

negated by the massive volume and direct relevance of the hidden documents, Qualcomms ability to easily locate the suppress documents using fundamental JVT and other search terms when forced to do ultimately; and belied by the number of Qualcomm employees and consultants who received the emails relating to the JVT meetings, who attended the JVT meetings, and otherwise knew about the information set forth in the undisclosed emails.

4. Lessons to be Learned

According to the findings by the Magistrate and ruling by the District Court judge, the attorneys failed to heed several warning signs that should have alerted Qualcomm to the fact that its document search and production were inadequate. The two Rule 30(b)(6) depositions were of individuals who testified, as Qualcomm employees supposedly most knowledgeable about Qualcomms involvement in the JVT, that they had not searched their personal computers, they were not provided with relevant JVT documents to review, and they did not make any further other efforts to ensure that they were in fact knowledgeable about Qualcomms JVT involvement. The Qualcomm court found that these were obligations the attorneys as well as the party-client shoulders. If a witness is testifying as an organizations most knowledgeable person on a specific subject, the organization has an obligation to conduct a reasonable investigation and review to ensure that the witness does process the organizations knowledge. *Fed R. Civ. P. 30(b)(6); In re JDS Uniphase Corp. Sec. Litig., 2007 U.S. Dist. LEXIS 8523 (N.D. Cal. 2007)* (the corporation must prepare the designee to the extent matters are reasonably available, whether from documents, past employees, or other sources). In its analysis of the attorneys misconduct, the court outlined four possible scenarios to explain what role lawyers retain by Qualcomm played in withholding the documents.

The first scenario the court outlined posited that Qualcomm hid the documents from the lawyers so effectively that they did not know or suspect the documents existed. The second possible cause was that the lawyers failed to discover the hidden documents or suspect their existence due to their complete ineptitude and disorganization. The third scenario imagined that Qualcomm shared the damaging documents with the lawyers, or some of them, and the lawyers then worked with Qualcomm to hide the documents and the evidence of Qualcomms early involvement in the JVT. Or, finally, while Qualcomm did not tell the retained lawyers about the damaging documents and evidence the lawyers suspected there was additional evidence or information but chose to ignore the evidence and warning signs. The court found no evidence of the first three scenarios, and that it was likely some variation of option 4 occurred:

One or more of the retained lawyers chose not to look in the correct locations for the correct documents, to accept the unsubstantiated assurances of an important client that its search was sufficient, to ignore the warning signs that the document search and production were inadequate, not to press Qualcomm employees for the truth, and/or encourage employees to provide the information (or lack of information) that Qualcomm needed to assert its non-participation argument and to succeed in this lawsuit.

That conduct enabled Qualcomm to withhold hundreds of thousands of pages of relevant discovery and to assert numerous false and misleading arguments to the court and jury.

5. Conclusion

It is no wonder sanctions were imposed. The case provides a road map for what attorneys involved in high profile, large document, multi-attorney cases must do in discharging their discovery responses. Over the past few decades, many large law firms have fostered or ignored within their ranks an attitude of hide the ball litigation, of gamesmanship, of fashioning arguments and then making the facts fit, of denying the existence of bad facts or bad documents. Such an attitude is often coupled to rank incivility in dealing with adversaries, but that will undoubtedly be the subject of a different court ruling.

The era of this attitude is over. Attorneys in complex cases should, and not simply out of an excess of caution, do the following:

- . First, recognize the facts of their cases for what they are;
- . Second, *diligently* pursue the existence of all documents and other writings that relate in any way to those facts;
- . Third, impress upon clients the dire consequences of not *preserving* those documents and other writings, especially electronically stored data, including the good, bad, or ugly, through adequate *litigation hold* letters and instructions; and only then,
- . Fourth, fashion arguments that actually fit the facts.

When an attorney discovers the slightest issue that reflects adversely on the litigation process, through the discovery of a document that should have been produced, through testimony that is recorded that is contrary to the facts, or through any other realization that prior representations by the attorney or co-counsel may have been misleading, serious ethical concerns should go off like a four alarm fire in a crowded city. When attorneys either rely on other attorneys to take care of the problem or give short shrift to corrective measures, one or more bar licenses are unnecessarily put at risk. Attorneys have nothing to sell to clients if they do not have their integrity.

For coverage of discovery sanctions in federal court actions in California, see Matthew Bender Practice Guide: Fed Pretrial Civil Procedure in California, Ch. 25, *Motions to Compel and Discovery Sanctions*.

For discussion of sanctions for misuse of discovery in California state court actions, see Matthew Bender Practice Guide: California Civil Discovery, Ch. 3, *Sanctions*.

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n1 . In a subsequent proceeding, the trial court in the case heard motions by the attorneys sanctioned in this order in which the attorneys claimed that Qualcomms assertion of attorney-client privilege prevented the attorneys from adequately responding to the Order to Show Cause. *See Qualcomm Inc. v. Broadcom Corp. (S.D. Cal. March 5, 2008), Case NO. 05-CV 1958B (BLM) 2008 U.S. Dist. LEXIS 16897*. The court granted the motions, and will permit the attorneys to respond to raise any pertinent information, on remand to the Magistrate, by virtue of the self-defense exception to Qualcomms assertion of attorney-client privilege. As a result, the attorneys may, possibly, obtain relief. The conduct as outlined in the original ruling by the Magistrate and the trial courts ruling remains egregious and deserves special consideration by attorneys in similar situations in the future.

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Jefferson James Davis on Mason v. The Home Depot U.S.A., Inc.

2008 Emerging Issues 2293

Jefferson James Davis on Mason v. The Home Depot U.S.A., Inc.

By Jefferson James Davis

May 7, 2008

SUMMARY: The Georgia Supreme Court, in *Mason v. The Home Depot U.S.A., Inc.*, has approved the use of Daubert expert evidence standards for civil cases. This commentary, written by Jefferson James Davis, explores the implications of this important decision.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Seismic Shifts. When Arvin Ritchey Mason and Claudia Mason filed their personal injury suit in 1997, they could not have envisioned that the case would last longer than 10 years and would determine the validity of a 2005 statute that significantly alters expert-evidence standards in Georgia civil litigation. Their recently decided appeal focuses on evidence law, but for litigators its main lesson is what to do when the tectonic plates of the law shift beneath a case that is ready for trial.

In 1996, Mr. Mason bought and used Varathane, a wood finish manufactured by the Flecto Company and sold by Home Depot. The next year he and Ms. Mason, asserting that the Varathane injured him when he inhaled its vapors, sued the two companies for those injuries and for her resulting loss of consortium. The plaintiffs engaged one expert witness on causation and another on labeling.

The case first went to trial in February 2005, eight years after it was filed. Five days before that trial, however, the Governor signed into law the Tort Reform Act of 2005. One part of that statute (codified as O.C.G.A. § 24-9-67.1) overhauled Georgias expert witness statute, making it more like the corresponding federal evidence rule and case law by enhancing the trial judges role of gatekeeper for expert evidence. Based on the new statute, the defendants moved to exclude the testimony of the plaintiffs expert witnesses. The trial court denied the motion, however, on the ground that applying the new statute after years of discovery under the former expert-witness rules would violate the Georgia Constitutions proscription against retroactive laws.

The trial then took an unexpected turn, ending in a hung jury and a mistrial. The defendants at that point renewed their motion to exclude the expert testimony, and the plaintiffs responded by launching a multi-pronged attack on the new statute. The trial court granted the motion this time, however. In doing so, the court rejected some of the prongs of the plaintiffs attack, accepted other prongs but severed offending parts of the statute, and found that the proposed testimony of both of plaintiffs expert witnesses failed to satisfy the resulting statutes reliability standards. The plaintiffs

appealed the two orders without proceeding to a second trial.

Tort Reform? The legal context for deciding the Masons appeal appeared promising for them, as the Supreme Court had already struck down (at least in part) three other sections of the Tort Reform Act. In *EHCA Cartersville, LLC v. Turner*, 280 Ga. 333, 626 S.E.2d 482 (2006), the Court found that O.C.G.A. § 9-10-31 (c) violated the joint tortfeasor venue provision of the Georgia Constitution; the statute provided that in a medical malpractice case a nonresident defendant could require that the case be transferred to a county of that defendant's residence if the tortious act upon which the claim was based occurred in that county.

The Court in *Allen v. Wright*, 282 Ga. 9, 644 S.E.2d 814 (2007), found that O.C.G.A. § 9-11-9.2, which required medical malpractice plaintiffs to file a particular medical authorization form along with the complaint, violated the Supremacy Clause of the federal Constitution. The state statute, the Court held in *Allen*, was less stringent than and inconsistent with the requirements of the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) as to notice of the right to revoke. Finally, the Court invalidated retroactive application of O.C.G.A. § 9-11-68(b)(1), the offer-of-judgment part of the Act, on the ground that, by creating a new obligation for attorney fees, the statute operates as a substantive law and thus cannot apply retroactively to pending cases. *Fowler Properties, Inc. v. Dowland*, 282 Ga. 76, 646 S.E.2d 197 (2007).

The Supreme Courts docket in *Mason* reflects the cases importance in the long war over tort law changes. As that docket shows, three briefs of amici curiae were filed for each side. Prominent members of the Georgia plaintiffs bar and defendants bar served as counsel for the parties and for amici. The plaintiffs also enlisted as counsel an attorney from the Center for Constitutional Litigation, a Washington law firm aligned with the American Association for Justice (until 2006, the Association of Trial Lawyers of America), and a Duke law professor served as a plaintiffs-side amicus counsel.

The Legal Change. The easiest way to analyze the Supreme Courts decision in *Mason* is to examine the statutory foundation of the dispute first. A longtime statute, applicable in both civil and criminal cases prior to the Tort Reform Act, provided that the opinions of experts on any question of science, skill, trade, or like questions shall always be admissible. Former O.C.G.A. § 24-9-67. The only reliability limitation on the admissibility of such evidence was the test adopted by the Court in *Harper v. State*, 249 Ga. 519, 292 S.E.2d 389 (1982) -- whether the technique or procedure the expert used in arriving at an opinion had reached a scientific stage of verifiable certainty. 249 Ga. at 525, 292 S.E. 2d at 395. In a series of cases over the years, the Court has also limited the data base for expert opinions by generally excluding from evidence opinions that were based substantially or wholly on hearsay. *E.g.*, *Leonard v. State*, 269 Ga. 867, 506 S.E.2d 853 (1998).

The new statute applies only to civil cases and provides that the facts or data upon which the expert forms the opinion need not be admissible in evidence in order for the opinion to be admitted, so long as they are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. O.C.G.A. § 24-9-67.1(a). It also provides that a qualified expert may testify if:

(1) The testimony is based upon sufficient facts or data which are or will be admitted into evidence at the hearing or trial;

(2) The testimony is the product of reliable principles and methods; and

(3) The witness has applied the principles and methods reliably to the facts of the case.

O.C.G.A. § 24-9-67.1(b).

Upholding the New Statute. The Supreme Court by a 5-2 vote affirmed the trial courts exclusion of the expert witnesses testimony. In their appeal, the Masons argued that the new statute should be invalidated on equal protection and due process grounds; that, due to retroactivity, the statute should not be applied to them; and that, if the statute were

to be found valid and generally applicable to them, it was incorrectly used in excluding their witnesses. From the plaintiffs viewpoint, the linchpin of the Courts decision is the rejection of their retroactivity argument, since a win for them on that one point would have obviated rulings on the other prongs of their attack.

The plaintiffs retroactivity argument essentially was that the new evidence statute was stricter than the old one, that by virtue of their hiring and preparing expert witnesses under the old law they now had a vested right to its application, and that applying the new one to them violated the Georgia Constitution. The Constitution provides simply that [n]o ... retroactive law ... shall be passed. Ga. Const. 1983, Art. 1, Sec. 1, Par. 10 The Court acknowledged that the new law is stricter, *Mason* at 3, but it found that the subject matter of the statute an evidentiary rule -- did not permit the its being vested in any party. *Mason* at 15.

Retroactive Application. Generally, the constitutional prohibition against retroactivity applies when the law injuriously affects vested rights. *Bullard v. Holman*, 184 Ga. 788, 193 S.E. 586 (1937). The Court here noted specifically that [w]here a statute governs only procedure of the courts, including the rules of evidence, it is to be given retroactive effect absent an expressed contrary intention. *Polito v. Holland*, 258 Ga. 54 (2) (365 SE2d 273) (1988).

The Court contrasted this treatment with statutes governing substance, noting that it had recently struck down the offer-of-judgment part of the Tort Reform Act on that basis in the *Fowler Properties* case. An uncodified part of the Act itself provides that certain parts of the Act shall apply only with respect to causes of action arising on or after the effective date of this Act, and that certain other parts, including the expert-testimony one, shall apply to causes of action pending on its effective date, unless such application would be unconstitutional leaving the courts with the same question of unconstitutionality. 2005 Ga. ALS 1, *; 2005 Ga. Act 1; 2005 Ga. SB 3, § 15(b).

Structural Soundness. As for their other structural arguments, the plaintiffs contended that the evidence statute violates the equal protection guarantees in the federal and Georgia constitutions, in that the statute by its terms applies to civil cases but not to criminal or eminent domain cases, which are governed by the less strict older act. The Court agreed that the older statute was not as strict. *Mason* at 3. It found, however, that one challenging a statute on this ground must initially establish that he or she is similarly situated to persons who are treated differently from him or her. It concluded that civil litigants are not similarly situated to criminal defendants, since different procedural statutes apply to each. *Mason* at 5, 6. Presiding Justice Hunstein, writing in dissent, was the lone justice to disagree on this point.

The plaintiffs also asked the Court to hold that the statute violated due process provisions by being too vague, since part (a) of the statute provides that the data underlying the expert opinion need not be admissible, while part (b)(1) provides that the data are or will be admitted into evidence. The Court agreed that these provisions are contradictory and thus unconstitutionally vague. Like the trial court, though, it determined that it could sever part (b)(1), since by doing so legislative intent is not compromised. The Court did not explain why it chose to sever that part rather than part (a), but the statutory statement of intent seems to supply the reason. That statement says essentially that federal evidence law may be used to construe this statute (O.C.G.A. § 24-9-67.1(f)), and federal law provides that the data underlying an opinion need not be admissible. *F.R.E.* 703.

The plaintiffs also argued that the statute usurps judicial authority by providing how the statutes own terms are to be construed. The last part of the statute states that in interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and its progeny. O.C.G.A. § 24-9-67.1(f). The Court rejected the usurpation argument by holding that the statute was not couched in mandatory terms and merely stated a principle of law regularly employed by Georgia courts. *Mason* at 12.

The last part of the statute also states that [i]t is the intent of the legislature that, in all civil cases, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states. The plaintiffs argued, in contrast to their previous points, that this language improperly delegates the legislative power to the courts of Georgia, and ultimately to the courts and legislatures of other states. The Court rejected this argument, noting again that

this language contains no words of command and simply states intent. *Mason* at 14. Both Presiding Justice Hunstein and Justice Carley dissented on these usurpation points.

Daubert Applied. Finally the Court, having disposed of the attacks on the validity of the new statute, reviewed the trial courts application of the statute to the facts at hand. Crucially, the Court first determined the proper standard of review: whether a witness is qualified to render an opinion as an expert is a legal determination for the trial court and will not be disturbed absent a manifest abuse of discretion. *Mason* at 18. The trial court had rejected the plaintiffs causation witness on the basis that she had no scientific support for using her methods of determining causation. The Court used a federal Court of Appeals decision to support refraining from disturbing this ruling. *Ervin v. Johnson & Johnson, Inc.*, 492 F.3d 901 (7th Cir. 2007). It used its own evaluation of the evidence proffered by the plaintiffs labeling expert to conclude that his exclusion by the trial court was not an abuse of discretion. *Mason* at 19.

Citations and Cross References. The statute that imposes the *Daubert*-style reliability rules is O.C.G.A. § 24-9-67.1, and it is codified from 2005 Ga. ALS 1, *; 2005 Ga. Act 1; 2005 Ga. SB 3, § 15(b). The particular cases suggested in the statute as models for construing the statute are *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); and *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999). The corresponding federal rules are *F.R.E.* 702, 703.

Practice Tips

Now that the *Daubert* statute has been approved by the highest court, make effective use of its standards by securing and using expert witnesses at the very beginning of the case (or, for plaintiffs in novel or potentially substantial cases, as part of deciding whether to undertake representation). Employ the standards to frame the experts work and trial examination, and use them against opposing expert witnesses in discovery and cross-examination. Resist the use of the standards, though, in ordinary cases where the reliability of the experts methods is properly taken for granted.

As to the problem of significant changes occurring in the law underlying a trial-ready case, avoiding these changes altogether is of course the best solution, but the only chance of doing that lies in keeping the case moving and paying close attention to pending legislation. Plaintiffs-bar and defense-bar groups provide assistance to their members on the latter.

Avoiding the unfavorable *effects* of such changes is next best, and that can be done in some cases by making alternative trial-preparation plans reflecting potential upcoming changes in the law.

If the statutory change or the unfavorable effects of that change cannot be avoided, then attacking the new statute becomes the last best hope. As in *Mason*, counsel should marshal their arguments and make them vigorously by way of an interlocutory appeal.

Illustrative Example. In another case like *Mason* where the General Assembly is threatening to change the law on the admissibility of certain evidence, counsel should from the outset seek evidence that will satisfy the potential new law as well as the existing law, present both sets of evidence to the expert, and have the expert consider alternative conclusions based on the two sets of evidence. In a normal case, this two-alternative approach would drastically undercut the force of the experts findings, but a case facing a substantial change in the governing law is not a normal case.

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Jefferson James Davis graduated in 1973 from the University of Texas School of Law in Austin, where he was an Associate Editor of the Texas Law Review. After serving three years in the Army Judge Advocate Generals Corps, he was an Assistant Attorney General for the State of Georgia from 1976 to 1979. From 1979 to 2007, he was in private practice in Decatur, Georgia, specializing in civil litigation at the trial and appellate levels in state and federal courts. He litigated business, domestic, and personal injury cases for private clients, and as a Special Assistant Attorney General for the State of Georgia he served as lead trial and appellate counsel in litigation involving constitutional, mental health, contract, bidding, ad valorem taxation, tort claim, and administrative law. He has coauthored two books and authored numerous articles on Georgia trial law and legal history. He is admitted to practice in the Georgia and Texas state courts as well as in the Northern and Middle Districts of Georgia, the Fifth and Eleventh Circuit Courts of Appeal, and the United States Supreme Court. He is a member of the Supreme Court Historical Society and the Georgia Legal History Foundation.

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Joe McDonnell on Carter v. SSC Odin Operating Company, LLC

2008 Emerging Issues 2269

Joe McDonnell on Carter v. SSC Odin Operating Company, LLC, 2008 Ill. App. LEXIS 305, opinion filed Apr. 4, 2008

By Joseph B. McDonnell

May 6, 2008

SUMMARY: The Federal Arbitration Act (9 U.S.C. Sec. 1 et seq.) mandates enforcement of agreements to arbitrate disputes. The Illinois Nursing Home Act (210 ILCS 45/1 et seq.) invalidates agreements which waive rights granted by the Act, including the right to a jury trial. This commentary by Joe McDonnell discussed the interplay of these Acts and the role of public policy in the preemption analysis.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Public Policy of Illinois as Expressed in Illinois Nursing Home Care Act (210 ILCS 45/1-101 et seq.) prevails over Federal Arbitration Act (9 U.S.C. Sec. 1 et seq.)

The Rule of Preemption. Generally, federal law preempts a state statute when a conflict between the two arises. *Maryland v. Louisiana*, 451 U.S. 725 (1981). However, preemption must be the clear and manifest purpose of Congress as expressed in the pertinent statute. *Thompson v. Northeast Illinois Regional Commuter R.R. Corp.*, 854 N.E.2d 744 (Ill.App. 1st Dist. 2006) (citing *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993)). If that purpose is not evident, or if the state statute deals with issues affecting the validity of contracts generally, the statute will be recognized and given force according to its terms.

The Rule as Applied to the FAA. The Federal Arbitration Act (9 U.S.C. Sec. 1 et seq) reflects a liberal federal policy favoring arbitration agreements. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S.1 (1983). Section 2 of the Act provides that arbitration agreements governed by the Act shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

In *Southland Corp. v. Keating*, 465 U.S.1 (1984), the U. S. Supreme Court held that Sec. 2 of the FAA applies in state as well as federal courts and forecloses any action by a state which would require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. The *Southland* decision held that the FAA established a broad principle of enforceability and that Sec. 2 of the Act provided for revocation of arbitration agreements only upon grounds as exist at law or in equity for the revocation of any contract.

The FAA v. Illinois Public Policy. The Illinois Nursing Home Care Act creates a right of action for damages, including recovery of attorneys fees and costs, in favor of a nursing home resident injured because of the intentional or

negligent conduct of the nursing home or its agents. The Act invalidates any waiver, whether oral or in writing, by a nursing home resident of such rights and of the right to a jury trial, which is granted by the Act. The effect of these provisions on the applicability of the Federal Arbitration Act was the issue presented in *Carter v. SSC Odin Operating Company, LLC*, Appellate Court of Illinois, Fifth District, No. 5-07-0392.

Background. Plaintiffs two-count complaint, filed on behalf of the estate of Joyce Gott, sought damages against the nursing home for injuries the decedent incurred prior to death (the survival action) and while a resident at the home and damages for loss of society to the decedents heirs (the wrongful death action). Defendants answer included an affirmative defense based on a written agreement which had been signed by the decedent and which purported to require arbitration of any disputes arising from her care while a resident. The defendant later moved to compel arbitration, in accordance with Section 4 of the Federal Arbitration Act, which provides for orders compelling arbitration when one party has failed, neglected, or refused to comply with an arbitration agreement. The lower court held that the agreements signed by the decedent violated the clear public policy of Illinois as expressed in the Nursing Home Care Act and refused to order arbitration. The nursing home appealed.

The Question Presented. The appellate court posited that a violation of a states public policy may be an appropriate defense to an action based on contract. The defendant had not urged the contrary and, even if it had, abundant Illinois authority established the rule. *Carter, slip op. at 5*. This left for determination only the issue of federal preemption. Given that the Nursing Home Care Act, and particularly its provisions precluding waiver of rights granted under the Act, contain an emphatically stated public policy of the State of Illinois, must that policy yield to the overriding philosophy of the Federal Arbitration Act recognizing as a general rule the enforceability of agreements to arbitrate?

The Courts Analysis. The fifth district was at pains to express its agreement with the U. S. Supreme Courts decisions in *Doctors Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), and *Perry v. Thomas*, 482 U.S. 483 (1987). In those cases, the Court had expressed the view that state law is not preempted by federal law if the state law governs issues concerning the validity, revocability, and enforceability of contracts generally. *Carter, slip op. at 7*. Conversely, where the state law purports to be directed to a contract or agreement to arbitrate, it will not overcome the applicability of the Federal Arbitration Act.

The fifth district found that the language of Sections 6 and 7 of the Nursing Home Care Act was not specifically directed to an agreement to arbitrate; rather, it applied generally to [a]ny waiver of the right to commence an action (Sec. 6) and to any waiver of the right to trial by jury (Sec. 7). The statute does not mention arbitration agreements at all and is not limited to such agreements. To the extent that the Act may invalidate an arbitration agreement, that, according to the court, is a tangential, rather than a direct, effect of the statute, and would apply to all contracts containing a waiver of rights under the Act, not simply arbitration agreements. *Id.* The statute expresses the public policy of Illinois relative to the validity, revocability, and enforceability of contracts generally, and since Illinois recognizes public policy as a defense to a contract action, the Federal Arbitration Act does not compel arbitration and the circuit court was correct in denying the motion to compel arbitration.

Strategies for Practitioners. Although the U. S. Supreme Court has stressed that federal policy, as express in the Federal Arbitration Act, favors the enforcement of valid arbitration agreements (see, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. at 24-25 (1991)), the Court has also clearly recognized that a party cannot be forced into arbitration unless the party has entered into a valid, enforceable contract waiving his or her right to a judicial forum. Typically, plaintiffs attempt to avoid arbitration by asserting defenses based on invalidity of the agreement, unconscionability, fraudulent inducement, illegality of one provision affecting the entire agreement, etc. See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006). The importance of the *Carter* case lies in the confrontation between a state statute specifically creating a cause of action and guaranteeing attendant rights (including nullification of agreements waiving such rights), and a federal law which recognizes arbitration agreements as valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C. Sec. 2. It is not often that such grounds will be found. (For examples of federal preemption as applied to an Illinois statute and a

municipal ordinance, see *Eagle Marine Industries, Inc. v. Union Pacific Railroad Company*, 227 Ill. 377, and *Village of Mundelein v. Wisconsin Central Railroad*, 227 Ill.2d 281, both decided January 25, 2008). When such a situation occurs, however, counsel must be alert to recognize that federal preemption has its limits; and that Illinois recognizes as valid a contract defense based on the public policy of the state as clearly stated in its statutes.

From the defense standpoint, while an affirmative defense may be pleaded with respect to any matter which seeks to avoid the legal effect of or defeat the cause of action set forth in the complaint (735 ILCS 5/2-613), ordinarily the motion to compel arbitration is filed as the initial pleading and that is the recommended course. If the goal is to get the case out of court and into arbitration quickly, a motion for that purpose, filed as soon as reasonably possible, would be the preferred route. (If the motion is denied, an appeal may be taken immediately under Supreme Court Rule 307(a)(1)). On the issue of arbitration, defense counsel should stress the increasing use of arbitration agreements and the increased willingness of the courts to recognize arbitration, so long as the contractual agreement is not susceptible to attack on a legally cognizable basis.

For additional discussion of arbitration and preemption, see Illinois Litigation Forms and Checklists Checklist 15.03. See also Illinois Litigation Forms and Checklists Form 15.17 Demand for Arbitration, Form 15.20 Motion for Order to Compel Arbitration, Form 15.21 Motion in Opposition to Motion to Compel Arbitration, Form 15.22 Order Granting or Denying Motion to Compel Arbitration, Form 15.23 Motion for Order to Stay Arbitration.

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William C. Bochet on SWH Funding Corp. v. Walden Printing Co.

2008 Emerging Issues 2271

William C. Bochet on SWH Funding Corp. v. Walden Printing Co., 399 N.J. Super. 1, 942 A.2d 839 (App. Div. 2008)

By William C. Bochet

May 5, 2008

SUMMARY: In *SWH Funding Corp. v. Walden Printing Co.*, the Appellate Division issued an outline of the applicable standards for vacating an arbitration award entered where neither the party nor its counsel appear for an arbitration hearing. This commentary, written by William C. Bochet, discusses the implications of this important decision.

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ARTICLE: Grounds for Relief from Failure to Appear at Arbitration Sanctions Outlined by Appellate Decision

The Appellate Division has issued an outline of the applicable standards for vacating an arbitration award entered where neither the party nor its counsel appear for an arbitration hearing. In *SWH Funding Corp. v. Walden Printing Co.*, 399 N.J. Super. 1, 942 A.2d 839 (App. Div. 2008), the court addressed N.J. Ct. R. 4:21A-4(f) (Failure to Appear) and set requirements of both a showing of good cause and a meritorious defense to obtain relief from an order entered against the absent party.

Not Feeling Too Well. The case was a commercial collection matter arising from defendant's failure to make rent and other payments in order to have the plaintiff forebear foreclosure on premises occupied by the defendant. The plaintiff filed suit, the defendant joined issue and the case ultimately was listed for arbitration under the court-mandated program, pursuant to N.J. Ct. R. 4:21A. The defendant's attorney successfully obtained an adjournment of the first-scheduled hearing date.

When the second hearing date approached, defense counsel was stricken with "flu-like" symptoms, apparently unrelated to the paucity of favorable equities in the case, and sought a second adjournment. This was denied by the arbitration administrator, via a message on counsel's voicemail. The arbitration proceeded without the defendant or its counsel and the arbitrator entered an award reflecting unpaid damages in excess of \$325,000.00.

Feeling Worse. Plaintiff's counsel moved to confirm the award 29 days later. Defendant's attorney opposed the motion and, this time, made it a point to be present at oral argument. The motion did not end in confirmation of the award. Rather, a series of orders were entered which ultimately resulted in a judgment against the defendant for \$416,508.00, an amount substantially in excess of the arbitration award.

The Appellate Division took on the task of dealing with the peculiar course of events which led to the result in the court below. The court's opinion does not paint a clear picture of the basis for the trial court's ruling, beyond ultimately suggesting that the easiest route between two points is a straight line. The appellate court pointed out that the rule that applies is the most obvious, namely N.J. Ct. R. 4:21A-4(f), as it sets the procedure for relief from an order entered against a party that does not appear at arbitration. The machinations of the lower court were not necessary.

Feeling Much Better. The first path to relief is a showing of "good cause" for failing to appear at the hearing. An example is provided in *Del. Valley Wholesale Florist v. Addalia*, 349 N.J. Super. 228, 793 A.2d 139 (App. Div. 2002). There, a busy trial lawyer failed to show for a hearing after a conversation with adverse counsel led to the impression that no claim would be advanced against his client at the hearing, thus allowing him to give his attention elsewhere. There was an unexpected result against counsel's client. The Appellate Division found this scenario to be sufficient to constitute "good cause" to permit rejection of the award. Other cases provide further enlightenment on that reasoning. See *Ghandi v. Cespedes*, 390 N.J. Super. 193, 196, 915 A.2d 39 (App. Div. 2007); *Farrell v. TCI of Northern New Jersey*, 378 N.J. Super. 341, 875 A.2d 1017 (App. Div. 2005); *Davis v. DND Fidorio, Inc.*, 317 N.J. Super. 92, 99, 721 A.2d 312 (App. Div. 1998).

Applying the "good cause" standard to judge the conduct of counsel for the defendant, the appellate panel found that there was sufficient showing to satisfy that ground for relief under N.J. Ct. R. 4:21A-4(f). This is in keeping with other appellate decisions which are forgiving of attorney misfeasance in connection with arbitration proceedings. See *Severino v. Marks*, 366 N.J. Super. 275, 840 A.2d 982 (App. Div. 2004); *Ravelo v. Campbell*, 360 N.J. Super. 511, 823 A.2d 868 (2003); and *Del. Valley Wholesale Florist, Inc., v. Addalia*, 349 N.J. Super. 228, 793 A.2d 139 (App. Div. 2002).

The reprieve for defendant's counsel was not visited upon the defendant. Rather, the appellate panel added a second requirement for paragraph (f) relief which it held was not satisfied.

Defenseless Defendant. N.J. Ct. R. 4:21A-4(f) allows for relief from an order entered after non-appearance at an arbitration upon a showing of good cause. The decision in *SWH Funding* added that it is also necessary for the moving party to show that it had a meritorious defense--a basis to oppose the claim for relief. 399 N.J. Super. 1, 942 A.2d 839 (App. Div. 2008)

The need to show a meritorious defense is found most frequently in the context of motions to vacate a default judgment, N.J. Ct. R. 4:43-3 and N.J. Ct. R. 4:50. It is satisfied when the moving party asserts sufficient facts or legal defenses so as to place plaintiff's claims at issue. See *Siwec v. Financial Resources, Inc.*, 375 N.J. Super. 212, 865 A.2d 485 (App. Div. 2005); *Morales v. Santiago*, 217 N.J. Super. 496, 501, 526 A.2d 266 (App. Div. 1987); *Marder v. Realty Constr. Co.*, 84 N.J. Super. 313, 202 A.2d 175 (App. Div. 1964), *aff'd*, 43 N.J. 508, 205 A.2d 744 (1964).

The *SWH Funding* panel applied that prerequisite and found the defendant's defense was lacking. 399 N.J. Super. 1, 942 A.2d 839 (App. Div. 2008). The court reinstated the judgment entered after the arbitration hearing for the amount of the award and pre-judgment interest.

Evading the Agony. The case evokes sympathy for the hapless defense attorney whose blunder was to assume that a request for adjournment due to illness would be granted as a matter of course. Instead, the arbitration administrator denied the request, apparently as a result of the emasculation of discretion by an immutable -- and improper, the decision points out -- county policy of allowing only one adjournment. The tortuous course of events suffered by counsel, until salvation by the appellate court, is obviously best avoided. Some lessons can be learned:

1. Requests to adjourn an arbitration hearing should be made in writing as soon as the reason therefor is known.
2. After the application for adjournment is submitted, counsel should follow up its outcome with the arbitration administrator.

3. When the administrator denies the request, counsel should make a new request by way of a phone call or fax to the civil presiding or designated judge, if possible.

4. On or before the hearing date, the request should be made in person to the civil presiding or designated judge.

Above all, every effort must be made to ensure sanctions pursuant to N.J. Ct. R. 4:21A-4(f) do not come into play.

Cross-references. LexisNexis Practice Guide NJ Pretrial Practice § 6.12: Preparing for and Participating in Arbitration Hearing.

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Curry on California Unlawful Detainer Notices

2008 Emerging Issues 2238

Christian A.M. Curry on the California Unlawful Detainer Process and its Required Notices

By Christian A.M. Curry

May 1, 2008

SUMMARY: In an unlawful detainer proceeding, the issues are limited to possession (the primary issue), and rent or holdover damages (a secondary issue) contingent on the existence of a valid claim for possession. Unlawful detainer is a creation of statute, unknown at common law, and demands strict adherence to the statutory procedural requirements. This Expert Commentary discusses these important requirements.

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ARTICLE: Introduction. Unlawful detainer is a summary proceeding to recover possession of real property by a landlord from a tenant. In an unlawful detainer proceeding, the issues are limited to possession (the primary issue), and rent or holdover damages (a secondary issue) contingent on the existence of a valid claim for possession. Unlawful detainer is a creation of statute, unknown at common law, and demands strict adherence to the statutory procedural requirements.

With the exception of the termination of a fixed-term lease (where all parties are aware of the tenancy termination date), one of the several types of noticed set forth in Cal. *Code Civ. Proc.* § 1161 must be served on the tenant and run as a prerequisite to the filing of a viable case in unlawful detainer. It is the service and running of the notice that terminates the tenancy such that the landlord-plaintiff may file and maintain a case in unlawful detainer, and allows the court to award possession.

Statutory Duty Requires Serving Notice and Allowing Notice to Run Before Filing Unlawful Detainer. The statutes that govern service of notices as prerequisites to an unlawful detainer action are Cal. Civ. Code § 1946 and *Code Civ. Proc.* § 1162.

30-day notices to quit under *Civ. Code* § 1946 (and 60-day notices to quit under *Civ. Code* §1946.1) may be given in the manner prescribed in *Section 1162 of the Code of Civil Procedure* or by sending a copy by certified or registered mail addressed to the other party@ [*Civ. Code* § 1946]. All other notices as a prerequisite to an unlawful detainer action per *Code Civ. Proc.* § 1161 must be served in accordance with *Code Civ. Proc.* § 1162 to be valid [see Judicial Council of California Civil Jury Instructions ("CACI") Nos. 4303, 4305, 4307 (LexisNexis Matthew Bender, official publisher)].

Unlawful Detainer Is Unique Body of Law; Requirements That Deviate From Common or Statutory Law Must be Followed. Chapter 4 of Title 3 of Part 3 of the Code of Civil Procedure (§§ 1159B, 1179a) is known as the Unlawful Detainer Act. The Unlawful Detainer Act is broad in scope, available to both landlords and tenants who have suffered wrongs committed by the other [*Woods-Drury, Inc. v. Superior Court* (1936) 18 Cal. App. 2d 340, 344, 63 P.2d 1184]. Procedures and proceedings in unlawful detainer were unknown at common law and are creatures of statute [*Woods-Drury, Inc. v. Superior Court* (1936) 18 Cal. App. 2d 340, 344, 63 P.2d 1184]. As such, they are governed solely by the statutes that created them [*Kwok v. Bergren* (1982) 130 Cal. App. 3d 596, 599, 181 Cal. Rptr. 785]. Thus, where the Unlawful Detainer Act deals with matters of practice, its provisions supersede the rules of practice contained in other portions of the code@ [*Schubert v. Lowe* (1924) 193 Cal. 291, 295, 223 P. 550; *Losornio v. Motta* (1998) 67 Cal. App. 4th 110, 78 Cal. Rptr. 2d 799].

Landlord Must Strictly Comply With Notice Statute to Effect Valid Service to Support Unlawful Detainer Claim. *Requirements for Service Are Set Forth in Plain Language of Code Civ. Proc. § 1162.* The requirements for service are unequivocal, set forth in *Code Civ. Proc. § 1162*:

The notices required by Sections 1161 and 1161a may be served, either:

1. By delivering a copy to the tenant personally; or,
2. If he or she is absent from his or her place of residence, and from his or her usual place of business, by leaving a copy with some person of suitable age and discretion at either place, and sending a copy through the mail addressed to the tenant at his or her place of residence; or,
3. If such place of residence and business can not be ascertained, or a person of suitable age or discretion there can not be found, then by affixing a copy in a conspicuous place on the property, and also delivering a copy to a person there residing, if such person can be found; and also sending a copy through the mail addressed to the tenant at the place where the property is situated. Service upon a subtenant may be made in the same manner.

Only Strict Compliance With Statutory Requirements Will Afford Remedy of Unlawful Detainer. The landlord must follow the procedures outlined in *Code Civ. Proc. § 1162*, or the action will fail. Thus, in an unlawful detainer action, a landlord must strictly comply with statutorily mandated requirements for service of the notice to pay rent or quit; compliance with one of these methods must be shown or judgment declaring the landlord's right to possession must be denied. The landlord *must* prove compliance with *Code Civ. Proc. § 1162* [*Liebovich v. Shahrokhkhany* (1997) 56 Cal. App. 4th 511, 513-514, 65 Cal. Rptr. 2d 457]. Thus, if there is not complete compliance with *Code Civ. Proc. § 1162*, judgment for unlawful detainer cannot be had.

Three cases are commonly cited to refute the plain language of *Code Civ. Proc. § 1162*: *Hozz v. Lewis* (1989) 215 Cal. App. 3d 314, 263 Cal. Rptr. 577; *Highland Plastics v. Enders* (1980) 109 Cal. App. 3d Supp. 1, 167 Cal. Rptr. 353; and *Nourafchan v. Miner* (1985) 169 Cal. App. 3d 746, 215 Cal. Rptr. 450. However, neither these cases, nor any other, stands for that premise.

In *Hozz v. Lewis*, the tenant had multiple residence addresses, and the court found that the landlord had no duty to demonstrate reasonable diligence in determining at which address the tenant was staying [*Hozz v. Lewis* (1989) 215 Cal. App. 3d 314, 317, 263 Cal. Rptr. 577]. The more important distinction in the *Hoss* case was that the landlord had a legitimate belief that the tenant had *no* business address, and could thus not attempt service there.

The *Hozz* case also addresses *Highland Plastics v. Enders* [(1980) Cal. App. 3d Supp.1, 7, 167 Cal. Rptr. 353]. *Highland Plastics* case also found that posting and mailing pursuant to *Code Civ. Proc. § 1162(3)* was appropriate. But, in *Highland Plastics*, the defendant used the property as both his residence and business addresses. The attempt of service on the home was itself also an attempt of service at the business because the business was in the home. In this

case, two trips to the same address were not necessary.

This was also the case in *Nourafchan v. Miner*, where the evidence supported the property manager's belief that the tenant used his home as his workplace. This included evidence that the tenant had converted one room into an office, and that the residence was frequented by his employees [*Nourafchan v. Miner* (1985) 169 Cal. App. 3d 746, 750, 215 Cal. Rptr. 450]. In the *Nourafchan* and *Highland Plastics* cases, posting and mailing was appropriate because the landlord, believing the tenant was away from home, had attempted service at the home and business before resorting to posting and mailing.

None of these cases supports the frequently misstated presumption that a landlord need not comply with the plain language of *Code Civ. Proc.* § 1162. All modern (post-*Hozz* [1998]) cases specifically say the landlord must strictly comply with all of *Code Civ. Proc.* § 1162. In *Losornio v. Motta*, the court stated in pertinent part [*Losornio v. Motta* (1998) 67 Cal. App. 4th 110, 78 Cal. Rptr. 2d 799]:

Section 1162 provides three methods of serving these notices: (1) by personal delivery to the tenant (personal service); or (2) if the tenant is absent from his residence and usual place of business, by leaving a copy with a person of suitable age and discretion at either place, and sending a copy through the mail to the tenant's residence (substituted service); or (3) if a place of residence and usual place of business cannot be ascertained or a person of suitable age or discretion cannot be found there, then by affixing a copy in a conspicuous place on the property and delivering a copy to a person residing there, if such a person can be found, and also sending a copy through the mail addressed to the tenant at the place where the property is situated (post and mail service). (§ 1162, subds. 1B3; *Civ. Code*, § 1946.) A 30-day or 3-day notice is valid and enforceable only if the lessor has strictly complied with these statutorily mandated requirements for service. (*Liebovich v. Shahrokhkhany* (1997) 56 Cal. App. 4th 511, 513, 65 Cal. Rptr. 2d 457.)

It is thus well established that *strict* compliance with statutory mandate as to contents and service of the subject notice is required, including attempting personal service and substituted service at both the home and place of business, if known, pursuant to *Code Civ. Proc.* § 1162(1), (2) before resorting to posting and mailing at the property pursuant to *Code Civ. Proc.* § 1162(3) [*Liebovich v. Shahrokhkhany* (1997) 56 Cal. App. 4th 511, 513-514, 65 Cal. Rptr. 2d 457; *Losornio v. Motta* (1998) 67 Cal. App. 4th 110, 78 Cal. Rptr. 2d 799; *Underwood v. Corsino* (2005) 133 Cal. App. 4th 132, 135, 34 Cal. Rptr. 2d 542].

Legally Required Service Vs. Actual Receipt of Service. Lack of actual receipt of a notice is not a defense to an unlawful detainer based on it when proper service is alleged and proven.

Landlords sometimes argue that actual receipt of a notice cures any defects in service, often citing *Lehr v. Crosby* [(1982) 123 Cal. App. 3d Supp. 1, 177 Cal. Rptr. 96] and *Valov v. Tank* [(1985) 168 Cal. App. 3d 867, 214 Cal. Rptr. 546]. Neither case actually supports that position.

In *Lehr*, the landlord served the tenant by substituted service under *Civ. Code* § 1962(2) by delivering a copy to the tenants' 16-year-old daughter and mailing a copy to the tenant [*Lehr v. Crosby* (1982) 123 Cal. App. 3d Supp. 1, 4, 177 Cal. Rptr. 96]. The landlord's efforts to serve ended there and did not proceed to the third step of posting and mailing. The court in *Lehr* stated [*Lehr v. Crosby* (1982) 123 Cal. App. 3d Supp. 1, 4, 177 Cal. Rptr. 96]:

[T]here is no evidence in the record that Hazlett [tenant] had a place of business, nor, in fact, does she so allege on appeal. Lacking such evidence, we believe the trial judge correctly concluded that an attempt to serve her at the one location where she might be found satisfies the requirements of the statute.

If anything, *Lehr* confirms that if the landlord knows of the tenant's place of business, the landlord must attempt personal service there before serving the tenant by substituted service at the subject property.

In oft-cited footnote 3, the court merely states that Awe infer that plaintiff received actual notice@ [*Lehr v. Crosby* (1982) 123 Cal. App. Supp. 1, 6 n.3, 177 Cal. Rptr. 96]. Not only is this dicta because the service under Civ. Code § 1962(2) means the court never directly addressed service under § 1962(3), but also the court never said what, if any, was the effect of actual receipt.

Valov was a commercial tenancy for sharecrop revenue, easily distinguishable from a residential tenancy. In *Valov*, the court found that the tenant had avoided service. The process server had observed the defendant sitting in the living room, but after the tenant saw the process server, he left the room and did not answer the door [*Valov v. Tank* (1985) 168 Cal. App. 3d 867, 870, 214 Cal. Rptr. 546]. There was also evidence that the tenant's business was at the same address as his residence and that this address, which was different from the address of the subject property, was where service was made. The *Valov* court found waiver Aunder the circumstances of this case@ only [*Valov v. Tank* (1985) 168 Cal. App. 3d 867, 870, 214 Cal. Rptr. 546]. In *Valov* service was not made by posting and mailing under Civ. Code § 1962(3) because the notice was not posted Aon the [subject] property@ or sent Athrough the mail addressed to the tenant at the place where the property is situated@ as required by § 1962(3). As such, the service in *Valov* bore no resemblance to posting and mailing, relying more on the position that mail service can be de facto Apersonal service@ when the tenant admits receiving notice.

Courts have made this type of finding on a case-by-case basis in several instances:

C Colyear v. Tobriner (1936) 7 Cal. 2d 735, 741-742, 62 P.2d 641 (commercial case predating Civ. Code § 827 requirement that notice served pursuant to Civ. Code § 1162).

C University of So. Calif. v. Weiss (1962) 208 Cal. App. 2d 759, 769, 25 Cal. Rptr. 475 (commercial case).

C Wilcox v. Anderson (1978) 84 Cal. App. 3d 593, 597, 148 Cal. Rptr. 773 (service of 30-day notice of termination of tenancy).

None of these cases addresses when a notice would start to run, but arguably they could not start to run earlier than the admitted date of receipt.

Although one reported case states that service by posting and mailing is effective only if it creates actual notice and that opportunity to cure is a possibility [see *Davidson v. Quinn* (1982) 138 Cal. App. 3d Supp. 9, 188 Cal. Rptr. 421], later cases do not follow this line of thinking [*Walters v. Meyers* (1990) 226 Cal. App. 3d Supp. 15, 19, 277 Cal. Rptr. 316].

Service on One Tenant Is Service on All Tenants. When two or more tenants hold the property either jointly or in common, service of notice on one of them is service on all of them [*University of Southern Cal. v. Weiss* (1962) 208 Cal. App. 2d 759, 769, 25 Cal. Rptr. 475; *Gentry v. Citron* (1918) 36 Cal. App. 288, 171 P. 1079].

Parties to Commercial Lease May Alter Statutory Requirements for Service.

Parties to a commercial lease may waive or modify the right to statutory notice, substituting a mutually agreed-on form of notice instead [*Folberg v. Clara G.R. Kinney Co., Inc.* (1980) 104 Cal. App. 3d 136, 140, 163 Cal. Rptr. 426; *Hignell v. Gebala* (1949) 90 Cal. App. 2d 61, 202 P.2d 378 (15-day notice to quit served only by registered mail)].

Unless the lease directs that the agreed-on notice is a replacement for (rather than an alternative to) the statutory notice requirements, the agreed-on notice period may be deemed an option to the statutory provisions, and not the exclusive remedy [*Fifth & Broadway Partnership v. Kimny, Inc.* (1980) 102 Cal. App. 3d 195, 200-201, 162 Cal. Rptr.

271].

Proving Defense of Defective Service of Subject Notice in Unlawful Detainer Action. A specific allegation in the tenant's answer that service is defective is not necessary. Service is part of the landlord's case in chief. Thus, a general denial is sufficient to cover this defense, which puts all facts of the landlord's case in issue including sufficiency of notice to quit [*Bevill v Zoura* (1994) 27 Cal. App. 4th 694, 698, 32 Cal. Rptr. 2d 635; see Code Civ. Proc. §§ 431.10(a), 431.30].

Proof that the landlord knows the tenant's business or primary residence address may come from various sources, including:

C Cross examination of the landlord or property manager.

C Direct examination of the tenant.

C Examination of the tenant's co-workers or co-habitators regarding contact at the alternative property by the landlord.

C Normal discovery channels.

C Information in the rental application.

Because proof of service is an element of the plaintiff's case in chief, the best starting point is to ask the person who served the notice to state the steps taken before resorting to posting and mailing.

For further discussion, see Matthew Bender Practice Guide: Landlord-Tenant Litigation, Ch. 4, *Termination of Tenancy*, §§ 4.07 et seq., 4.21 et seq.

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Hauser on Florida Rule of Civil Procedure 1.525

2008 Emerging Issues 2143

Florida Rule of Civil Procedure 1.525 -- Bright Line Turns Into Black Hole.

By Hon. James C. Hauser

April 30, 2008

SUMMARY: In Florida, following the necessary procedures for obtaining attorneys fees is becoming more and more critical. This commentary, written by James C. Hauser, an expert on attorneys fees and author of *Attorneys Fees in Florida*, examines important considerations for the practitioner on Rule 1.525 motions for attorneys fees in light of recent case law interpreting the Rule.

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ARTICLE: Cite as: Hauser, James C. Fla. R. Civ. P. 1.525 Bright Line Turns Into Black Hole. LexisNexis Expert Commentary, (*Insert date you accessed the document online*).

Background. When the Florida Supreme Court adopted Fla. R. Civ. P. 1.525 (1.525) the clear goal was to set a time certain when the motion for attorneys fees must be served after the final judgment was signed. However, Rule 1.525, as recently interpreted by several appellate courts, has only created more uncertainty on the proper filing procedures for seeking attorneys fees than it has resolved -- exactly the opposite objective of what Rule 1.525 was intended to cure. In fact, several weeks after the publication of *Hauser on Proper Motion Filing for Attorney's Fees* the Second District Court of Appeals in *Parrot Cove Marina, LLC., v. Duncan Seawall Dock & Boatlift, Inc.*, 32 Fla. L. Weekly d2733 (Fla. 2d DCA 2007) (*Parrot Cove*) created additional ambiguities on this critical step in obtaining attorneys fees and withdrew their opinion four months later.

2nd DCA Holds That Both the Basis for Attorneys Fees and Discovery Supporting the Amount of Such Fees Must be Disclosed in the 1.525 Motion. In *Parrot Cove Marina, LLC., v. Duncan Seawall Dock & Boatlift, Inc.*, 32 Fla. L. Weekly d2733 (Fla. 2d DCA 2007) (*Parrot Cove*) the trial court ruled that the prevailing party was entitled to attorneys fees. Because the final judgment dealt with the issue of entitlement to attorneys fees, the prevailing party did not serve a 1.525 motion for attorneys fees. Instead within the required 30 day time period required by 1.525, Duncan served a notice of hearing to recover on attorneys fees. Duncan argued that because its notice of hearing was the functional equivalent of a 1.525 motion, attorneys fees should be permitted as suggested by dicta in a prior 2nd DCA case, *Gulf Landings Assoc., v. Hershberger*, 845 So. 2d 344 (Fla. 2d DCA 2003). The 2nd DCA in *Parrot Cove* tentatively agreed that a notice of hearing could comply with 1.525. *Parrot Cove* was less concerned about the nomenclature of the document filed, be it a notice of hearing or a motion for attorneys fees, then the contents of such document. Thus the issue to be decided in *Parrot Cove* was whether Duncans notice of hearing on attorneys fees

complied with 1.525.

In *Hart v. City of Groveland*, 919 So. 2d 665 (Fla. 5th DCA 2006), the 5th DCA stated in dicta that it would be superfluous to require a party to file a motion to tax attorneys fees and costs, when the issue of entitlement to attorneys fees had already been decided in the final judgment. By implication, the 5th DCA was following a long line of cases holding that the law does not require a redundant, useless or futile act. *C.U. Associates, Inc. v. R. B. Grove, Inc.*, 472 So. 2d 1177 (Fla. 1985) (C.U.); *Florida Emergency Physicians- Kang and Assoc. v. Parker*, 800 So. 2d 631 (Fla. 5th DCA 2001).

In *C.U.*, Mr. Grove brought an action to foreclose on a mechanics lien, which permits attorneys fees to the prevailing party, against C.U. C.U. agreed to pay in full the unpaid balance of the bill, which was the subject of the dispute. Mr. Grove refused and recovered the exact amount offered by C.U. The trial court then awarded Grove attorneys fees, because there had not been a formal tender of the settlement amount after the informal offer had been rejected. The Florida Supreme Court reversed and denied Grove attorneys fees. *C.U. Associates, Inc. v. R.B. Grove, Inc.*, 472 So. 2d 1177 (Fla. 1985).

The Florida Supreme Court stated at page 1179: ...we note that the law does not require a futile act. *Haimovitz v. Robb*, 178 So. 827 (Fla. 1937). Thus when a bona fide, good faith settlement offer has been unequivocally refused, a formal tender of the settlement is not required. The 2nd DCA in *Parrot Cove* declined to follow the Hart decision, stating the plain language of the rule n1 and prior case law within the 2nd DCA, *Nicoletti v. Nicoletti*, 902 So. 2d 215 (Fla. 2d DCA 2005); *Gulf Shores, L.L.C. v. Riverwood Community Development District*, 927 So. 2d 246 (Fla. 2d DCA 2006) and *Caldwell v. Finochi*, 909 So. 2d 976 (Fla. 2d DCA 2005) prevented them from doing so.

Once the issue of entitlement to attorneys fees has been resolved, the only remaining issue to be decided is the amount of attorneys fees to be awarded. Thus when the 2nd DCA ruled that a 1.525 must be served, even though entitlement to attorneys fees had been resolved, it had no choice but to require that a 1.525 motion notify the opposing party of the amount of attorneys fees sought. *Gulf Landings Association v. Hershberger*, 845 So. 2d 344 (Fla. 2nd DCA 2003).

As will be explained in this EC, *Parrot Cove* did not so much preserve a bright line, as paint itself in a corner. *Parrot Cove* stated:

We think that to comply with rule 1.525, a partys filing should, at a minimum, include a statement of the amount of fees sought and the substantive basis for the amount of fees sought, including, but not limited to, supporting affidavits, copies of bills or invoices, and the identities of any witnesses whose testimonies are intended to support the request for fees. In other words, the notice should be the substantive equivalent of a proper fee motion, and therefore its nomenclature alone should not determine its effect. However, Duncans notice of hearing did not contain any such information- it merely referenced the final judgment. *Parrot Cove Marina, LLC., v. Duncan Seawall Dock & Boatlift, Inc.*, 32 Fla. L. Weekly d2733, 2735 (Fla 2d DCA 2007)(emphasis added).

***Parrot Cove* Misinterprets the Purpose of Rule 1.525 -- 1.525 Must be Read in Conjunction with 1.100(b).** Motions for Costs and Attorneys Fees states: Any party seeking a judgment taxing costs, attorneys fees, or both, shall serve a motion no later than 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal.

1.525 deals solely with when the motion for attorneys fees must be served. There is nothing in the rule that hints what must be contained in the motion itself. *Gulf Landings Association v. Hershberger*, 845 So. 2d 344 (Fla. 2nd DCA 2003)(*Gulf Landings*). However, like any other rule, 1.525 must be read in conjunction with the other rules of Florida Civil Procedure. Fla. R. Civ. P. 1.100(b) requires that any motion state with particularity the grounds therefor and shall state the relief or order sought. Thus to comply with 1.100(b) the 1.525 motion must state the relief sought (the recovery of attorneys fees) and state with particularity the basis to obtain such relief, to wit, the contract, statute or common law

that entitles a party to recover attorneys fees.

In applying 1.100(b) in conjunction with 1.525, *Gulf Landings*, which was relied upon by *Parrot Cove*, was correct when it held that to comply with the first prong of Fla. R. Civ. P. 1.100(b) (state with particularity the grounds therefore) the 1.525 motion must state the legal basis for entitlement to attorneys fees. Unfortunately, *Gulf Landings* misapplied the second prong of Fla. R. Civ. P. 1.100(b)(shall state the relief or order sought) by holding that the amount of attorneys fees must be disclosed. As will be shown by this EC, the misapplication of this second prong to 1.525 motions has led to unnecessary and expensive legal confusion. Two other appellate courts have rejected the requirement that 1.525 requires that the motion for attorneys fees be accompanied by an affidavit as to the time spent on the case. *Silver Springs Properties, LLC., v. ERA Murray Realities Inc.*, 874 So. 2d 712 (Fla. 2004); *P.R. Smith Corp., v. Goyarrola*, 864 So. 2d 584 (Fla. 3d DCA 2004). Their analysis was simple. The wording of 1.525 does not mention the need for affidavits and therefore none is required.

Silver Springs rejected outright the argument that somehow 1.100(b) might require an affidavit of the attorneys fees sought, by pointing out that no court has ever required that a motion be accompanied by an affidavit. See *Exceletech Inc., Williams*, 579 So. 2d 850 (Fla. 5th DCA 1991). It should be noted that *Parrot Cove* never mentioned, much less distinguished the above two cases.

Discovery Requirements Judicially Created by *Parrot Cove* Unconstitutionally Impinges on the Rule Making Authority of the Florida Supreme Court. Fla. Const. Art. V sec 2(a) grants the Florida Supreme Court sole power to create rules of procedure. Various rules committees meet, and once every four years, submit suggested rule changes to the Florida Supreme Court. The Florida Supreme Court then invites comment on the suggested rule changes. It then decides, after careful deliberation, what rules should be amended, deleted or left unchanged.

In *Citigroup, Inc. v. Holtsberg*, 915 So. 2d 1265 (Fla. 4th DCA 2005), a high level corporate officer sought to prevent his deposition unless the party seeking discovery was able to show he had unique or superior knowledge about the lawsuit. However there were no Florida discovery rules demanding such proof. The trial court denied the corporate officers objection and the corporate officer filed a petition for writ of certiorari to the 4th DCA. In denying the corporate officers petition for writ of certiorari, the 4th DCA stated at page 1269: A district court may not adopt a doctrine which arguably conflicts with the discovery rules. Because discovery rules are rules of practice and procedure, only the Florida Supreme Court has this authority. Article V sec 2(a) Florida Constitution. See also *Capone v. Florida Board of Regents*, 774 So. 2d 825 (Fla. 4th DCA 2000).

Requiring the disclosure of supporting affidavits, copies of bills or invoices and the identities of any witnesses, as part of the 1.525 motion clearly constitute rules of discovery, which are rules of practice and procedure, solely within the province of the Florida Supreme Court. As a result it is not even worthy of debate that the 2d DCA in *Parrot Cove* unconstitutionally infringed on the rule making authority of the Florida Supreme Court and therefore the discovery requirements are not necessary to comply with 1.525.

Finally the language of 1.525 is clear on its face. There is no reason to try to add language where none exists. Florida courts interpret statutes according to their plain meaning. There are certain accepted principles of statutory construction that can be applied if a statute is ambiguous, but the courts have no reason to speculate as to the meaning of a statute if it is clear on its face. *Brown v. State of Florida Commission on Ethics*, 32 Fla. L. Weekly d 2342, 2348 (Fla. 1st DCA 2007).

Requiring the Amount of Attorneys Fees be Disclosed Prior to the Entitlement Phase of Attorneys Fees Being Decided Creates Unnecessary Expense.

1. Prevailing Party Is Unclear -- who is the prevailing party, entitled to attorneys fees, is often very difficult to determine. n2 The test as to which party prevailed is which party prevailed on the significant issue of the case. *Moritz*

v. Hoyt Enterprises, Inc., 604 So. 2d 807 (Fla. 1992).

For example, a plaintiff files a four count complaint, of which Counts I- III permits the award of attorneys fees to the prevailing party. After a one month jury trial, the plaintiff prevails on Count I, loses on counts II and III, but prevails on Count IV, which does not authorize the award of attorneys fees. Thus at this stage of the proceedings, it is not clear whether the plaintiff or defendant will be the prevailing party entitled to attorneys fees. In virtually every case, the entitlement phase of the attorneys fees hearing will be heard long after 30 day time period required by the 1.525 motion has expired.

In the above example, if 1.525 only deals with entitlement to attorneys fees, then both parties must timely serve its 1.525 motion citing only their legal theory that would entitle them to attorneys fees. However under *Parrot Cove*, both parties would be required to submit their time records, calculate the amount of attorneys fees incurred and hire an attorney as an expert witness to review the time sheets, a needless and costly expense to the party that does not prevail. From a practical standpoint the amount of attorneys fees should only have to be disclosed after the issue of entitlement to attorneys fees has been decided.

2. Entitlement to Attorneys Fees is Not Clear a successful offer of judgment permits a party to recover attorneys fees, even if there is no other statutory or contractual basis for attorneys fees. If a defendant makes an offer of judgment and the amount obtained in the net judgment is at least 25% less than the offer, the defendant will be entitled to attorneys fees. Fla. Stat. § 768.79(6)(a). Attorneys fees under the offer of judgment will be denied if the offer is found not to have been made in good faith. Sec 768.79(7)(a).

Suppose the defendant serves an offer of judgment for \$100,000 and the jury returns a verdict of \$70,000. Two separate issues must be decided before the defendant will be entitled to attorneys fees. First the offer of judgment must be procedurally valid. The procedural validity of the offer of judgment has been the subject of extensive litigation, with many offer of judgments being found defective, which resulted in attorneys fees not being awarded. n3

Secondly, even if procedurally valid, the amount of the net judgment must be less than 75% of the offer of judgment. When costs and other legally permissible amounts are added to the above final judgment, it may, or may not, be less than 75% of the threshold level which would entitle the defendant to attorneys fees. Again there has been extensive litigation in this area, where many offers have been found not to have met the threshold level and thus attorneys fees denied. n4

Even if the offer of judgment is procedurally adequate and the threshold level has been met, attorneys fees may be denied if the offer is found not to have been made in good faith. Sec. 768.79(7). There has also been extensive litigation on whether the offer has, or has not, been made in good faith. n5

If, in fact, the offer of judgment is not valid, for any of the reasons listed above, it is a needless and unnecessary expense for the defendant to have to go through the procedural hoops created by *Parrot Cove*, only to be denied attorneys fees.

3. Multiplier -- in calculating attorneys fees the court must multiply the reasonable number of hours times the hourly rate. *Standard Guarantee Ins. Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990). In certain situations, that amount may be increased by a multiplier. n6 In order to recover a multiplier under *Standard Guarantee*, the prevailing party must prove:

1. Whether the relevant market rate requires a contingency fee multiplier to obtain competent counsel.
2. Whether the attorney was able to mitigate the risk of non payment.
3. The amount involved, the results obtained and the type of fee arrangement between the client and attorney.

If a multiplier should be awarded, then the court must determine the likelihood of success at the beginning of the case to calculate the amount of the multiplier.

Requiring the discovery disclosures as part of the 1.525 motion under *Parrot Cove* becomes not just an onerous financial burden, but raises even more questions. When *Parrot Cove* stated that an affidavit must be filed, one assumes *Parrot Cove* was referring to the prevailing party's attorney. In order to satisfy prong I of *Standard Guarantee*, recent case law has mandated that the prevailing party himself testify that he had difficulty in obtaining counsel. *Progressive Express Ins. Co., Schultz*, 948 So. 2d 1027 (Fla. 5th DCA 2007). Does *Parrot Cove* also require an affidavit from the party himself as to this issue?

To satisfy prong three of *Standard Guarantee*, the contact between the attorney and client must be introduced into evidence. Suppose the original attorney withdraws and is succeeded by a replacement attorney. Must the contracts of both attorneys be attached to the motion? If the original attorney's contract is not attached, may it be submitted after the 1.525 motion is served?

If a multiplier is to be awarded then there must be evidence as to the likelihood of success at the beginning of the case. Can that be accomplished in the 1.525 motion by the attorney seeking fees or must an expert attorney's fees witness have to submit an affidavit on this issue within the 30 day time period required by 1.525?

Attorneys Fees Not Yet Incurred Post Judgment Are Not Capable of Being Disclosed in the 1.525 Motion

Example: Attorneys Fees for Litigating Entitlement to Attorneys Fees. Florida permits attorneys fees for litigating entitlement to attorneys fees, but not the amount of attorneys fees. *State Farm Fire & Cas. Ins. Co. v. Palma*, 555 So. 2d 836 (Fla. 1990); *Crittenden Orange Blossom Fruit v. Stone*, 514 So. 2d 351 (Fla. 1987). In fact the 2nd DCA has suggested that attorneys fees should also be permitted for litigating the amount of attorneys fees. *Wight v. Wight*, 880 So. 2d 692 (Fla. 2d DCA 2004).

As previously stated, if the issue of entitlement to attorneys fees is disputed, the entitlement hearing will be heard long after the 1.525 motion is served. How, pray tell, is the party seeking attorneys fees to disclose an amount of attorney fees spent on the entitlement phase, when the amount of time is not yet known? Obviously any such disclosure would have to be speculative and as a result, serve no useful purpose.

World Omni timely served its 1.525 motion seeking attorneys fees under sec. 768.79 Florida Statutes, based on the offer of judgment statute. Attorneys fees were awarded. The losing party appealed both the merits of the case and the attorneys fees award. The appellate court affirmed on both issues and awarded attorneys fees for the appeal based on sec. 768.79. After the remand, the trial court awarded attorneys fees for both the appeal and for non appellate post judgment attorneys fees. Clearly the attorneys fees incurred for the non appeal, post judgment attorneys fees occurred more than 30 days after the final judgment and thus there was no way that World could timely comply with time requirements of 1.525. Nevertheless, the 15th Circuit denied attorneys fees for the non appellate, post judgment attorneys fees for failure to comply with 1.525. *Cohen v. World Omni Financial Corp.*, 15 Fla. L. Weekly Supp. 30a (15th Cir. App. 2007) (*Cohen*).

It is axiomatic that courts will not interpret a statute or rule which would lead to an absurd or unreasonable result. *State v. Webb*, 398 So. 2d 820 (Fla. 1991); *Contract Point Florida Parks, L.L.C. v. State of Florida, Dept. Of Env. Protection*, 958 So. 2d 1035 (Fla. 1st DCA 2007). The basis for denying post judgment attorneys fees in *Cohen*, for failure to comply with 1.525, because the attorneys fees has not yet accrued at the time the 1.525 motion was served, is both absurd and unreasonable.

Summary. In its zeal to make sure the bright line test is not violated, appellate courts have added layer after layer of requirements, making it more confusing and difficult to comply with 1.525. 1.525 is a notice rule for when the attorneys fees motion must be served. Compliance with the rule is fully accomplished by the party seeking attorneys fees serving a motion for attorneys fees no later than 30 days after the final judgment and informing the opposing party

of its basis for entitlement to attorneys fee. That is all 1.525 requires.

Practice Tips. Unless the 2nd DCA reverses its position in *Parrot Cove*, attorneys in order to avoid any problems should include in their 1.525 motion the amount of attorneys fees sought, an affidavit from the attorney as to the hours spent on the case and his normal hourly rate, invoices and or bills and the name, address and phone number of the attorneys fees expert witness.

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n1 . It is not clear to the author what plain language requiring the added disclosures mandated by in 1.525 the 2nd DCA is referring to.

n2

[2]. Attorneys Fees in Florida by James C. Hauser, Chapter 3 -- Prevailing Party (LexisNexis).

n3

[3]. See generally Attorneys Fees in Florida by James C. Hauser, Chapter 4.01 2(b)(c)(d) (LexisNexis).

n4

[4]. See generally Attorneys Fees in Florida by James C. Hauser, Chapter 4.01 2(f)(g) (LexisNexis). More specifically *White v. Steak and Ale of Florida, Inc.*, 816 So. 2d 546 (Fla. 2002); *Scottsdale Ins. Co., v. DeSalvo*, 748 So. 2d 941 (Fla. 1999); *Danis Industries Corp., v. General Imp. Techniques, Inc.*, 645 So. 2d 420 (Fla. 1994)

n5

[5]. See generally Attorneys Fees in Florida by James C. Hauser, Chapter 4.01 2(h) (LexisNexis).

n6

[6]. If an attorney normally charges \$300 an hour, and a court awards a multiplier of two, then the hourly

rate equals \$600 an hour.

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Hon. James C. Hauser is a recently retired Circuit Court Judge for the Ninth Judicial Circuit of the State of Florida where he had served since 1990. Previously, he was County Judge in Orange County, in which capacity he was named Jurist of the Year by the Young Lawyers Division of the Florida Bar in 1989. He is a graduate of Boston University School of Law and the Wharton School of Finance at the University of Pennsylvania. Judge Hauser lectures frequently before the bench, bar, and public on the subject of attorney's fees. He is the author for Floridas foremost authority on attorneys fees, *Attorneys Fees in Florida*, Second edition. He is also the author *Florida Residential Landlord-Tenant Manual*. Judge Hauser is available for personal consultations or to lecture on obtaining and maximizing attorney fees and can be reached at 407-951-6685, 9012 Summit Centre Way 102, Orlando, Fla. 32810 or by email at jameshauser@attorneysfeesflorida.com.

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Russ Bensing on Tabatha v. Zimmerman, 2008 Ohio 1639 (6th Dist. 2008).

2008 Emerging Issues 2242

Russ Bensing on Tabatha v. Zimmerman and Expert Testimony in Medical Malpractice Cases

By Russell Bensing

April 29, 2008

SUMMARY: *Tabatha v. Zimmerman* joins a number of recent decisions discussing the standards for admission of medical testimony in medical malpractice cases. This commentary, by Russ Bensing, discusses the trend in these cases and concludes that the courts may be adopting a more lenient attitude toward the admission of such testimony.

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ARTICLE: Less Restrictive Standards of Admissibility for Expert Testimony in Medical Malpractice Cases

Your case is only as good as your expert is a common aphorism among lawyers who handle medical malpractice cases. Although a physician is usually the first choice for an expert, the decision in *Tabatha v. Zimmerman, 2008 Ohio 1639 (6th Dist. 2008)* makes clear that non-physicians can fulfill that function in certain cases. The *Tabatha* decision was not ground-breaking; the opinion draws largely from *Morris v. Childrens Hosp. Medical Center, 73 Ohio App. 3d 437 (1st Dist. 1991)*, where the court reached a similar result, reversing a grant of summary judgment based on the trial courts conclusion that the plaintiffs expert witness, a nurse, was unqualified to give testimony.

Interplay of Evidence Rules. What *Tabatha* and several other recent decisions indicate, however, is that the courts may be willing to adopt a more relaxed attitude toward expert testimony in medical malpractice cases. Its important to note that there are two evidentiary rules at issue. The first is R. Evid. 702, which spells out the broad requirements for expert testimony: basically, that the subject is beyond the normal understanding of laymen, that the witness has a specialized knowledge or training, and that his or her testimony is based on reliable scientific methods. R. Evid. 601(D), however, defines the qualifications necessary for an expert testifying in a medical claim, requiring that the expert devote at least one-half his or her time to the active clinical practice of medicine, or to instruction in an accredited school.

While Rule 601(D) is obviously a restriction on Rule 702, counsel considering the presentation of expert testimony in medical malpractice cases should still emphasize the latter rule over the former, relying on case law that stresses the importance of the expert in assisting the jury in coming to a just result, such as the Supreme Courts language in *Ishler v. Miller, 56 O.St.2d 447, 453 (1978)* that the test of admissibility is whether a particular witness offered as an expert will aid the trier of fact in the search of the truth, not whether the expert witness is the best witness on the subject. Similarly

helpful is the decision last year in *Celmer v. Rogers*, 114 O.St.3d 221 (2007), where the Court affirmed the 11th Districts decision to permit the testimony of a doctor, even though he did not meet the Rule 601(D) requirements at the time of his testimony because he had retired six months earlier. The unique facts render the case of little precedential value the trial had to be continued for over a year because of the insolvency of the defendants insurance carrier but the opinion contains important language to the effect that Rule 601(D) must be read in conformity with other rules of evidence to provide procedures for the adjudication of causes *to the end that the truth may be ascertained and proceedings justly determined*. (Emphasis in opinion).

Caveats for Practitioners. To be sure, Rule 601(D) still governs the admissibility of expert testimony in medical malpractice cases, and counsel contemplating the use of non-physician experts, or even physician experts, should keep several caveats in mind:

- . As *Tabatha* indicates, a nurse is competent to give testimony as to the standard of care of a nurse. In fact, where the case revolves around the issue of the professional skill and judgment of a nurse, a nurse may be the best expert. *Ramage v. Central Ohio Emergency Services, Inc.*, 64 Ohio St. 3d 97 (1992).

- . A non-physician cannot testify as to the direct liability of a physician or a hospital, but can testify as to the liability of a physician or hospital under a *respondeat superior* theory. *Morris*, *supra*, 73 Ohio App. 3d 437.

- . Even if a non-physician is qualified to testify on the issue of standard of care, he or she may not be qualified to testify as to proximate cause. *Grigsby v. Anesthesiologists of Southwestern Ohio*, 1994 Ohio App. LEXIS 1814 (1st Dist. 1994) (nurse qualified to testify that anesthesiologist violated standard of care, but not to testify that proximate result was vasovagal episode). *But see Tranter v. Mercy Franciscan Hosp. W. Hills*, 2007 Ohio 5132 (1st Dist. 2007) (nurse experts testimony that negligence of nurse caused fall sufficient, because issue of proximate cause and damages was within common knowledge).

- . The standards for expert testimony under the evidentiary rules are not the same as the standards for an affidavit of merit for a medical liability claim under Civ.R. 10(D)(2). *Tranter*, *supra* (purpose of affidavit to winnow out utterly frivolous claims. . . not to test the sufficiency of the plaintiff's evidence on the ultimate issue of the defendant's liability).

- . Doctors arent fungible as experts: even a physician may not be qualified to testify as to another doctors standard of care. The cautionary tale here is provided by *Taulbee v. Dunskey*, 2003 Ohio 5988 (12th Dist. 2003), where the plaintiffs decedent alleged that the defendant emergency room physicians had negligently failed to diagnose an aortic dissection. The plaintiffs presented the testimony of a cardiothoracic surgeon, but the defense objected at trial, claiming that the doctor lacked the qualifications to testify as to the standard of care of an emergency room physician and family practitioner. The court acknowledged the general rule that an expert need not be of the same specialty as the defendant, but despite the fact that the expert testified he had diagnosed and treated aortic dissections on numerous occasions, the court concluded that his experience in that regard was much different from that of emergency physicians in initial consults, and held that the trial court did not abuse its discretion in excluding the experts testimony.

Taulbee may well be an outlier, or may have been the result of inadequate preparation of the expert. In *Schutte v. Mooney*, 165 O.App.3d 56 (2nd Dist. 2006), the appellate court reversed the trial judges decision, which had been based on *Taulbee*, excluding the testimony of an expert in a case involving an emergency room physician. Despite the fact that the expert, a cardiovascular surgeon, had not worked in emergency rooms for twenty-eight years, the appellate court held that *Taulbee* was distinguishable because the expert had testified that the standard of care was the same whether the patient had presented to a family practitioner, and emergency room physician, or a specialist.

Perhaps the key to *Taulbee*, and to many of these cases, is the standard of review: like virtually all questions of admission of evidence, the trial courts determination of an experts qualifications is reviewed under an abuse of discretion standard. The essential task is persuading the trial judge, in the first instance, that the testimony is admissible. Given *Tabatha*, *Celmer*, and the other recent decisions in this area, counsel can be prepared to argue that the standards of admissibility for expert testimony in medical malpractice cases should be viewed less restrictively than they traditionally have been.

For additional discussion of expert testimony, see Weissenberger's Ohio Evidence Treatise 702.syn Testimony by Experts; Weissenberger's Ohio Evidence Treatise § 601.6 Expert Medical Testimony in Medical Malpractice Cases; Ohio Evidence Courtroom Manual 702.syn Rule 702. Testimony by Experts; Ohio Evidence Courtroom Manual 601.syn Rule 601. General Rule of Competency.

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McDonnell on MD Electrical Contractors, Inc. v. Abrams, 2008 Ill. LEXIS 305

2008 Emerging Issues 2234

Joe McDonnell on MD Electrical Contractors, Inc. v. Abrams, 2008 Ill. LEXIS 305 (Ill. S. Ct. 2008)

By Joseph B. McDonnell

April 28, 2008

SUMMARY: In *MD Electrical Contractors, Inc. v. Abrams*, a case of first impression, the Illinois Supreme Court applied the principles of statutory construction and the custom and usage of the construction industry to conclude that the Home Repair and Remodeling Act does not apply to subcontractors. This commentary, written by Joe McDonnell, explores the implications of this decision.

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ARTICLE: Cite as: McDonnell, Joe. *MD Electrical Contractors, Inc. v. Abrams*. LexisNexis Expert Commentary, (Insert date you accessed the document online).

Home Repair and Remodeling Act Does Not Apply to Subcontractors

In *MD Electrical Contractors, Inc. v. Abrams*, a case of first impression, the Illinois Supreme Court held that the Home Repair and Remodeling Act does not apply to subcontractors. The Court relied on several principles of statutory construction, as well as custom and usage in the construction industry, to reach its result. The case stresses the importance of reading all relevant parts of a statute in order to determine the legislative intent. It also emphasizes the significance of commonly-understood business practices in gaining insight into the application of a statute.

Background of the Home Repair and Remodeling Act. The Home Repair and Remodeling Act (815 ILCS 513/5) was passed in 1999 as Public Act 91-230 and became effective on January 1, 2000. Its purpose was to improve communications between consumers and persons engaged in the business of home repairs or remodeling in order to increase consumer confidence, reduce the likelihood of disputes, and promote fair and honest practices in that business in this State. *Smith v. Bogard*, 316 Ill. Dec. 476 (4th Dist. 2007).

In *Smith v. Bogard*, cited *supra*, the plaintiff, who had orally contracted with the defendants to build an addition to the living room of their home, sued for the balance that he contended was due him after receiving some \$15,000.00 from the defendants. Defendants motion to dismiss on the basis that plaintiff had failed to comply with the Home Repair and Remodeling Act was allowed and, on appeal, the ruling was affirmed. Even though plaintiff contended that he was a subcontractor and thus not bound by the Act, the *Smith* court found, based on the evidence, that he was a person engaged in the business of home repair, that he had performed general construction work for the homeowner; and that

no other person had a written contract with the homeowners, as envisioned by the Act. He was therefore held to be subject to the Act and his failure to have a written contract with the defendants, as required by the Act, was fatal to his action. *Smith v. Bogard*, 316 Ill. Dec. 476 (4th Dist. 2007).

The court in *Smith*, however, did not squarely address whether a subcontractor (if proven to be such) was subject to the Home Repair and Remodeling Act. That issue was dealt with for the first time by the Supreme Court in *MD Electrical Contractors, Inc. v. Abrams*.

Principles of Statutory Construction. In *MD Electrical Contractors, Inc. v. Abrams*, the plaintiff argued that the Act was designed to regulate communications between contractors and the consumer/home owner and that, because subcontractors typically do not have significant direct communications with homeowners, the Act could not apply to them. Any ambiguity in the wording of the statute, plaintiff contended, must be resolved against the inclusion of subcontractors within its terms. The homeowner defendants argued that since the term contractor was not defined, and the statute repeatedly referred to any person in describing those bound by its terms, all contractors, including subcontractors, were included within its scope.

The court rejected each approach suggested by the parties and, instead, focused on the importance of reading the statute as a whole and considering all of its relevant parts. In addition, the Court found it important to understand what it termed the common business practice in the home repair and remodeling industry. That practice, noted the court, typically involves a homeowner contracting with a general contractor to oversee a specific project, such as an addition to a residence. In the usual circumstance, the general contractor acts as project manager and may in turn contract with other individuals or tradesman to perform certain duties. This frees the homeowner from the necessity of coordinating the work of various contractors and tradespeople, permits the homeowner to deal only with one person or company, and frees the homeowner from the responsibility of supervising every aspect of the project. This common understanding, said the court, is critical to the understanding of the Home Repair and Remodeling Act. *MD Electrical*, slip op. at 4-5.

Employing these aids to statutory construction, the Court found it clear that the statute unambiguously applies only to those who directly contract with the homeowner. The Courts focus on the principles of statutory construction, and particularly the principle of reading every relevant part of the statute in an effort to arrive at the legislative intent, is well supported by Illinois authority. In *Parizon v. Granite City Steel Company*, 71 Ill.App.2d 53 (5th Dist. 1966), the Fifth District Appellate Court, in determining whether the roof of a structure was a scaffold, support or mechanical contrivance within the terms of the former Structural Work Act, found it useful to consider all sections of the statute, in addition to the one containing the quoted language. The Supreme Court reiterated and followed the rule in other recent cases. See, e.g., *Illinois Dept. of Healthcare and Family Services v. Warner*, 227 Ill.2d 223 (Ill. 2008) and *Vine Street Clinic v. HealthLink, Inc.*, 222 Ill.2d 276, 856 N.E.2d 422 (Ill. 2006).

In addition to considering all portions of the Home Repair and Remodeling Act, the Court also pointed to other related statutes in determining the limited scope of the Act. The Mechanics Lien Act (770 ILCS 60/0.01 et seq.) protects subcontractors by giving them lien rights against the property in the event their bills are not paid through the general contractor. For that reason, the pamphlet that the Home Repair and Remodeling Act mandates be given the consumer references the rights of suppliers and subcontractors to lien the property if not paid by the general contractor. Such references would be meaningless if the Act were intended to apply to subcontractors. *MD Electrical*, slip op. at 10-12.

Aided by the principles of statutory construction and its understanding of common business practice in the home repair and remodeling industry, the Courts conclusion that the statute does not apply to subcontractors is well-supported. Because the usual contracts involve only the homeowners and the general contractor who undertakes overall responsibility for the project and the homeowners rarely, if ever, deal with subcontractors and suppliers, it appears manifest that the legislative intent was to limit the statutes applicability to general contractors in their dealings with homeowners and not to include subcontractors.

Tips for Practitioners. A case involving the application of a statute may bring into play several principles of statutory construction. The cardinal rule, of course, is to give effect to the intent of the legislature, and the best evidence of legislative intent is the language used in the statute itself, which must be given its plain and ordinary meaning. It is also a well-settled principle of statutory interpretation that undefined terms in a statute shall be accorded their plain and commonly understood meanings. The statute should be read as a whole and construed so that no part of it is rendered meaningless or superfluous. And if the statutory language is susceptible to more than one interpretation, the court may look beyond the language to consider the purposes of the statute. *In re B.C.*, 176 Ill.2d 536 (Ill. 1997).

As is seen from *MD Electrical Contractors, Inc. v. Abrams*, sometimes one or more of these rules is overlooked, and the result may leave the court unsatisfied with the approach taken by either or both of the parties. It is imperative that all applicable rules of statutory construction be consulted and utilized as appropriate by counsel on both sides of the case. Anything less will handicap the court (whether trial or appellate) in reaching an appropriate resolution.

For additional discussion of the home improvement contracts, see *Midwest Trans. Guide -- Bus. & Comm. Law & Forms* § 56.41 Home Improvement Contracts.

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Don Cetrulo on Asset Acceptance, LLC v. Moberly, 241 S.W.3d 329 (Ky. 2007)

2008 Emerging Issues 2228

Don Cetrulo on Asset Acceptance, LLC v. Moberly, 241 S.W.3d 329 (Ky. 2007)

By Don Cetrulo

April 28, 2008

SUMMARY: In *Asset Acceptance, LLC v. Moberly, 241 S.W.3d 329 (Ky. 2007)*, the Supreme Court of Kentucky joins the federal courts in recognizing a narrow exception to the rule that orders setting aside a judgment are not subject to an immediate appeal under Ky. R. Civ. P. 60.02(f). This commentary, written by Don Cetrulo, examines this decision and its ramifications.

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ARTICLE: In *Asset Acceptance, LLC v. Moberly, 241 S.W.3d 329 (Ky. 2007)*, the Kentucky Supreme Court recognized a new avenue of relief by appeal, for a party aggrieved by a trial courts vacating a judgment under CR 60.02, so long as the courts temporal jurisdiction may reasonably be questioned.

In this collections case, Asset Acceptance obtained a default judgment against Moberly, who admitted that she had been served with all of the relevant pleadings and orders, and hence, claimed no procedural defect in the judgment. Nevertheless, Moberly claimed to be unaware of the proceedings because she was going through substance addiction treatment at the time, and, two years after the judgment, Moberly moved to have it set aside primarily on CR 60.02(f) grounds, that is, relief from a judgment for reasons of an extraordinary nature. The trial court set aside the judgment because default judgments are disfavored in the law. See e.g., *Educator & Executive Insurers, Inc. v. Moore, 505 S.W.2d 176, 178 (Ky. 1974)*.

Asset Acceptance unsuccessfully argued that, to the dubious extent Moberly might have been entitled to any relief at all, it could only have come from CR 60.02(a), *inter alia*, excusable neglect, which must be raised within one year. It sought redress from the trial courts order via an appeal.

Rare Appeal for Interlocutory Order. A trial courts order setting aside the judgment is interlocutory for the obvious reason: rather than finalizing a case it reopens it. *Hackney v. Hackney, 327 S.W.2d 570 (Ky. 1959)*. The rule prohibiting appeals from interlocutory orders is not an invariable one. Previously, however, the Court confined the exception to those instances in which the appeals were expressly authorized by statute. *Cavalier Homes of Ala. v. Coleman, 181 S.W.3d 558 (Ky. 2005)*. Otherwise, relief from interlocutory orders has been limited to that attainable by

writ. In *Asset Acceptance*, the Court recognized another exception: appeals from orders vacating judgments under CR 60.02 if the trial courts jurisdiction is doubtful owing to the passage of time, in this case, beyond a year.

Narrow Holding but Broad Grounds. By way of its expression of confidence that its decision would result in few additional appeals, the Court implied that the case should not be read as establishing a broad new class of interlocutory appeals. Nonetheless, the holding is grounded in the Courts reasoning that an out-of-time order vacating a judgment amounts to an act beyond the jurisdiction of the trial court and should be appealable. Logically, the holding could extend to any other claim that the trial court has acted beyond its jurisdiction. This would include, for example, a family courts issuing an order to nonparties, or the courts issuing sua sponte restraining orders or injunctions. *Lewis LP Gas, Inc. v. Lambert*, 113 S.W.3d 171, 173 (Ky. 2003).

Acts Beyond Courts Jurisdiction Are Also Grounds for a Writ. A courts acting beyond its jurisdictional boundaries is also recognized as sufficient grounds for a writ. *Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2004); *Newell Enters. v. Bowling*, 158 S.W.3d 750 (Ky. 2005); *Wood v. Graham*, 633 S.W.2d 404 (Ky. 1982). Although the Court in *Asset Acceptance* referred to irreparable injury" as a prerequisite to a writ in like circumstances, it was by way of dicta, and it is highly unlikely that the Court intended to modify its holding in *Hoskins*, which specifically held that the irreparable injury/no adequate remedy by appeal test was to be applied only to the class of writ applications grounded in a claim that the trial court was acting erroneously but within its jurisdiction.

The better explanation is that the Court disfavors writs and may be disposed toward permitting interlocutory appeals whenever the trial court acted beyond its jurisdiction. That theory will have to be tested in cases to come. But it should not go unnoticed that to accomplish the narrow end of allowing certain appeals under CR 60.02, the Court need only have amended the Rules of Civil Procedure to expressly permit those appeals. The Court mentioned that many jurisdictions have adopted statutes authorizing such appeals. At least in this jurisdiction, the Supreme Court itself is vested with that power under KY. CONST. §§ 110 (2)(b) and 116. *Elk Horn Coal Corp. v. Cheyenne Res., Inc.*, 163 S.W.3d 408 (Ky. 2005); *O'Bryan v. Hedgespeth*, 892 S.W.2d 571 (Ky. 1995); *Smothers v. Lewis*, 672 S.W.2d 62 (Ky. 1984).

Strategic Considerations for the Practitioner. For the practitioner, an appeal is always preferable to a writ. The former is less particularized to the trial judge, and the latter is always discretionary on the part of the higher court. It is, to say the least, inadvisable to choose the route of the writ if, by a reasonable extension of *Asset Acceptance*, an appeal would do. A writ is an extraordinary remedy that Kentucky courts have always been cautious and conservative both in entertaining and granting. *Commonwealth v. Paisley*, 201 S.W.3d 34 (Ky. 2006). Conversely, appeals are routine and are more likely to succeed.

For additional discussion of writs and interlocutory appeals, see Caldwell's Kentucky Form Book § 9.00 et seq. (Writ of Prohibition); Caldwell's Kentucky Form Book § 103.00 et seq. (Appeals to the Kentucky Supreme Court);

Caldwell's Kentucky Form Book § 105.00 et seq. (Special Appellate Remedies);

UK/CLE Kentucky Civil Practice After Trial § 4.1 et seq. (Extraordinary Appellate Remedies).

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Wilson on Queensway Financial Holdings, Ltd. v. Cotton Allen, P.S.C.

2008 Emerging Issues 2233

Mike Wilson on Queensway Financial Holdings, Ltd. v. Cotton Allen, P.S.C., 237 S.W.3d 141 (Ky. 2007)

By Mike Wilson

April 25, 2008

SUMMARY: Can a party prevent summary judgment without producing affirmative evidence of the existence of a genuine issue of material fact for trial? Probably not, unless issues of material fact are self-evident from the record, according to the Supreme Court of Kentucky in *Queensway Financial Holdings, Ltd. v. Cotton Allen, P.S.C.*, 237 S.W.3d 141 (Ky. 2007). This commentary, written by Mike Wilson, explores the implications of this decision.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Cite as: Wilson, Mike. *Queensway Financial Holdings, Ltd v. Cotton Allen, P.S.C.* LexisNexis Expert Commentary, (Insert date you accessed the document online).

In *Queensway Financial Holdings, Ltd v. Cotton Allen, P.S.C.*, the Supreme Court of Kentucky held that summary judgment based upon the running of the statute of limitations for a professional malpractice action was appropriate where there was no material issue of fact regarding when the appellant should have known it had a cause of action. While acknowledging that the record must be construed in a light most favorable to the party opposing the summary judgment, the court observed that [Queensway] did not file evidence of its own in response to Cotton & Allen's motion for summary judgment cannot be ignored. *Queensway Financial Holdings, Ltd.*, p. 150. The court further observed that ordinarily [t]he party opposing a properly presented summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing the existence of a genuine issue of material fact for trial. *Queensway Financial Holdings, Ltd.*, at 150, quoting *City of Florence v. Chipman*, 38 S.W.3d 387, 390 (Ky.2001).

Application of Rule 56. Rule 56 allows for summary judgment if (1) there is no genuine issue as to any material fact, and (2) the moving party is entitled to a judgment as a matter of law. *City of Florence*, at p. 390, states:

All doubts are to be resolved in favor of the party opposing the motion. The movant should not succeed unless a right to judgment is shown with such clarity that there is no room left for controversy, and it is established that the adverse party cannot prevail under any circumstances.

Rule 56.03 states that summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories,

stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact. The initial burden is on the moving party to establish that a genuine issue does not exist. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476 (Ky.1991).

However, though the rule includes pleadings as items to be considered, *Morton v. Allen Const. Co.*, 416 S.W.2d 733 (Ky. 1967) and other cases have held that allegations in a complaint cannot supplant testimony in the record. Similarly, allegations in the unverified pleadings are not sufficient to controvert affidavits submitted in support or opposition to summary judgment, as one of the purposes of the affidavits is to pierce the pleadings. *Gevedon v. Grigsby*, 303 S.W.2d 282, 284 (Ky. 1967).

City of Florence states that the trial judge must examine the evidentiary matter, not to decide any issue of fact, but to discover if a real or genuine issue exists. *City of Florence*, p. 390. *Queensway Financial Holdings, Ltd* serves as a reminder that for there to be a genuine issue of fact, there must be some evidence that could support a judgment in favor of the party opposing the summary judgment.

How much evidence is required to defeat a motion for summary judgment? Summary judgment is *only proper when it would be impossible for the plaintiff to produce any evidence at trial warranting a judgment in his favor.* *Queensway*, at 150, emphasis added, citing *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky.1991). *Wymer v. JH Properties, Inc.*, 50 S.W.3d 195, 199 (Ky.2001) citing *Steelvest, Inc.*, states the same rule, but then adds that [t]he party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent a summary judgment. *Wymer*, p. 199.

Though Kentucky courts continue to use the impossible language from *Steelvest*, *Welch v. American Publishing Co. of Kentucky*, 3 S.W.3d 724, 729 (Ky. 1999) attempted to clarify what *Steelvest* meant:

Since rendition of our decision in *Steelvest v. Scansteel*, Ky., 807 S.W.2d 476 (1991), on the question of the proper standard for deciding summary judgment motions, much attention has been given to the use of the word impossible. *Steelvest* did not repeal CR 56. See CR 56.03 (summary judgment shall be granted if there is no genuine issue as to any material fact). It merely stated forcefully that trial judges are to refrain from weighing evidence at the summary judgment stage; that they are to review the record after discovery has been completed to determine whether the trier of fact could find a verdict for the non-moving party. *Steelvest* at 482-483. The inquiry should be whether, from the evidence of record, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial.

Although *Welch* says the focus is on what is of record at the time of the motion, the determination being made as stated in *Queensway* and many other cases is whether the party opposing summary judgment can produce any evidence at trial warranting a judgment in his favor. *Queensway*, p. 150.

Advice for Practitioners. *Queensway*, and *Welch*, with its statement that the focus should be on what is of record rather than what might be presented at trial, suggest affidavits opposing summary judgment should be filed and response to a summary judgment motion should reference evidence in the record, not just pleadings, and draw inferences from such evidence to put facts at issue.

Arguments can be styled in favor or opposing summary judgment by emphasizing certain cases as illustrated below.

When seeking summary judgment, meet your initial burden to establish the non-existence of material issue of fact and determine whether the opposing party has put facts at issue merely by unverified allegations. Rule 56 is designed to resolve matters where a purported issue of fact is not genuine. If opposing party speculates about what could be proven at trial, cite *Welch* that the focus should be on evidence in the record.

When opposing summary judgment, note that summary judgment circumvents trial. *Steelvest* at p. 482 notes that [r]uling on summary judgment is more delicate matter than ruling on directed verdict, and requires greater judicial determination and discretion. Per *Welch*, it is not proper to weigh evidence at the summary judgment stage. *City of Florence*, at p. 390, states:

All doubts are to be resolved in favor of the party opposing the motion. The movant should not succeed unless a right to judgment is shown with such clarity that there is no room left for controversy, and it is established that the adverse party cannot prevail under any circumstances.

For more information about motions for summary judgment, see Caldwell's Kentucky Form Book § 30.12 Motion for Summary Judgment; Caldwell's Kentucky Form Book Form 51.04 Motion for Summary Judgment (Defendant).

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Mike Wilson on Bissell v. Baumgardner, 236 S.W.3d 24 (Ky. 2007)

2008 Emerging Issues 2231

Mike Wilson on Bissell v. Baumgardner, 236 S.W.3d 24 (Ky. 2007)

By Michael Wilson

April 25, 2008

SUMMARY: What must be shown to require recusal of a judge for bias or the appearance of bias? A lot, according to the Court of Appeals of Kentucky in *Bissell v. Baumgardner*, 236 S.W.3d 24 (Ky. 2007), which reaffirms *Stopher v. Commonwealth*, 57 SW3d 787 (Ky. 2001) and states that the burden of proof required is onerous and there must be a showing of facts of a character calculated seriously to impair the judge's impartiality and sway his judgment.

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ARTICLE: Cite as: Wilson, Mike. *Bissell v. Baumgardner*. LexisNexis Expert Commentary, (Insert date you accessed the document online).

Onerous Burden Must Be Met to Require Recusal

In *Bissell v. Baumgardner*, a case involving a Domestic Violence Order (DVO) proceeding, Baumgardner appeared, accompanied by her stepfather, former Fayette Circuit Judge Charles Tackett. The presiding judge stated on the record that she knew and respected Judge Tackett. Based on this information, Bissell asked the presiding judge to recuse herself, which the presiding judge agreed to do, and requested appointment of a special judge. When Judge Philpot was appointed as the special judge, Bissell filed a new motion to recuse Philpot, arguing that (1) the matter should be assigned to a judge from outside Fayette County, (2) that Judge Philpot had once been a law partner with a close friend of Judge Tackett; and (3) that Judge Tackett had contributed to Judge Philpot's judicial campaign.

Bissell asserted that this prior relationship created an appearance of partiality requiring Judge Philpot to recuse himself. Judge Philpot denied the motion to recuse, explaining that he had never had any relationship with Judge Tackett outside of court, and that he had no knowledge as to whether Judge Tackett had contributed to his campaign. Judge Philpot decline to recuse, holding that Bissell failed to make any showing that Judge Philpot's impartiality might reasonably be questioned.

Statutory Standards for Recusal. KRS 26A.015 sets forth the standards for disqualification of judges. Certain specified relationships, conflicts, and prior associations set forth in KRS 26A.015(2)(b) through (d) are grounds for

disqualification. KRS 26A.015(2)(a) requires disqualification for actual bias and KRS 26A.015(2)(e) for other circumstances in which his impartiality might reasonably be questioned. It is KRS 26A.015(2)(e) that Bissell argued required recusal in this case.

Stopher v. Commonwealth, 57 S.W.3d 787, 794 (Ky. 2001), cited by Bissell, holds that the burden of proof required for recusal is onerous and there must be a showing of facts of a character calculated seriously to impair the judge's impartiality and sway his judgment. *Stopher* in turn, is quoting *Foster v. Commonwealth*, 348 SW2d 759 (Ky. 1961).

Circumstances that Are NOT Sufficient to Show Bias. [T]he mere belief that the judge will not afford a fair and impartial trial is not sufficient grounds for recusal. Bissell, p. 29. A judge is not required to disqualify himself or herself based solely on an allegation that a litigant or counsel for a litigant has made a legal campaign contribution to the political campaign of the trial judge. Bissell, at p. 29, citing *Dean v. Bondurant*, 193 S.W.3d 744, 748 (Ky. 2006). Bissell also held that the fact that one of the parties was related to a retired Fayette County judge did not disqualify all Fayette County judges from hearing the case.

Affidavits alleging a judge had presided in other litigation between parties in which the movants were unsuccessful were not enough to establish bias requiring recusal. *Johnson v. Ducobu*, 258 SW2d 509 (Ky. 1953). Generally, political alignment is not deemed sufficient ground for disqualification of a judge. *Howerton v. Price*, 449 SW2d 775 (Ky 1970).

Circumstances that Are Sufficient to Show Bias. Overt bias or stated predisposition to rule a certain way may be grounds for recusal. Where a judge repeated several times, in open court, that under no circumstances would he suspend or probate the sentence of anyone convicted of armed robbery, regardless of the facts, *Wyatt v. Ropke*, 407 SW2d 410 (Ky. 1966) held that the judge should have recused himself. Similarly, where a judge advised that he could not impose the death penalty if recommended by the jury, *Tamme v. Commonwealth* 973 SW2d 13 (Ky. 1998) held that the judge should have recused himself.

In *Sommers v. Commonwealth*, 843 SW2d 879 (Ky. 1992), it was found to be an error not to recuse where a judge made public comments to a newspaper possibly indicating a presumption that a defendant being tried was guilty. In this case, the newspaper alleged that this judge had granted guardianship of two girls, later victims of homicide, to the custody of the defendant charged with murdering them. The judges statements that, in hindsight, he would not have granted guardianship, it was argued, assumed that the defendant was guilty of the crime charged and responsible for the embarrassing publicity to which the judge had been subjected.

Implications for Practitioners. If one of the prohibited relationships, conflicts or associations set forth in KRS 26A.015(2)(b) through (d) is not present, it will be difficult to force recusal absent proof that the judge has said something that indicates an intent not to be impartial or that the judge has formed assumptions regarding the merits of the case prior to hearing the evidence. Prior rulings against a particular party, political relationships, and the like, are unlikely to be sufficient to require recusal. Some examples follow:

Recusal is sought on grounds that opposing counsel or opposing party donated money to a judges political campaign. This will not require recusal under Bissell.

Judge and opposing counsel or the opposing party socialize frequently. It is unlike that this alone will constitute facts of a character calculated seriously to impair the judge's impartiality and sway [the judges] judgment. Bissell, p. 29.

An indigent defendant requests appointment of counsel and the judge says, you can have an attorney, but it wont keep you from going to jail. Here, the judge has made a statement indicating he or she will not impartially judge the case and recusal would be required.

For additional discussion of recusal, see generally Moore's Federal Practice, Ch. 63 Judge's Inability to Proceed.

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Joe McDonnell on Williams v. Manchester, 2008 Ill. LEXIS 306 (April 3, 2008)

2008 Emerging Issues 2230

Joe McDonnell on Williams v. Manchester, 2008 Ill. LEXIS 306 (April 3, 2008)

By Joseph B. McDonnell

April 25, 2008

SUMMARY: In a return to basics, the Illinois Supreme Court in *Williams v. Manchester* examined the requirements of the Illinois Wrongful Death Act and reiterated the need to show an injury to the decedent as a prerequisite to obtaining damages under the Act. This commentary, written by Joe McDonnell, examines the implications of this decision.

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ARTICLE: Need to Showing Injury Under Illinois Wrongful Death Act

In *Williams v. Manchester*, the Illinois Supreme Court examined the Illinois Wrongful Death Act and focused on the necessity of demonstrating an *injury* as the basis for a suit under the Act -- a fundamental prerequisite that had escaped the attention of the appellate court, notwithstanding a dissent in that court which pointed it out. *Williams v. Manchester, 2008 Ill. LEXIS 306* at *16-17.

Background of The Illinois Wrongful Death Act. The Illinois Wrongful Death Act (*740 ILCS 180/1 et seq.*) creates a cause of action in favor of the estate of a deceased person if the death resulted from the wrongful act, neglect or default of another and would have entitled the deceased person, had he or she lived, to maintain an action against the wrongdoer. The cause of action is for the benefit of the surviving spouse and next of kin of the decedent. *740 ILCS 180/2*.

There was no cause of action at common law for the death of an individual. A suit for personal injuries abated at the death of the injured party. In 1846, the British Parliament enacted a statute which changed the common-law rule. Known as *Lord Campbells Act*, the law created an action for damages whenever the death was caused by the wrongful act, neglect or default of another. The English statute became the model for similar legislation enacted in America beginning in the mid-19th century. Illinois enacted its statute (originally called the Injuries Act) in 1853. *Ill. Ann. Stat., ch. 70, para. 1*. The statute created a cause of action in the estate of a deceased person for pecuniary injuries suffered by the decedents next of kin where the death was caused by a tortious act.

The Act As Applied to Williams. In October 2000, Michelle Williams, ten and one-half weeks pregnant, was injured when the automobile in which she was a passenger was struck by another vehicle. Her injuries included a broken hip and pelvis. While the fetus in her womb was unharmed, fears were expressed by her doctors that x-rays done at the emergency room could cause disabilities in the unborn child, including mental problems. After consultation with a high-risk specialist in obstetrics, plaintiff decided to terminate the pregnancy.

Plaintiffs later suit for injuries sustained in the automobile accident included a count under the Wrongful Death Act for damages to herself and the baby's father as next of kin, arising out of the death of the unborn child. The trial judge entered summary judgment in defendants favor on the wrongful death claim, pointing out that, subsequent to the car accident, the fetus was uninjured and viable; and that, rather than continuing with the pregnancy and waiting until later to address her own injuries, plaintiff chose to receive medical treatment for her own injuries, at the expense of her unborn child. The trial court concluded that it was plaintiffs termination of the pregnancy that was the actual cause of the child's death and that defendants alleged negligence did not cause any injury to, much less the death of, the child, as required by the Wrongful Death Act.

Plaintiff appealed and the Appellate Court, First District, reversed, holding that a question of proximate cause, i.e., the foreseeability of the choice to terminate the pregnancy, was a triable issue for the jury to determine. The Supreme Court, after allowing defendants petition for leave to appeal, vacated the appellate court's decision and affirmed the judgment of the circuit court.

Fetus Is a Person Under the Act. Both the appellate court and the Supreme Court assumed, for purposes of their respective analyses, that the child Baby Doe, of a gestational age less than three months at the time of the accident, was a person within the meaning of the Wrongful Death Act.

Earlier cases had held that viability of a fetus is critical to the determination of whether he or she is a "person" within the meaning of the Wrongful Death Act and that no cause of action existed for injuries to, or death of, an unborn infant plaintiff unless, at the time of the occurrence, it had attained viability. *See Green v. Smith*, 1978, 17 Ill.Dec. 847, 71 Ill.2d 501, 377 N.E.2d 37 and *Chrisafogeorgis v. Brandenburg*, 1973, 55 Ill.2d 368, 304 N.E.2d 88.

By a 1980 amendment to the statute, the legislature determined that viability was unnecessary: [T]he state of gestation or development of a human being when an injury is caused, when an injury takes effect, or at death, shall not foreclose maintenance of any cause of action under the law of this State arising from the death of a human being caused by wrongful act, neglect or default. 740 ILCS 180/2.2. On the basis of that amendment, the Illinois Supreme Court has held that the parents of a stillborn child may maintain a cause of action to recover damages for loss of a child's society, as an unborn fetus is recognized as a "person" under the Act. *Seef v. Sutkus*, 164 Ill.Dec. 594, 145 Ill.2d 336, 583 N.E.2d 510 (1991).

Where Is the Injury? Granting that Baby Doe qualified as a person under the Act, the Supreme Court looked in vain for any evidence in the record demonstrating that the child was injured as a result of the automobile accident. In its analysis, the first district had treated the issue as one of proximate cause, and had engaged in a discussion of the concept of foreseeability in connection with the mother's dilemma in determining whether to proceed with medical treatment of her injuries which might prove harmful to the fetus. But the Supreme Court stated that whether the ultimate decision to abort the child was or was not foreseeable was beside the point. Both the parties and the appellate court had identified the wrong issue. As framed there, the issue was whether Baby Doe's death was foreseeable; the appropriate inquiry, however, was whether there was an injury to the unborn child, as the Act requires.

As a creation of the legislature, the Wrongful Death Act must be interpreted according to its terms. The Act changed the common-law rule that a cause of action for injury did not survive the death of an injured person. No cause of action for wrongful death existed at common law. The Court therefore could not extend the application of the Act beyond its precise terms, and one of those terms requires that the person injured would have been entitled to maintain an action for his injuries had he lived. *Williams*, 2008 Ill. LEXIS 306 at *24, citing, *inter alia*, *Biddy v. Blue Bird Air*

Service, 374 Ill. 506 (1940).

The undisputed evidence as shown by the record indicated that the unborn child was not injured as a result of the accident. Therefore, he would not have been entitled to sue the tortfeasor had he lived, and that, in turn, meant there was no cause of action on behalf of the parents for their pecuniary loss under the Wrongful Death Act.

Plaintiff also contended that the increased risk of future injury to the fetus by reason of radiation exposure was a present injury which would have permitted the child (had he been born) to file an action for damages against the tortfeasor. The Court pointed out in response to this argument that increased risk of injury is an element of damages if a defendant's conduct causes injury; it is not in and of itself a present injury. *Williams*, 2008 Ill. LEXIS 306 at *31-33, distinguishing *Dillon v. Evanston Hospital*, 199 Ill.2d 483 (2002) (a portion of a catheter inserted in plaintiff's vein broke off and lodged in plaintiff's heart chamber, creating an increased risk of future harm from its presence). Even if it were otherwise, said the Court, there was nothing in the record to support a finding that the fetus suffered any damage up to the time of the death as the appellate court had properly concluded in affirming the trial court's dismissal of the survival action. Absent proof of damages by reason of an injury to the unborn child, there was no basis for either a survival action (for damages up to the time of death) or for a wrongful death claim on behalf of the next of kin, arising from any such injury.

Lessons for Practitioners. Difficult issues concerning proximate cause may sometimes cause lawyers to overlook the more basic elements presented in a particular case. Since the time of *Palsgraf v. Long Island R.R. Co.*, barrels of ink have been spilled in debating whether a given fact pattern satisfies the requirement that an injury be the natural and probable result of the defendant's act or omission. Foreseeability of the injury is an appropriate consideration in that context. See, for example, *Ney v. Yellow Cab*, 2 Ill.2d 74 (1954); *Neering v. Illinois Central R.R. Co.*, 383 Ill. 366 (1943). As *Williams* illustrates, however, one must first determine whether there is in fact a demonstrable injury, before considering whether that injury was brought about by the defendant's wrongful conduct. Particularly where a statute removed or modifies a common-law disability, the terms of the statute must be satisfied before an action based on the statute can be pursued.

One further comment seems appropriate: Had the mother decided to continue the pregnancy to term, and the child did indeed exhibit symptoms of prenatal injury following its birth, the inquiry then would be directed toward whether the injuries were the result of the automobile accident (a difficult connection, given the doctors' earlier assurance of no injury) or whether they were, as feared by the doctors, the result of the treatment, including X-Rays, given the mother. In the latter scenario, it would then be appropriate to cast the issue in terms of proximate cause (as the appellate court improperly did in its decision in *Williams*). Was it reasonably foreseeable that the mother would choose not to terminate the pregnancy, but to undergo treatment for her own injuries even at the risk of injuring her unborn child? Cogent arguments could be made on either side of that issue, plaintiff arguing that a mother can hardly be faulted for choosing the life of her child over abortion, even at risk to the child, and the defense arguing that the conscious and voluntary act of foregoing the legal option of abortion to prevent the prospect of a damaged child was a superseding cause of the injury.

For additional discussion of the Illinois Wrongful Death Act, see

Illinois Jurisprudence, Personal Injury and Torts, Chapter 18 Wrongful Death.

Illinois Civil Procedure LexisNexis Forms FORM 25.20 Claim for Wrongful Death Damages: Survivors; FORM 25.22 Claim for Additional Wrongful Death Damages: Parent of Minor Decedent.

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McGhee on Winston Products Co., Inc. v. Deboer

2008 Emerging Issues 2219

Kimberly R. McGhee on Winston Products Co., Inc. v. Deboer

By Kimberly R. McGhee

April 24, 2008

SUMMARY: In managing a successful legal practice, every Nevada practitioner must know how to accurately calculate filing deadlines. Analyzing *Winston Products Co., Inc. v. Deboer*, this Expert Commentary provides the Nevada practitioner with a set of guidelines for computing filing deadlines that maximize the allowable time when service is made through the mail.

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ARTICLE: Cite as: McGhee, Kimberly R. *Winston Products Co., Inc. v. Deboer*. LexisNexis Expert Commentary, (Insert date you accessed the document online).

Introduction. Every Nevada litigator appreciates the critical need for observance of deadlines in his or her practice. However, at times, the computation of filing deadlines can be a fluid concept. This dichotomy may be caused by ambiguous rules for determining the computation of time to file motions. For instance, pursuant to NRCP 59(b), the time to file a motion for a new trial shall be no later than 10 days after the service of written notice of the entry of the judgment. Rule 59(b) must then be read in conjunction with NRCP 6(a), which provides that [w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and non-judicial days shall be excluded in the computation Additionally, because most motions are served by mail or electronic means, an additional 3 days shall be added to the prescribed period [NRCP 6(e)]. On its face, this computation appears clear: 10 days, plus three, excluding non-judicial days. However, the method a practitioner uses to compute the time or to calendar these dates can lead to dramatically different deadlines.

Many practitioners read these rules to mean that there is a 13-day period for filing motions--leading to the inclusion of intermediate Saturdays, Sundays, and non-judicial days. Other practitioners read the rules as counting the three-day allowance only after computing the 10-day filing period--which would exclude intermediate Saturdays, Sundays, and non-judicial days. Still others add the three-day allowance and then count the 10-day filing period while still excluding the intermediate Saturdays, Sundays, and non-judicial days. Each calculation can lead to a different filing deadline. Which is correct?

Nevadas Historical Treatment of NRCP 6. In *Ross v. Giacomo* [97 Nev. 550, 635 P.2d 298 (1981)] and *Custom Cabinet Factory of New York v. District Court* [119 Nev. 51, 62 P.3d 741 (2003)], the Nevada Supreme Court

considered the issue of time computation when service is made by mail. In *Ross*, the Nevada Supreme Court held that in calculating the time for filing a motion, the additional three days allowed for mailing should be added directly to the 10-day period, for a total of a 13-day filing period [*Ross*, 97 Nev. at 553 nn. 1 & 2]. In *Custom Cabinet*, the Nevada Supreme Court affirmed the *Ross* computation, reasoning that an alternative computation would result in additional time--five to seven days--to file motions which was complicated and absurd [*Winston Products Co., Inc. v. Deboer*, 122 Nev. 517, ___, 134 P.3d 726, 729 (2006) (quoting *Custom Cabinet Factory of New York*, 119 Nev. at 5455)]. The Court found that adding the three days to the time computation was a simpler and speedier computation scheme [*Winston Products*, 134 P.3d at 729].

However, subsequent to the Courts decisions, in 2004 the Court amended NRCP 6 to be consistent with the federal rules [*Winston Products*, 134 P.3d at 729]. The amendment provided for the exclusion of intermediate Saturdays, Sundays, and non-judicial days when the period of time for filing is less than 11 days--as opposed to the previous seven-day rule [*Winston Products*, 134 P.3d at 729]. When interpreting the NRCP 6(e) three-day mailing allowance, the Nevada Supreme Court considered several federal court decisions that found that the period of time prescribed does not include the additional three days for mailing [*Winston Products Co., Inc.*, 134 P.3d at 729]. For instance, in *Nalty v. Nalty Tree Farm* [654 F. Supp. 1315 (S.D. Ala. 1987)], the court recognized that the intent of the 1985 amendment to *Fed. R. Civ. P. 6* was to extend the response time when a 10-day limit was prescribed [*Nalty*, 654 F. Supp. at 1317]. The *Nalty* court reasoned that to hold otherwise would result in the allowance for the same amount of time to file the motion or response [*Nalty*, 654 F. Supp. at 1317]. Therefore, the appropriate computation should add the three-day allowance for mailing only after computing the time period under *Fed. R. Civ. P. 6(a)* [*Nalty*, 654 F. Supp. at 1317]. n1

Nevadas Current Interpretation of NRCP 6. Because the *Ross* and *Custom Cabinet* decisions did not involve time computation when intermediate Saturdays, Sundays, and non-judicial should be excluded, the Nevada Supreme Court revisited the issue in order to reconcile the calculations with the intent--to provide additional time when service is made by mail--behind *Fed. R. Civ. P. 6(e)*. In *Winston Products Co., Inc. v. Doboer* [122 Nev. 517, 134 P.3d 726 (2006)], the Nevada Supreme Court addressed the issue of computing the deadline for a filing when the prescribed period is less than 11 judicial days and when service was made by mail or electronic means. The Nevada Supreme Court was concerned that with the inclusion of the 2004 amendment, computing time under the *Ross* and *Custom Cabinet* holdings resulted in more time to act for a party who is served in person than a party who is served by mail [*Winston Products*, 134 P.3d at 730].

For example, pursuant to NRCP 59(b), a party has 10 days to file a motion for a new trial after service of written notice of the entry of the judgment. If the notice of entry was personally served, the party would have 14 calendar days to file the motion [*Winston Products*, 134 P.3d at 730]. However, under the *Ross* and *Custom Cabinet* decisions, if the notice of entry was served by mail, the party would only have 13 days to file the motion. This result is contrary to the purpose of *Fed. R. Civ. P. 6(a)* [*Winston Products*, 134 P.3d at 730]. Therefore, in *Winston Products*, the Nevada Supreme Court reversed its decisions in *Ross* and *Custom Cabinet* to the extent that they require filing periods to be computed by adding the three-day allowance for mail before applying the computation under NRCP 6(a) [*Winston Products*, 134 P.3d at 731]. The appropriate time computation for filing deadlines under 10 days is to first calculate the time period under NRCP 6(a), excluding intermediate Saturdays, Sundays, and non-judicial days, and then to add the three-day allowance for mailing, if applicable [*Winston Products*, 134 P.3d at 731].

Practical Application of NRCP 6. An example of how the *Winston Products* decision applies to NRCP 6 can be seen when calculating the time period to file motions for judgment as a matter of law and for a new trial [*Winston Products*, 134 P.3d at 731]. Supposing the notice of entry of judgment in the matter was served by mail on April 21, 2005, the deadline to file the motions would be computed as follows: compute the 10-day time period from April 21, 2005, excluding intermediate Saturdays, Sundays, and non-judicial days, which results in May 5, 2005 [*Winston Products*, 134 P.3d at 731]. The party should then add the three-day allowance for service by mail, which extends the

final deadline to May 9, 2005 [*Winston Products*, 134 P.3d at 731]. Practitioners should also note that the order in which this calculation is made is also important. In the event the practitioner adds the three days for mail service before calculating the 10-day period, excluding intermediate Saturdays, Sundays, and non-judicial days, the deadline would be May 6, 2005, not May 9, 2005.

In *Winston Products*, the Nevada Supreme Court provides the practitioner with the clearest method with which to calculate filing deadlines in order to comport with the intent of the rules--to maximize response times.

For additional information on computation of time in Nevada, see Nevada Civil Practice Manual, Ch. 9, Service, § 9.20 (Matthew Bender).

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n1 . For additional case law, see *Lerro v. Quaker Oats Co.* [84 F.3d 239, 242 (7th Cir. 1996) (holding that prescribed time to file objection to magistrate judges report was not sum of all allowable periods)] and *Tushner v. U. S. Dist. Court for Cent. Dist. of Cal.* [829 F.2d 853 (9th Cir. 1987) (holding that three-day allowance for mailing was not added to 10-day period prescribed for filing jury demand)].

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Washko on Retention of Employment Records in the Age of Electronic Discovery

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Washko on Retention of Employment Records in the Age of Electronic Discovery

By Elizabeth Washko

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SUMMARY: Employers in the United States are required, by statute, regulation and case law, to retain various types of employment records for varying periods of time. Compliance with the existing laws requires 3 steps: 1) creation and implementation of a sound data retention program that addresses electronic data issues; (2) creation and implementation of an effective litigation hold procedure; and 3) training employees.

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ARTICLE: Employers in the United States are required, by statute, regulation and case law, to retain various types of employment records for varying periods of time. With companies increasing use of and dependence on computerized and electronic communications, data creation and data maintenance, the burden on employers to retain the required employment records has increased substantially. Ever improving technology creates new forms of communication in text and digital formats as well as new, often mobile, storage platforms. At the same time, technology improvements continue to simplify the process of creating recorded information, resulting in its proliferation at exponentially escalating rates. To further complicate matters, our litigious society has turned its attention to accusations of spoliation as alternative methods of securing recoveries.

There are no special rules applicable to the retention of electronic data for discovery purposes. However, recent litigation and amendments to the Federal Rules of Civil Procedure have brought electronic discovery to the forefront, making it even more important to clearly understand the existing rules regarding document retention and how to apply them to electronic data.

To ensure compliance with the existing laws and regulations, best practice requires three key steps: (1) creation and implementation of a sound data retention program, that addresses electronic data issues; (2) creation and implementation of an effective litigation hold procedure; and (3) training employees on these policies and procedures. In order to understand why compliance is so important, it is helpful to understand the potential consequences of failing to comply. This information should also be utilized in training employees so they understand the importance of their data retention obligations.

I. Potential Consequences of Failing to Retain the Right Data -- The Growing Threat and Potential Consequences of Spoliation Claims

Anyone who has an obligation to retain and produce data or other evidence, for that matter) and fails to do so -- by withholding it, losing it or destroying it, may be subject to a claim for spoliation. While spoliation may be found to have occurred even in the absence of any wrongdoing, the consequences of spoliation are generally determined based on a combination of two factors: fault and prejudice to the non-producing party.

Prejudice is shown when it is proven that the withheld evidence was relevant. Absent such proof, even deliberate destruction of recorded information may not be sanctionable. *Gates Rubber Co. v. Bando Chemical Industries, Ltd.*, 167 F.R.D. 90 (D. Colo. 1996) (declining to create a strict liability discovery offense and requiring establishment of some minimal relevance of any discarded or destroyed materials to the circumstances of the litigation).

Fault is more difficult to define. As one court said:

We have recognized that spoliation of evidence occurs along a continuum of fault, from innocence through the varying degrees of negligence to intentional destruction. Likewise, a host of penalties may accompany the types of behavior manifested through this continuum.

Welsh v. United States, 844 F.2d 1239, 1245-1247 (6th Cir. 1988).

On the lower end of the spectrum, the consequences of proven spoliation are ordinarily additional discovery (e.g., an opportunity to inspect a computer system or re-depose a witness after previously withheld documents are belatedly produced). More serious sanctions may include awards of attorneys fees and costs associated with the protraction of discovery (e.g., if repeated trips to the court were needed in order to ultimately obtain certain evidence) or fines. Monetary sanctions may range from tens of thousands of dollars to millions. See, e.g., *Phoenix Four, Inc. v. Strategic Resources Corp.*, 2006 U.S. Dist. LEXIS 52402 (S.D.N.Y. 2006) (\$30,000 sanction plus costs relating to the motion for sanctions for failure to timely locate legacy servers); *MOSAID Techs. Inc. v. Samsung Elecs. Co.*, 224 F.R.D. 595 (D.N.J. 2004) (more than \$500,000 in fines and costs for failure to preserve e-mails); *Qualcomm Incorporated v. Broadcom Corporation*, 2008 U.S. Dist. LEXIS 911 (S.D. Cal. 2008) (more than \$8.5 million in fees for failure to timely search for and produce 46,000 relevant e-mails).

The worst civil sanctions involve either adverse inference instructions to the jury (i.e., that certain information under the control of a party was not produced, and that the jury should assume the information would have been detrimental to that party), *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) (failure to preserve all relevant e-mail); *Broccoli v. Echostar Communications Corp.*, 229 F.R.D. 506 (D. Md. 2005) (failure to preserve any relevant e-mail or other records relating to an employee termination), or outright default judgment, *Coleman Holdings, Inc. v. Morgan Stanley & Co., Inc.* Case No. 4D04-135 (Fla. Cir. Ct. 2005), *reversed on other grounds* 955 So.2d 1124 (Fla. 4th DCA 2007) (substantial delay and repeated misrepresentations to the court concerning the existence of back-up tapes containing relevant evidence); *Communications Center, Inc. v. Hewitt*, 2005 U.S. Dist. LEXIS 10891 (E.D. Cal. 2005) (use of Evidence Eliminator to wipe computer hard drives alleged to contain relevant evidence) or dismissal. *Leon v. IDX Sys. Corp.*, 464 F.3d 12951 (9th Cir. 2006) (deliberate destruction of evidence). The outcome in many adverse inference cases suggests the sanction may be as effective as a default judgment. For example, in *Zubulake*, the jury awarded the plaintiff more than \$21 million dollars after receiving the instruction.

Many of the recent cases (several cited above) have focused on the issue of spoliation in the context of electronic data. Electronic data is easy to create, easy to inadvertently destroy (in some respects) and easy to forget about when an employer begins the process of collecting documents and evidence in connection with defending against a claim or lawsuit. This makes a sound data retention program more important today than it has ever been.

II. Creating and Implementing an Effective Data Retention Program

An effective data retention program has several components. First, it identifies those categories of documents and

other data that need to be retained and the period of time for which they must be retained. Second, an effective data retention program provides for the regular destruction of categories of documents and data that do not need to be retained at all or that no longer need to be retained because the required timeframe has passed. Finally, the program must provide a mechanism to ensure that documents subject to a litigation hold (to be discussed in the next section) are retained until the litigation hold period has passed. It is this last component which is often critical in warding off sanctions for spoliation. *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004); *Broccoli v. Echostar Communications, Inc.*, 229 F.R.D. 506 (D. Md. 2005); *Tantivy Communications, Inc. v. Lucent Technologies, Inc.*, 2005 U.S. Dist. LEXIS 29981 (E.D. Tex. 2005).

It is important to note that a data retention program successfully fulfills its litigation role only if (1) it includes provisions for suspending the expiration of retention periods and obligations to discard transient materials; (2) it is adopted for reasons of record management, not to avoid discovery obligations; and (3) it is regularly enforced, not just when it is convenient in order to eliminate troublesome information. The absence of any one of these conditions can turn the program into evidence of spoliation. *See, e.g., Rambus, Inc. v. Infineon Technologies AG*, 220 F.R.D. 264 (E.D. Va. 2004) (adopting program and purposefully holding a shred day shortly before filing suit on a patent claim was grounds for sanctions); *Broccoli v. Echostar Communications Corp.*, 229 F.R.D. 506 (D. Md. 2005) (failure to suspend record destruction when claim should have been anticipated was grounds for sanctions); *Arthur Anderson, Inc. v. United States*, 544 U.S. 696 (2005) (sudden, selective compliance with a record retention program was basis for prosecution).

In developing the record retention program, the employer should make sure that, in addition to legal and human resources professionals, the company's relevant IT professionals are consulted. The IT professionals can provide invaluable assistance in properly identifying and defining the electronic data that should be covered by the program, designing systems to assist with proper retention and timely destruction, and implementing the litigation hold elements of the program.

A. Identifying Data to be Retained. An effective data retention program should typically identify those categories of employment records that need to be retained, how they should be retained and stored and how long after their creation they need to be retained and stored. A checklist identifying employment records that must be retained and the periods of time for which they must be retained is provided at the end of this Commentary.

This requirement has become trickier with the development of the many ways in which employees are required and encouraged to utilize electronic and portable data systems in their work and communications. In developing data retention programs, the employer should make clear that the program does not apply only to paper documents, but also applies to electronic data as well. For example, under Title VII, an employer is required to maintain, for a one year period (absent the filing of a claim or litigation) any document that qualifies as an employment or personnel record. In the context of disciplinary action against an employee accused of sexual harassment, such documents may include the complainant's statement, investigation notes and other witness statements, a report on the complaint and investigation and, of course, the disciplinary write-up. However, the employer may also be required to retain emails exchanged between the complainant, the investigator, the supervisor and/or the accused relating to the allegations, investigation and discipline. Care must be taken to ensure that those responsible for retaining records understand the need to collect (if necessary) and retain email exchanges and other electronic data relevant to the employment action at issue.

B. Destroying Unnecessary Data. An employer that destroys documents and data that it was not otherwise required to keep (because no law required they be kept or the timeframe for retention had expired) in accordance with a comprehensive retention/destruction program cannot be faulted for any such destruction that occurs prior to receipt of notice of a potential claim. *OBrien v. Ed Donnelly Enterprises, Inc.*, 2006 U.S. Dist. LEXIS 66633 (S.D. Ohio 2006) (rejecting spoliation claim based on overwriting of electronic data in accordance with established procedures); *Molins PLC v. Textron, Inc.*, 48 F.3d 1172 (Fed. Cir. 1995) (companies are entitled to maintain file destruction programs without being found to have improperly destroyed evidence). In addition, to the extent that a jurisdiction requires bad faith in order to warrant severe sanctions for spoliation, a data retention program may serve as a defense even if the destruction occurs after notice of a claim. *See, e.g., Tulip Computers International B.V. v. Dell Computer Corp.*, 63

U.S.P.Q.2d (BNA) 1527, 2002 U.S. Dist. LEXIS 7792 (D. Del 2002) (refusing severe sanctions for spoliation resulting from the operation of Dells record retention policy even though Dell had an obligation to preserve at the time). Additionally, regularly and systematically discarding recorded information that is otherwise of no continued use to the company, reduces its store of data -- there is less to search and review and litigation costs are reduced.

C. Mechanism to Retain Data for Litigation. As discussed in the next section, the data retention program needs to include a mechanism for putting a hold on any destruction components of the plan (including automatic destruction like electronic data overwrites) when the employer receives notice of a potential claim. Those responsible for implementing and enforcing the program must be particularly attuned to potential issues with the destruction of electronic data. It is easy enough for a supervisor to pull a paper file and set it aside with a do not destroy note placed on it. It is another task, however, for that supervisor to engage in the necessary work to review electronic files, including emails, to identify additional data that must be retained that might otherwise be destroyed by an automated program or through an inadvertent manual destruction, and make sure that data is properly protected.

III. Litigation Holds

Apart from the legislative and regulatory requirements to retain certain types of records (and other evidence), an employer has an additional obligation to retain any and all records that may be relevant to a claim that has been threatened or filed against the company. One of the most effective ways of dealing with this obligation is through the use of a notice, often called a litigation hold that is sent to those who may have possession or control of records that may be relevant to the claim.

As set forth above, a litigation hold process should be part of the overall data retention program and should define the circumstances when litigation holds apply, set forth basic rules on what is expected of employees when a hold is in place, and provide guidance to help employees successfully meet those expectations. In addition, it is recommended that the employer identify an individual or team to be responsible for implementing the litigation hold policy and, further, anytime a litigation hold notice is issued, identify one individual (whether the person in charge of the program or a delegate) to be responsible for that particular litigation hold process (Litigation Hold Coordinator).

A. Potential Triggers. A litigation hold ordinarily applies when there is notice of litigation, government investigation, or a subpoena or similar information request. However, it may also apply when a claim, lawsuit, or investigation is reasonably anticipated. Reasonable anticipation is deemed to exist whenever an administrative claim is filed, and might likely be based on receipt of a demand letter. It may also be based on receipt of internal complaints, even of an informal nature. In *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 217-218 (S.D.N.Y. 2003), the court held that the duty to preserve evidence would arise prior to the filing of an EEOC charge if there were a uniform belief by key players that litigation would ensue.

However, it should be noted that whether litigation or other circumstances requiring evidence should have been reasonably anticipated is always decided by a court or other tribunal with the benefit of hindsight, and the decision is often colored by the extent of missing evidence. For example, in *Broccoli v. Echostar Communications Corp.*, 229 F.R.D. 506, 511 (D. Md. 2005) where essentially all evidence had been destroyed, the court concluded that litigation should have been anticipated at the time of an initial informal complaint of mistreatment to the plaintiffs immediate supervisors without regard to whether those supervisors formed a belief as to the likelihood of litigation.

B. Who Should Receive Notice. Who should receive notice of the litigation hold needs to be determined on a case-by-case basis. Essentially, it should be provided to any employee who the company reasonably believes may have possession of or may come into possession of potentially relevant data. For example, in a case where an individual was terminated for violating company policy and claims the termination was based on sex discrimination, the company should identify those individuals who may have records relevant to the individuals employment and termination. That would likely include the individuals direct supervisor and anyone directly involved in the termination decision. However, it may also include others within the individuals chain of command (the supervisors supervisor, for example),

human resources personnel, and, perhaps coworkers who may have exchanged relevant emails with the individual.

The company's IT Department should also be notified anytime a litigation hold notice is going to issue and should be told who is going to be receiving the notice. This will enable the IT professionals to take any necessary steps to halt automated electronic data destruction systems (i.e. overwrites or programs that delete all emails after a certain period of time has passed). In addition, it will enable the IT Department to analyze and determine whether it needs to take steps to ensure preservation of data on particular computers and/or to provide assistance to notice recipients in doing so.

C. What Should Be Retained. Again, the specifics of what needs to be retained must be determined on a case-by-case basis. Certainly, those receiving notice should be advised of the general categories of documents that need to be retained personnel files, email communications, time records. In addition, to the extent the employer is aware of the existence of specifically relevant documents for example, in a termination case, all documents prepared in connection with the investigation that led to the termination -- these should be identified as well.

In a case where an individual claims they were treated differently than another employee, the employer may be under an obligation to retain records relating to the other potential comparators. For example, if a claimant contends he was denied a promotion based on his race, the employer should identify the promotions at issue (if possible from the claim or complaint), identify those who were considered for the promotion and received it, and make sure that the relevant employment documents for those individuals are also retained as they are likely to be considered relevant during the course of any investigation or litigation.

D. Notice Requirements. There is no magic language required of a litigation hold notice. However, the typical notice should include:

1. The identity of the person or persons who are the subject of the hold (i.e. the claimant(s));
2. The fact that a claim has been made or is anticipated;
3. The company is mandating that those receiving notice take immediate steps to preserve, retain and maintain (or perhaps turnover to HR or Legal) the identified documents;
4. An identification of the categories of documents to be retained and any relevant specifics;
5. An identification of the relevant timeframe (i.e., January 1, 2005 to December 31, 2006);
6. Any specific instructions, including steps that need to be taken to preserve electronic data or other special procedures the company wants to use to ensure documents are retained; and
7. The name and contact number of the Litigation Hold Coordinator who they may contact with any questions or concerns.

Other items that may be included in the litigation hold notice are: (a) a request that the recipient notify the Litigation Hold Coordinator of any special circumstance that exists or is reasonably anticipated; (b) guidance regarding where to search for potentially relevant data; (c) the potential need to disseminate the notice to subordinate employees; and (d) a request that the recipient identify additional personnel with relevant information.

A word of caution: if the claimant is still employed by the company, the litigation hold notice must take into account the continuing obligation to preserve documents as they continue to be created emails, performance evaluations, etc. In addition, a best practice in preparing a litigation hold notice involving a current employee, would be to include a no retaliation provision. n1

Many companies incorporate an acknowledgment of receipt and/or compliance as an aspect of the litigation hold process. Such an acknowledgment enhances the ability to track compliance, may serve to further impress on the

employee the need for compliance by creating individual accountability, and may serve as evidence of the company's good faith efforts to preserve potentially relevant evidence.

E. Follow-Up. The litigation hold process must provide for regular reminders to employees who hold data subject to a hold, and other activities to ensure that potentially relevant evidence is preserved and is continuing to be preserved. IT must audit systems under its control to ensure that auto delete functions have been deactivated as needed, or that alternative measures have successfully been implemented to avoid the destruction of potentially relevant evidence in those cases where the automatic roll-off of information cannot be suspended. It may be advisable to initiate e-mail journaling for select custodians, or to segregate select custodians to specific servers whose back-up tapes are then preserved.

IV. Training

It is recommended that employees who have responsibilities that involve creating, handling or maintaining recorded data of any kind receive some training on the company's data retention program. Certainly, all such employees should receive a copy of the policy or a concise but substantive summary of the policy with a signed acknowledgment of their receipt. However, in order to make sure that these employees understand the importance of complying with their respective retention and destruction obligations, it is advisable to provide an orientation or training class on the elements of the program and the employee's role in ensuring compliance. The better the employees understand their retention obligations, the more likely they are to properly fulfill those obligations and, thus, protect the company. Such training may have an added benefit of serving as further evidence of the company's good faith efforts to ensure compliance, in the event a mistake is made in the preservation process.

V. Conclusion

Effective implementation of a comprehensive data retention program is an integral component of successful business operations in today's legal and business environments. Although development of such a program may require a substantial investment of time, effort and other resources, the investment ultimately pays off.

Federal Document Retention Requirements

STATUTE

RECORDS TO BE RETAINED

LENGTH OF RETENTION

Title VII of the Civil Rights Act of 1964; Americans with Disabilities Act Any personnel or employment record made or kept by an employer (including but not necessarily limited to requests for reasonable accommodation, application forms submitted by applicants and other records having to do with hiring, evaluations, promotion, demotion, transfer, lay-off, discipline or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship)

Records relevant to any charge of discrimination or court proceedings related to charge of discrimination

1 year from date record is made or personnel action taken, whichever is later

Final disposition of charge or proceeding

Age Discrimination in Employment Act

Name; address; date of birth; occupation; rate of pay; and compensation

Job applications; job advertisements or postings; job orders submitted to employment agencies or unions; resumes; replies to job advertisements; personnel actions (promotions, transfers, training ,layoffs, recalls, discharges); aptitude test results; physical exam test results

Employee benefit plans; seniority system plans; merit systems

Records relating to any charge of discrimination or court proceedings related to charge of discrimination

3 years

1 year

1 year after plan termination

Final disposition of charge or proceeding

Fair Labor Standards Act

Employee's full name and on the same record, the employee's identifying symbol or number if such is used in place of name on any time, work, or payroll records; address, including zip code; birth date, if younger than 19; sex and occupation; time and day of week when employee's workweek begins; hours worked each day and total hours worked each workweek; basis on which employee's wages are paid; regular hourly pay rate; total daily or weekly straight-time earnings; total overtime earnings for the workweek; all additions to or deductions from the employee's wages; total wages paid each pay period; date of payment and the pay period covered by the payment.

For non-exempt employees, must also keep records showing the basis on which wages are paid in sufficient detail to permit calculation for each pay period of the employee's total remuneration for employment including fringe benefits and prerequisites

Supplementary records, including employment and earnings records; wage rate tables; work schedules; additions or deductions from wages; shipping and billing records; changes in compensation rates

3 years

3 years

2 years

Family and Medical Leave Act

Same as FLSA, but also dates FMLA leave is taken; hours of leave if incremental leave is taken; copies of employee notices of leave furnished to the employer and copies of all general and specific written notices given to employees; any documents describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves; premium payments of employee benefits; and records of any dispute between the employer and an employee regarding designation of leave as FMLA leave

3 years

Equal Pay Act

Any records an employer makes relating to the payment of wages, evaluations, job wage rates, job descriptions, merit systems, seniority agreements, or other collective bargaining matters which explain the basis for payment of a wage differential to employees of the opposite sex.

All records required to be kept by the FLSA.

2 years

Immigration Reform and Control Act

INS Form I-9

3 years after date of hiring or 1 year after date of termination, whichever is later

Employee Retirement Income Security Act

Benefit plans; summary benefit descriptions; all related benefit documents

Minimum of 6 years following the end of the applicable plan year for which the record applies.

Occupational Safety and Health Act

A log and summary of all recordable occupational injuries and illnesses for each establishment (OSHA Form 200) and a supplementary record (OSCH Form 101).

Employee exposure records on toxic substances and harmful physical agents (including environmental and biological monitoring information and material safety data sheets).

Employee medical records (including medical histories, examinations and test results, medical opinions and diagnoses, description of treatment and prescriptions, and employee complaints).

5 years.

30 years.

Duration of employment, plus 30 years.

Consolidated Omnibus Budget Reconciliation Act of 1985

General Notice

Election Notice

Notice of Unavailability

Notice of Termination

COBRA policy

COBRA correspondence with participant, including returned election forms, premium payments, postage marks, etc.

Proof of mailing

Not specified (recommend proof of COBRA notice mailing and COBRA records be maintained for at least 7 years)

from date last effective)

For labor and employment content, see Labor and Employment Area of Law Page.

For further analysis of record keeping of employee information, see Labor & Employment Law, Chapter 271.

For the Federal Rules of Civil Procedure related to electronic discovery, see E-Discovery: The Newly Amended Federal Rules of Civil Procedure

For further analysis of electronically stored information, see Moore's Federal Practice Civil, Chapter 37.

For more resources on electronic discovery, visit <https://www.lexisnexis.com/applieddiscovery/>

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n1 . One of the risks of notifying all relevant individuals about the potential claim, charge or litigation is the possibility of retaliation or, more likely, that the employee will perceive any potentially adverse employment action is retaliatory.

ABOUT THE AUTHOR(S):

Elizabeth Washko is a shareholder with the law firm of Ogletree Deakins, Nash, Smoak & Stewart, P.C. Ms. Washko represents management in a wide variety of employment litigation matters, including discrimination, harassment, retaliation, FMLA, FLSA, wrongful termination, breach of contract, and covenant not to compete cases. Ms. Washko has acted as lead counsel in many jury trials in both state and federal courts. In addition to her litigation experience, Ms. Washko also conducts training on employment issues, drafts and reviews employment policies and agreements, and conducts harassment and other types of investigations for employers. Ms. Washko is a frequent speaker on topics relating to all types of employment issues and works with clients on preventive strategies to avoid discrimination, retaliation and other employment claims.

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Judge David M. Gersten on Progressive Express Ins. Co. v. Menendez

2008 Emerging Issues 2221

Judge David M. Gersten on Progressive Express Ins. Co. v. Menendez

By David M. Gersten

April 24, 2008

SUMMARY: Judge David M. Gersten on the latest development in pre-suit notice requirements under section 627.736, Florida Statutes, and Progressive Express Ins. Co. v. Menendez, No. 3D06-2570 (Fla. 3d DCA March 19, 2008).

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: *Progressive Express Ins. Co. v. Menendez*. In 2001, Cathy Menendez suffered injuries in an automobile accident. Menendez had PIP automobile insurance through Progressive. Thereafter, Menendez's attorney sent Progressive a series of letters, requesting supplemental lost income and reimbursement for a workers compensation lien. In response, Progressive sent Menendez two letters, requesting additional documentation. Meanwhile, Menendez sued for overdue PIP benefits. Then, over a year after litigation commenced, Menendez finally sent a demand letter to Progressive.

In a motion for summary judgment, Progressive argued that Menendez failed to comply with the pre-suit notice requirement of section 627.736, Florida Statutes (2001), which was enacted after filing suit. The trial court found that the pre-suit notice requirement did not apply, and that even if it did apply, Progressive effectively denied Menendez's claim.

On appeal, the Third District Court of Appeal determined that the pre-suit notice was procedural in nature. Therefore, applying it did not violate Article I, Section 10 of the Florida Constitution, which prohibits laws impairing existing contracts. Thus, the Third District reasoned, Menendez failed to comply with section 627.736(11), which required that the insured must provide the insurer with written notice of the intent to initiate litigation for overdue benefits.

Ultimately, the court found that in the absence of a dismissal and subsequent refiling of the complaint, the demand letter sent nearly one year after the initiation of the lawsuit has no effect. To rule otherwise would effectively nullify the words of the legislature. . . . *Menendez*, No. 3D06-2570.

Therefore, the court remanded the cause to the trial court to determine whether Progressive denied Menendez's claim. If Progressive did not deny Menendez's claim, then recovery is barred because Menendez would be in material breach of the insurance contract.

Prospective vs. Retroactive Laws. It is incorrect to assume that all laws operate prospectively. Although Florida follows the general rule that in the absence of a clear legislative expression to the contrary, a law is presumed to apply prospectively, *Rothermel v. Fla. Parole & Probation Comm.*, 441 So. 2d 663, 664 (Fla. 1st DCA 1983), *Menendez* demonstrates that a law can be applied retroactively to a pending lawsuit.

To determine whether a newly enacted law or amendment applies to a pending case, the court must examine whether it is substantive or procedural in nature. *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994). Substantive law prescribes the duties and rights under our system of government. Procedural law concerns the means and method to apply and enforce those duties and rights. *Benyard v. Wainwright*, 322 So. 2d 473, 475 (Fla. 1975).

In general, a substantive law is presumed to operate prospectively, unless legislative intent clearly shows otherwise. *State v. Lavazzoli*, 434 So. 2d 321, 323 (Fla. 1983). On the other hand, procedural legislation is to apply retroactively. *Arrow Air v. Walsh*, 645 So. 2d 422, 424 (Fla. 1994). Procedural statutes do not fall within the constitutional prohibition against retroactive legislation. Instead, they may be held immediately applicable to pending cases. *Vill. of El Portal v. City of Miami Shores*, 362 So. 2d 275, 278 (Fla. 1978).

Remedial legislation is also applied retroactively. *Arrow Air*, 645 So. 2d at 424. A remedial statute intend[s] to afford [a] private remedy to [a] person injured by [a] wrongful act; it is designed to correct existing law, redress existing grievance, or introduce regulations conducive to [the] public good. *Walsh v. Arrow Air, Inc.*, 629 So. 2d 144, 148 (Fla. 3d DCA 1993). This type of legislation does not create new rights or eliminate any existing rights. *City of Lakeland v. Catinella*, 129 So. 2d 133, 136 (Fla. 1961).

Practitioner Pointers. In light of *Menendez*, practitioners must be aware of whether legislation is substantive or procedural in nature. The first step is to research similar laws to determine whether courts have designated the law as substantive or procedural. If the law is substantive in nature, it will not be applied retroactively.

Avoiding the *Menendez* Trap. In general, since section 627.736(11) is procedural in nature, courts will apply it retroactively to pending suits, regardless of the date of the accident or issuance of the policy. Thus, if the practitioner fails to send a demand letter before initiating suit, the court will dismiss the action. Also, if the court has not dismissed the action and the practitioner has not filed an amended complaint, any subsequent demand letter has no legal effect.

Therefore, before initiating suit, practitioners should research the claim together with current legislation and determine the conditions precedent to filing suit. Further, the practitioner should send a demand letter to the insurer, even if the effective date of the applicable policy or the date of the accident precedes the enactment of the statute. Remember, the complaint must contain an allegation of compliance with all conditions precedent. Failure to do so may lead to a dismissal of the claim.

If suit has already been filed and conditions precedent are not met, the practitioner should immediately make a motion to abate or voluntarily dismiss the claim and re-file after compliance. However, be sure that the limitations period has not run for the condition precedent. If the period has expired, the court will dismiss the claim with prejudice.

Menendez and section 627.736, Florida Statutes, gives defense practitioners grounds for dismissal. Now, this defense is viable regardless of the effective date of the policy and the date of the accident. Therefore, fulfillment of conditions precedent should be the first item on defense practitioners checklist for a dismissal.

As a last note, the Southern District of Florida has held that the pre-suit notice requirement is substantive in nature, and therefore only prospective in application. *Shenandoah Chiropractic, P.A. v. Natl Specialty Ins. Co.*, 526 F.Supp.2d 1283 (S.D. Fla. 2007). Thus, if practicing in federal court, retroactivity does not apply. Regardless, a practitioner should still comply with pre-suit notice requirements, even if the effective date of the insurance policy and date of the accident precede the enactment of the statute.

Conclusion. A practitioner should research current law and determine whether it is procedural or substantive in nature. Compliance with all conditions precedent is essential. The failure to do so can lead to serious consequences for the client and for the practitioner. The clients claim may be dismissed and the practitioner may face a malpractice action. Be sure not to fall into the same *Menendez* trap.

ABOUT THE AUTHOR(S):

Judge David M. Gersten is currently a judge on the Third District Court of Appeal where he was appointed in 1989. Prior to his appointment, he was in private practice from 1975 until 1980. He was elected to the Dade County Court in 1980 and elected to the Eleventh Judicial Circuit in 1982. In 1995, he was appointed as Associate Dean, Appellate Division, at the Florida College of Advanced Judicial Studies, and became a member of the Florida Court Education Council in 1996. He is the author for the Florida Civil Practice Guide, a multi volume set published by LexisNexis/Matthew Bender, and he is a judicial consultant for LexisNexis Practice Guide: Florida Pretrial Civil Procedure.

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Federal Question Juris: Hoffman on Grable & Sons Metal Prods. v Darue Eng'g Mfg.

2008 Emerging Issues 2199

Federal Question Juris: Hoffman on Grable & Sons Metal Prods. v. Darue Eng'g Mfg.

By Lonny Hoffman

April 17, 2008

SUMMARY: After the Supreme Court decided *Grable & Sons Metal Products v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), there has been a notable increase in the number of reported cases involving the question of whether a case raising a state law claim nevertheless comes within the 28 U.S.C. §1331 grant of jurisdiction. In this commentary Professor Lonny Hoffman analyzes the Grable decision and subsequent removal cases.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Overview. In 2005, the Court handed down a case that, quietly and well below the radar screen of most observers, can be a powerful strategic tool for defendants and, in consequence, a source of frustration, cost and delay for plaintiffs. The case, *Grable & Sons Metal Products v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005) considered whether a state court lawsuit--comprised entirely of state law claims--may nevertheless be regarded as arising under federal law within the meaning of 28 U.S.C. § 1331, the general statutory grant of federal question jurisdiction to the district courts. If so, then defendants may be able to trump the plaintiffs choice of forum by using the removal power to take the case from state to federal court.

The doctrine at issue in *Grable*, known as the substantial federal question doctrine traditionally has played a very small role in federal practice. Indeed, with only two limited exceptions, *Grable* was the first Supreme Court case since *Merrell Dow Pharmaceuticals, Inc. v. Thompson* 478 U.S. 804 (1986) to directly ask whether a civil action in which the plaintiffs claims for relief sound exclusively in state law nonetheless arises under federal law for jurisdictional purposes.

Rising Incidence of Substantial Federal Question Removals. Lots of people read *Merrell Dow* as limiting the scope of arising under jurisdiction to cases in which the plaintiff asserts a right to relief pursuant to a federal statute. This reading had the effect of really restricting the effective scope of cases said to come within the § 1331 grant of arising under jurisdiction. Thats borne out by the empirical evidence. In 1986, the year of *Merrell Dow*, only 76 cases raised the issue. That figure had only barely budged (up to 81) by 1994.

To be sure, since 1994 the numbers of reported substantial federal question cases continued to creep up but the pace was slow and regular, and probably in line with the overall increases in the total number of federal question cases. But,

after *Grable* was handed down, there's been a notable increase in the number of reported cases involving the question of whether a case raising a state law claim nevertheless comes within the § 1331 grant of jurisdiction. *Grable* was decided in June but, before the year was out, there were 197 reported cases involving the substantial federal question doctrine. In 2006, there were 241 and 258 in 2007. And these are the reported cases which, as we should know by now, probably are but the tip of the iceberg. n1

Court Encourages More Attempts to Gain Entrance Into the Federal Courthouse. The uptick in reported substantial federal question cases after *Grable* confirms a prediction I previously made that, even if the courts end up interpreting *Grable* as not expanding in any significant way the scope of the arising under jurisdiction through the substantial federal question doctrine, the Courts decision nevertheless emboldens defendants to remove cases on the basis of *Grable*. Along with another decision that same term that effectively immunizes defendants from cost shifting under 28 U.S.C. § 1447(c) for improvident removals (*Martin v. Franklin*, 546 U.S. 132 (2005)), the practical effect of *Grable* is that defendants are now able--at the least--to successfully delay the plaintiffs bid for relief and add considerable additional costs into this early forum battle that has nothing to do with the merits of the dispute. Even worse, for those federal courts interested in reading the substantial federal question doctrine expansively, *Grable* provides plenty of available cover to do so.

But enough preamble. On to *Grable* to see what were the factual circumstances of that case and the new standard the Court laid out for determining if federal jurisdiction exists under the substantial federal question doctrine.

The *Grable* Case. The plaintiff in *Grable* had filed a quiet title action in Michigan state court alleging that the federal tax delinquency sale of his property was invalid because the IRS failed to give proper notice of the seizure, as required by 26 U.S.C. § 6335(a). Defendant had purchased the property from the IRS but plaintiff maintained that it had superior title because service had been improper. Defendant removed the case to federal court, asserting that the source of the district courts original jurisdiction was § 1331. Although plaintiff asserted purely state law causes of action and no federal statute did not provide a private right of action, the district court held that it had original jurisdiction over the cause because the sole issue in dispute--whether § 6335(a) requires personal service--raised a substantial federal question. The Sixth Circuit affirmed the district courts jurisdictional determination. Thereafter, the Supreme Court granted certiorari.

The Well Pledged Complaint Rule. What makes it seem that a case like *Grable* shouldn't come within the general grant of federal jurisdiction in § 1331 is that the Court has long insisted Congress only meant to permit jurisdiction when the federal question arises as part of the plaintiffs well-pleaded complaint. You may remember *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908), where the Court, in rejecting the plaintiffs bid to characterize their breach of contract case against the railroad as raising a federal question, gave a classic exposition of the well pleaded complaint rule. One justification often offered for the well pleaded complaint rule is that plaintiffs are said to be the masters of their own complaints; if they choose not to bring a federal law cause of action, so be it. It's their choice.

Looking Beyond the Plaintiffs Allegations. We don't always have to take the plaintiffs pleading at face value, however. One occasion when this is appropriate is when complete preemption exists: that is, when Congress has preempted so fully all conflicting state laws that we can just as well say there is no such thing as a claim based on state law in this field. n2 The other primary instance when we look beyond the plaintiffs assertion of exclusively state claims for relief--and the one with which *Grable* was concerned--arises when a closer look at the pleading reveals that there are substantial federal issues that must necessarily be decided in the course of adjudicating the claim for relief. The hard question, then, is how we figure out when a case can be removed into federal court when the plaintiff is asserting entirely state law causes of action. And that's where *Grable* comes in. The Court has now given us a two-part test for answering this question.

The First Prong of *Grable's* Two-Part Test: Focusing on the Question. Under the first formal step in the post-*Grable* inquiry, the court must determine whether there is a substantial federal question that is necessary to the determination of plaintiffs right to relief and actually in dispute. So, not only must there be an issue of federal law, but

there must be one that is *substantial, necessary, and actually in dispute*. In *Grable*, this first step was readily met because the Court found that the question of what constitutes proper notice under § 6335(a) is a substantial and important question and one that was necessary and actually in dispute in the case. Indeed, if proper notice had been given, the plaintiff would lose; if it had not been given, the plaintiff would win. Simple as that: there were no other material issues in dispute.

Grables Second Step: Considering the Federalism Balance. Even after finding such a substantial, necessary federal question that is actually in dispute, the courts interpretative task is not complete until a second step is taken, however. That is, *Grable* further directs that it is necessary to determine whether exercising jurisdiction under § 1331 would upset the balance Congress intended to strike in terms of allocating cases between the state and federal courts. In *Grable*, this second step was also easily satisfied where the notice question was going to be relevant to this one case, which is to say that it was not likely to arise again very often, if at all. That is, once the federal courts decided that § 6335 did or did not require personal service, there would not be a need thereafter for a federal court to decide the question again in another quiet title (or other) case where service was effected under the statute.

Analysis: Interpreting *Grable*, and Beyond. *Grables* retreat from what for many years appeared to be the predominant interpretation of *Merrell Dow*--that a private right of action is a necessary condition to entry through the § 1331 door into the federal courthouse--might lead one to contend that *Grable* was meant to expand significantly the number of suits that can be heard and adjudicated in federal court. Indeed, as I noted at the outset, many more defendants seem to be making this precise argument, taking advantage of the pliancy in the new *Grable* test to argue that all kinds of state law claims actually raise a question of federal law substantial enough to come within *Grables* new interpretation of 1331. But this reading of *Grable* misunderstands the result of the Courts decision and profoundly misreads the lesson the eight-member majority intended to send.

Federal Question Must Be Only Key Issue in Case. On the first *Grable* step--whether there is a substantial federal question that is actually in dispute and necessary to the determination of plaintiffs right to relief--most courts seem to have recognized that the meaning of the federal statute must be the only legal or factual issue in the case. Post-*Grable* courts have also closely followed the Supreme Courts directive from earlier decisions and, in contrast to the circumstances confronting the Court in *Grable*, that when a claim can be supported by alternative and independent theories and one of those theories is based on state law, then a federal question is not a necessary element of the claim.

In *Sheridan v. New Vista L.L.C.*, 406 F. Supp. 2d 789 (W.D. Mi. 2005), for instance, the court remanded a suit brought against defendants who allegedly induced plaintiffs to make investments based on the representation that they would receive the tax benefits from doing so when the IRS subsequently disallowed the intended strategy. Rejecting the analogy to *Grable*, the court concluded that plaintiffs would have to prove primarily state-law based allegations. Indeed, the proper interpretation of the federal tax law was not even the key issue in the case, the court found. Even if plaintiffs were correct that the investment was not proper under federal law, they would still have to demonstrate that the defendants were aware or should have been aware that the tax strategy would be illegal.

Cant Rely on Conclusory Allegations about the Importance of Federal Law. Cases like *Sheridan* and others underscore the necessity of going through each cause of action, element by element, to assess whether the plaintiffs suit necessarily raises a stated federal issue, actually disputed and substantial as required by *Grable*. Defendants cannot rely on conclusory allegations that a plaintiffs petition is peppered with references to federal law or that federal issues pervade the case. To succeed in demonstrating arising under jurisdiction, the defendant must be precise in identifying when, how and why a substantial federal question will arise in the course of adjudicating the plaintiffs claims.

Remembering the Second Step. Even if a substantial federal question is actually in dispute and necessary to the adjudication of plaintiffs state law claims, *Grable* held that the arising under jurisdiction in § 1331 is still not satisfied until the court undertakes an evaluation to determine how Congress intended to allocate the balance of jurisdiction between state and federal courts. To illustrate the importance of taking into consideration the legislative judgment regarding federalism interests, consider again the district courts decision in *Sheridan*.

Remember that the nub of the claims against the defendants was that plaintiffs were induced to make investments that did not produce the intended tax benefits. Having found that federal law not substantial because it was only one of several issues to be decided in the case, the court in *Sheridan* went on to observe that even if the federal law issue were treated as substantial, the impact on federalism would counsel against finding the arising under jurisdiction satisfied. The court recognized that a determination that the case asserting exclusively state law claims comes within § 1331 merely because some interpretation of federal tax law was required would herald a substantial transfer of cases from state to federal courts. Put another way, *Sheridans* conclusion reaffirms that state courts are to be routinely relied upon to decide and apply questions of federal law.

The Two Prongs Usually Pull in Opposite Directions. At its essential core, *Grables* refinement of the substantial federal question doctrine is best understood as signaling that routine efforts to come within this statutory head of jurisdiction should be rejected in favor of allowing the state court to apply and interpret the applicable federal law. What is perhaps most important about *Grables* two-part test is to see that, on most occasions, these two prongs will pull in opposite directions. That is, as formulated, to satisfy the first step the federal question has to be very important. Not some minor point of federal law, but significant to those who would be impacted by interpretation of the federal question.

So, in *Grable*, the Court thought the meaning of the federal tax provision was an important issue because government has a strong interest in the prompt and certain collection of taxes. Also, buyers of property sold at a delinquency sale have a significant interest in making sure that notice was proper so that they are purchasing with clean title. So resolution of the federal question in this case will impact a wide range of persons and behavior. By contrast, an issue relevant only in a single circumstance is far less likely to qualify as substantial.

At the same time, the second step of the *Grable* test will usually point in the other direction. That is, if it has been determined that a question of federal law is substantial because its resolution will impact a wide range of persons and behavior, the consequence of shifting so much of the state caseload into federal court will often be that such a profound federalism impact will not be understood to be the legislative judgment. The sheer number of cases affected may not be the only criterion *Grable* contemplates in the measurement of the federalism impact, but it is likely to be one of the most significant factors.

Conclusion. The lesson of lower court cases like *Sheridan* is that *Grable* shouldnt be read as signaling a wide expansion in the scope of the substantial federal question doctrine. It is also the lesson of another and even more obscure Supreme Court decision that came out after *Grable*: *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006).

Empire involved a suit brought by an insurance carrier in federal court seeking reimbursement for amounts it had paid for medical care to one of its beneficiaries. The carriers action was based entirely on state law and, although it advanced a different argument to justify keeping the case in federal court on § 1331 grounds, the Court seemed to be interested in the possibility that the substantial federal question doctrine from *Grable* might provide a jurisdictional basis. Ultimately, however, a majority of the justices rejected this argument as well, concluding that the case was poles apart from *Grable*, referring to the earlier decision as a special and small category of federal jurisdiction. *Grable* was distinguished as a case where the resolution of the federal question, a nearly pure issue of law was both dispositive of that case and would be controlling in numerous other cases. By contrast, the issues in *Empire* were fact-bound and situation-specific. Even the four dissenting justices who urged that jurisdiction did exist for the suit to remain in federal court relied on other arguments to make their case. *Grable* and the substantial federal question doctrine were not even mentioned.

In sum, although the *Grable* issue in *Empire* was one of the minor issues in the case, the Courts treatment of the argument helps show that its wrong to read the Courts decision as significantly expanding federal jurisdiction. A substantial federal question will usually only be found when an issue is of widespread import: that is, it will be relevant not just to the instant case, but its interpretation will be relevant in lots of other cases. At same time, a question that will

have relevance in lots of cases cannot arise in a way that would result in continuous removal of cases routinely tried in state courts. Otherwise, that would open the federal courthouse doors too widely and that, *Grable* emphatically tells us, is not what Congress meant. So, defendants contemplating removal--but wary of overreaching--should think twice before removing on the basis of *Grable*. But for plaintiffs who are facing a substantial federal question removal after *Grable*, this Expert Commentary offers some ammunition that might just come in handy at the motion to remand stage.

References

For more information about the substantial federal question doctrine, see *Moore's Federal Practice* (3d Ed.) §§ 103.31, 103.42.

For more information about the nature and purpose of removal and the basis of removal jurisdiction, see *Moore's Federal Practice* (3d Ed.) §§ 107.04, 107.14.

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n1 . Indeed, because most remand orders are not reviewable on appeal or otherwise, thanks to 28 U.S.C. § 1447(d), focusing only on reported cases likely means dramatically *understating* the number of unreported instances when a defendant tried to remove a case to federal court on the basis of this doctrine.

n2 . I won't say any more about complete preemption here other than that complete preemption is a really, really rare phenomenon. Even when a federal law does preempt conflicting state law, almost all of the time that issue is litigated as a defense to the plaintiff's claim; and issues of federal law that arise by way of defense don't satisfy the well-pleaded complaint rule.

ABOUT THE AUTHOR(S):

Lonny Hoffman is the George Butler Research Professor of Law at the University of Houston Law Center. He is a specialist on civil procedure in the federal and state courts, including class actions and other complex litigation. His full bio and CV may be found at <http://www.law.uh.edu/faculty/main.asp?PID=179>.

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Atty-Client Privilege: Sullivan on In re Sonicblue

2008 Emerging Issues 2200

Atty-Client Privilege: Sullivan on In re Sonicblue

By Christopher D. Sullivan

April 17, 2008

SUMMARY: Can an attorney seek advice from other lawyers within the same firm regarding problems arising during the course of representing a client and then shield such communications from the client by claiming an attorney-client privilege? If so, under what circumstances? These are the questions Christopher D. Sullivan addresses in this Emerging Issues Analysis on *In re Sonicblue, Inc.*

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Can an attorney seek advice from other lawyers within the same firm regarding problems arising during the course of representing a client and then shield such communications from the client by claiming an attorney-client privilege? If so, under what circumstances? These were the questions addressed in *In re Sonicblue, Inc., 2008 Bankr. LEXIS 181 (Bankr. N.D. Cal. 2008)*, which is an important decision in a developing area of law of significant interest to attorneys. The court had to decide whether to permit former counsel for the debtors, which had been disqualified for failing to disclose an actual conflict of interest with the debtors during the course of its representation, to assert an attorney-client privilege as to internal firm communications against its own former client for communications made during the course of the firms representation.

Introduction and Summary of *In re Sonicblue* Holding. After thoughtfully analyzing the issues and existing precedent, the court held that a law firm cannot assert the attorney-client privilege against a current outside client when the communications that it seeks to protect arise out of self-representation that creates an impermissible conflicting relationship with that outside client. *2008 Bankr. LEXIS 181*, *26-27. In particular, a privilege cannot be asserted by a law firm against a client as to intra-firm communications after such time as the firm has, *or should have*, determined that dual representation of itself and an outside client should not continue without the informed consent of the client. *Id.* at *27 (emphasis added).

This Expert Commentary focuses on: (1) the case law considering when, if at all, a law firm can protect internal firm communications regarding potential ethical issues arising during the course of a clients representation from the client if disputes later arise; (2) the courts decision in *In re Sonicblue*; and (3) practical issues for attorneys faced with ethical or conflict problems involving a current client and potential solutions to such difficulties.

Background. Most experienced practitioners have encountered problems after discovering a potential conflict

between the firm and a current client. For example, a mistake during the course of a clients representation may expose the firm to liability for malpractice. In the bankruptcy context, many issues arise regarding the firms representation of a debtor where a conflict emerges or if the firms fees are questioned. Courts generally recognize that communications regarding a law firms consultation with in house counsel may fall within an attorney-client privilege and be protected from disclosure to third parties. *United States v. Rowe*, 96 F.3d 1294 (9th Cir. 1996). When lawyers seek advice from their firms internal legal counsel regarding the firms ethical responsibilities and a dispute arises as to whether the firm can protect these communications by invoking an attorney-client privilege *against its former client* very different considerations apply.

In Bankruptcy Cases, Little Protection for Intra Firm Communications. Courts are reluctant to allow a firm to protect such intra firm communications. For example, in *Koen Book Distributors v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283, 286 (E.D. Pa. 2002), the court refused to allow a law firm to shield communications relating to the firms efforts to oppose a motion to disqualify the firm from continuing to represent the debtor. The court recognize[d] the law firm was enmeshed in an unenviable situation once [a] threat had been made with a hearing before the bankruptcy judge . . . only weeks away. Nonetheless, the firm still owed a fiduciary duty to [its] clients. This duty is paramount to its own interests. *Koen Book Distributors v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283, 286 (E.D. Pa. 2002). Claiming a privilege against its own client as to communications prior to the Courts ruling on the motion to disqualify was held to be fundamentally incompatible with the firms fiduciary duty to its client during any ongoing representation. *Id.*; *Burns v. Hale and Dorr, LLP*, 242 F.R.D. 170, 172-73 (D. Mass 2007).

Similar Results for Non-Bankruptcy Cases. The same results have been reached outside of the bankruptcy context as well In *Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A.*, 220 F. Supp. 2d 283, 287 (S.D.N.Y. 2002), the court cited *Rowe* as the leading case on the applicability of the privilege to in-house consultations by law firms. The court then noted, However, while these cases did recognize the attorney-client privilege for intra-firm communications, none of these cases addressed whether the privilege can be asserted against the firms current client. *See Rowe*, 96 F.3d at 1296 (privilege asserted in response to governmental subpoena in criminal investigation); [other citations]. Asserting the privilege against a current client seems to create an inherent conflict against that client. *Id.* The court refused to allow the firm to assert the privilege against its former client as to communications during the scope of the representation.

Work Product Doctrine. In the same vein, it has been held repeatedly that the work product doctrine does not apply to the situation in which a client seeks access to documents or other tangible things created or amassed by his attorney during the course of the representation. *Spivey v. Zant*, 683 F.2d 881, 885 (5th Cir. 1982); *see also Roberts v. Heim*, 123 F.R.D. 614, 631 (N.D. Cal. 1988) (reasoning of the *Spivey* court is apparent and speaks for itself, there can be no assertion of the work product privilege against the former client); *In re Standard Financial Management Corporation*, 79 B.R. 97, 99 (Bankr. D. Mass. 1987) (To protect counsel from his own client trying to recapture background detail is a perversion of the privilege unsupported by text writers or cases and in no way comporting with the *Hickman* rationale for such a privilege.)

Thelen: An Exception Providing Limited Protection. In *Thelen Reid & Priest, LLP v. Marland*, 2007 U.S. Dist. LEXIS 17482 (N.D. Cal. 2007), the court carved out a very important possible exception to the developing rule that a law firm cannot protect communications against in house counsel against its own former client.

In *Thelen*, the court first noted that no case had been cited to it in which an intra-firm communication relating to the firms representation of a client was withheld *from the client* under a claim of privilege. *Id.* at *17. But the court recognize[d] that law firms should and do seek advice about their legal and ethical obligations in connection with representing a client and that firms normally seek this advice from their own lawyers. *Id.* To reconcile the competing concerns, the *Thelen* court held that a *limited privilege* applies to confidential communications from a lawyer seeking advice regarding ethical obligations. However, once the law firm learns that a client may have a claim against the firm or that the firm needs client consent in order to commence or continue another client representation, then the firm

should disclose to the client the firms conclusions with respect to those ethical issues. *Id.* at *21 The court compelled disclosure of communications discussing claims the former client may have against the firm or discussing known errors, conflicts, or other circumstances that triggered a duty to advise its former client and obtain consent to continued representation.

The *In re Sonicblue* decision. In *In re Sonicblue*, Pillsbury, Winthrop, Shaw Pittman LLP (PWSP), long term counsel for the debtors, claimed a privilege as to at least 435 communications among various PWSP attorneys, though its former client had waived its privileges. *2008 Bankr. LEXIS 181*, at *4. Conflicts developed between PWSP and the debtors during PWSPs representations during the bankruptcy, which became more acute in the summer of 2006 when certain of the debtors former directors and officers entered into a tolling agreement with PWSP over an insurance dispute (*id.* at *12) and then the largest creditors threatened PWSP with an indemnity demand arising from a pre-bankruptcy opinion PWSP had issued in connection with a private placement of \$75 million in senior secured debentures. *Id.* at *17-18. PWSP did not disclose any of these conflicts to the court or obtain waivers from the debtor to continue the representation until after the first of the conflicts had been discovered by third parties and the United States Trustee moved to disqualify PWSP. *Id.* at *20-22.

PWSP claimed protection for communications with its firms in-house counsel that were made in an effort to defend itself against the allegations made in the bankruptcy proceedings. *Id.* at *24. The *Sonicblue* court rejected the claim, holding that no privilege applies once a law firm has, or should have, determined that dual representation of itself and the outside client should not continue without the informed written consent of the outside client. *Id.* at *27. The court thus followed the guidance of the *Thelen* court, but also expressly applied an *objective standard* refusing to protect communications once the firm knows, or should know, it is faced with a conflict requiring it to obtain the informed written consent of its client to continue the representation.

The *In re Sonicblue* decision puts an affirmative burden on law firms to recognize when a conflict with its client triggers a need to inform the client of the conflict and the potential ramifications and will not protect any internal firm communications after the conflict was, or should have been, apparent to the firm unless proper client waivers are received.

Practical Implications. There are several practical lessons that can be drawn from the *In re Sonicblue* decision and the case law the court relied upon. First, early recognition of potential conflicts with a client and then paying prompt and adequate attention to the issues raised is critical. Counsel should not downplay the importance of any potential divergence between the interests of the law firm and the client even if the attorneys believe it is unlikely that the conflict will ripen into a material claim. The mere threat of a potential claim against the firm later can create the appearance that the firms loyalties will not remain undivided.

Second, when a question is raised, it is safer to seek advice from outside counsel if the attorneys are concerned that communications regarding the issues should be protected from subsequent disclosure to the client. The *In re Sonicblue* court upheld the privilege as to communications between PWSP and its outside counsel despite the presence of an actual conflict. *2008 Bankr. LEXIS 181*, *32-33. The court reasoned that outside counsel, unlike the firm that continues to represent its client, owes no fiduciary duty to the client. *Id.* It should be noted, however, that in *Rowe* the court stated that inside and outside counsel should be treated the same (96 *F.3d* at 1296) and it is the law firm itself *not outside counsel* that is attempting to claim a privilege against its own client. If the law firm as the client cannot invoke the attorney-client with respect to internal communications, logic suggests that it should not be able to protect communications with outside counsel either. Thus, counsel should be cautious as to whether a privilege can be successfully asserted later even when consulting outside counsel.

Third, the cardinal rule once a potential conflict surfaces should be disclosure, disclosure, disclosure. The central basis for the decisions by the courts that have refused to protect the law firms internal communications is the importance of the firms fiduciary duty to its client. Trying to keep any information that the law firm becomes aware of that could implicate the interests of its client secret conflicts with the firms duties of ultimate fidelity to its client. By

affirmatively disclosing all potential issues to its client (or in a bankruptcy context, to the client, the court, and all parties) keeps the client fully informed and eliminates any disadvantage the client may suffer from if it lacks knowledge regarding a potential conflict with the firm.

Finally, the attorneys should err on the side of either seeking the informed written consent of its client when a conflict arises or taking steps to withdraw. The importance of the lawyers obligations under the professional rules cannot be over-emphasized. The rules may be strictly applied, regardless of whether the lawyer thinks that the chances of a potential dispute germinating into a real problem are slim. Once such a problem does develop, the fallout from the conflict can be quite serious. And the potential that damaging or embarrassing internal communications will be disclosed reflecting the law firms efforts to protect itself first and the client second is very real in light of court decisions such as *In re Sonicblue*.

References

For information about the scope of the attorney-client privilege, see *Moore's Federal Practice* (3d Ed.) § 26.49.

For information on the attorney-client privilege and the ethical duty of confidentiality, see *Moore's Federal Practice* (3d Ed.) § 811.06.

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McDonnell on Section 2-1117 of the Illinois Code of Civil Procedure

2008 Emerging Issues 2135

Joe McDonnell on Joint Liability: Section 2-1117 of the Illinois Code of Civil Procedure (735 ILCS 5/2 1117)

By Joseph B. McDonnell

April 16, 2008

SUMMARY: Joint liability for tort damages among multiple defendants is a perplexing issue. Just who are the defendants who are liable and in what proportion? How can the plaintiff ensure that recovery is not diluted? How can defendants ensure that they are not unduly burdened? These and other issues arising out of 735 ILCS 5/2 1117 are examined by Joe McDonnell in this commentary on the joint liability statute.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Cite as: McDonnell, Joseph B. Joint Liability: Section 2-1117 of the Illinois Code of Civil Procedure (735 ILCS 5/2 1117). LexisNexis Expert Commentary, (*Insert date you accessed the document online*).

Background. One of the most vigorously disputed aspects of Illinois practice and procedure over the past several years involves the construction of Section 2-1117 of the Civil Practice Act. *735 ILCS 5/2-1117*. As originally enacted in 1986, the statute provided that in injury, death, or product liability actions, all defendants found liable were jointly and severally liable for medical expenses, but that any defendant whose fault was more than 25% of the total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third party defendant who could have been sued by the plaintiff, shall be severally liable for all of the damages. Because of uncertainty created by the phrase any third party who could have been sued by the plaintiff and conflicting interpretations by the appellate court districts as to whether that phrase included the plaintiffs employer, n1 the Act was amended in 2003 to substitute the phrase and any third party defendant except the plaintiffs employer in place of the former language. *See P.A. 93-10 and P.A. 93-12, eff. June 4, 2003.*

Another Problem Presents Itself. The resolution of that problem, however, has not to this point resolved another issue pertaining to the construction of the statute. Sec. 2-1117 states that [a]ny defendant, whose fault is less than 25% of the total fault attributable to the plaintiff, *the defendants sued by the plaintiff*, and any third party defendants except the plaintiffs employer is severally, rather than jointly, liable for all non-medical damages. *735 ILCS 5/2-1117* (emphasis added).

The italicized language continues to vex the bench and bar. Conflicting results have been reached as to whether a

defendant who was sued, but with whom a settlement was reached prior to submission of the case to the jury, should be included in the jury verdict form for purposes of apportionment of damages under Sec. 2-117. Once again, the appellate districts have reached opposite results. See *Ready v. United/Goedecke Services, Inc.*, 367 Ill.App.3d 272 (2006); *Blake v. Hy Ho Restaurant, Inc.*, 273 Ill.App.3d 372 (5th Dist. 1995); *Skaggs v. Senior Services of Central Illinois, Inc.*, 355 Ill.App.3d 1120 (4th Dist. 2005).

Importance of the Issue. The resolution of the question has a great bearing on the apportionment of damages by the jury. Inclusion of the absent party's name on the jury verdict form increases the chances that a particular defendant's share of the liability will be decreased, because the damages will be spread among more parties. Conversely, inclusion of the absent party's name on the jury verdict will be disadvantageous to the plaintiff for the same reason.

The Illinois Supreme Court granted petition for leave to appeal in the *Ready* case and oral argument was heard on May 22, 2007. The case is on the Court's advisement docket awaiting decision.

Yet Another Problem. A recent case decided by the First District, 3d Division, has added a new wrinkle to the debate. In *Heupel v. Jenkins*, Docket No. 1-07-1338, opinion filed March 5, 2008, the Appellate Court considered for the first time the effect of a settlement with a tortfeasor who was never sued in the case, but against whom a claim had been made by the plaintiff. Before suit was filed, plaintiff settled with Murugeson, one of several tortfeasors, for Murugeson's insurance limits, then filed suit against others. Prior to trial, defendants sought leave to join Murugeson as a third party defendant, so that his alleged liability could be before the jury, as had been done in *Skaggs* and *Blake*, cited *supra*. Leave was denied, but the motion judge indicated that he felt that Murugeson's name should be on the jury verdict nonetheless. The trial judge agreed with the ruling and also agreed that Murugeson's name would appear on the jury verdict form. The jury returned a defendant's verdict and plaintiff appealed, asserting, *inter alia*, that the trial court had erred in including Murugeson's name on the jury verdict form.

The Appellate Court held that the inclusion of Murugeson's name was appropriate. Relying on *Skaggs* and on an unreported federal court memorandum opinion (*Dowe v. National Railroad R.R. Passenger Corp.*, No. 01-C-5808, April 26, 2004), the court held that the legislative intent supporting Section 2-1117 of the Code, and the cases interpreting the statute, apply where an absent defendant was never sued. This was particularly true, the court said, in light of the events leading to the trial court's determination that Murugeson was to be named on the jury verdict form. *Slip Op. at 13.*

The applicable jury verdict form (IBI Civil (2000) b 4503.A) provides for the apportionment of fault among all tortfeasors. In the First District's opinion, there was no substantial difference between Murugeson's status and any other settling defendant simply because Murugeson had settled before being named a defendant in the suit. The court said that several principles of statutory construction supported its decision: [W]e conclude that Section 2-1117 of the Code applies to all tortfeasors no matter whether or when the plaintiff enters a settlement with any individual. *Slip op. at 14.*

Tips for Practitioners. At this writing, *Heupel* is not final and it is conceivable that review will be sought either by petition for rehearing or by petition for leave to appeal to the Illinois Supreme Court. In the meantime, the *Ready* case awaits decision by the high court. Until the issue is resolved, plaintiffs should continue to resist the inclusion of the name of any party, whether sued or not, who is not in the case at the time a case goes to jury, relying on *Blake v. Hy Ho Restaurant*. Where plaintiff has settled with a party prior to filing suit, the argument should be that, notwithstanding *Heupel*, the statute uses the word defendant and that the plain meaning rule should therefore exclude any reference in the jury verdict form to any tortfeasor who is not only absent but who was never a defendant to begin with. The argument that the jury should consider only those parties actually before it at the time they receive the case for determination is particularly appropriate where the absent party has not had the opportunity to defend itself at trial. Finally, any ruling to the contrary would frustrate the policy of the law to encourage settlement.

From the defendants standpoint, the argument should be that the obvious intent of the legislature in enacting Section 2-1117 was to enable the jury to determine and to apportion liability among all parties whose wrongful conduct contributed to the alleged injuries. The obvious policy behind apportionment of damages is to reach all persons whose conduct may have contributed to the injurious occurrence, and their formal status in the litigation is irrelevant to that purpose. To omit from the verdict form the identity of a contributing tortfeasor would lead to absurd results; first, it would deprive the jury of the opportunity to consider the liability of all responsible persons, and, second, it would enable a plaintiff to manipulate liability and damages issues by settling, whether before or after filing suit, with a party or parties whose liability may be substantial, but who would never be accountable in the final resolution of the claims considered by the jury.

For additional discussion of the issues surrounding 735 ILCS 5/2 1117 see

Illinois Jurisprudence, Personal Injury and Torts § 33:148 Joint and several liability of multiple tortfeasors; Illinois Jurisprudence, Personal Injury and Torts § 29:109

Contributory fault; joint liability; Illinois Jurisprudence, Personal Injury and Torts § 4:03 Actions in concert; Illinois Jurisprudence, Personal Injury and Torts § 4:02

Statutory limitations on joint and several liability; Illinois Tort Law § 23.03 Joint Liability Law; *see generally* Illinois Tort Law Ch. 23 Third Party Practice.

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n1 . Compare *Lilly v. Marcal Rope & Rigging*, 289 Ill.App.3d 1105 (5th Dist. 1997) and *Unzicker v. Kraft Food Ingredients Corp.* (4th Dist. 2001); conflict resolved by Illinois Supreme Court, *Unzicker v. Kraft Food Ingredients Corp.*, 203 Ill.2d 64 (Ill. 2002)(plaintiffs employer was a third party defendant who could have been sued by the plaintiff and was therefore properly included in the jury verdict form for purposes of apportioning damages under Sec. 2-1117; abrogating *Lilly v. Marcal Rope and Rigging*, *supra*.

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Mr. McDonnell's trial practice has included the defense of legal malpractice suits, product liability actions, industrial accident cases and commercial litigation. He is a member of the Illinois State Bar Association, the American Bar Association, the Metropolitan Bar Association of St. Louis, and past president of the St. Clair County (IL) Bar Association. He is also a member of the Bar Association for the Central and Southern Districts of Illinois, the Seventh Circuit Bar Association and the Appellate Lawyers Association of Illinois. He serves on the board of the Lawyers Trust Fund of Illinois.

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Labady on Davidson v. Slater

2008 Emerging Issues 2177

Jean-Claude Labady, Esq. on A Double-Edged Sword: Re-Assessing Comparative Analysis in Injury Aggravation Claims, *Davidson v. Slater*, 189 N.J. 166, 914 A.2d. 282 (2007).

By Jean-Claude Labady

April 16, 2008

SUMMARY: The NJ Supreme Court in *Davidson v. Slater* examines the long-standing decision in *Polk* on when a claimant is required to produce a comparative analysis report to show the impact of prior and subsequent accidents on alleged injuries. This commentary, written by Jean Claude Labady, an experienced New Jersey litigator, examines important strategic considerations surrounding comparative analysis reports in light of *Davidson*.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Cite as: Labady, Jean-Claude. A Double-Edged Sword: Re-Assessing Comparative Analysis in Injury Aggravation Claims. LexisNexis Expert Commentary, (*Insert date you accessed the document online*).

The New Jersey Supreme Courts decision in *Davidson* examined the Appellate Divisions long-standing approach in *Polk v. Daconceicao*, 268 N.J.Super. 568, 634 A.2d 135 (App. Div. 1993). Under *Polk*, a claimant is required to produce a comparative analysis, referred to as the *Polk* analysis by practitioners, to show the impact of prior and subsequent accidents on alleged injuries. Comparative analysis reports produced by plaintiffs usually spell out physicians opinions of percentages of causation attributed to each accident. Yet, the Court went further in *Davidson* to hold that when a plaintiff does not plead aggravation of a previous injury, he does not have to produce a comparative analysis report. This holding is a double-edged sword: it appears to relieve claimants for the burden and expenses associated with producing such reports while it inspires caution. After a plaintiff made the decision not to produce the analysis, a defendant may be able to prove at trial that the plaintiffs injuries had pre-existed and hence were aggravated in the course of the current accident, in which case it may be too late for the plaintiff to differentiate between the injuries.

The Supreme Court Modifies a Long-Standing Approach. In *Davidson*, the defendant took the position that the *Polk* analysis was required even when the plaintiff asserted no aggravation claims in her pleadings. Practitioners cannot complain that the Courts holding, which thwarts the defendants attempt, is bereft of clarity: When a plaintiff alleges aggravation of pre-existing injuries as the animating theory for the claim, then plaintiff must produce comparative evidence to move forward with the causation element of that tort action. When a plaintiff does not plead aggravation of pre-existing injuries, a comparative analysis is not required to make that demonstration. *Davidson*, 189 N.J. at 170.

The Plaintiffs Prior Injuries. The *Davidson* plaintiff sustained injuries when her vehicle was involved in an

automobile accident. In answers to interrogatories, she described her symptoms as related to the present accident and did not identify any prior injury. She described her injuries as rib, right knee, lower back and neck pain, headaches, and tingling sensation in her hand and feet. The plaintiff followed treatment with a number of physicians who related her injuries only to the present accident. A physician who examined her for her no-fault insurer reached the same conclusion. Nonetheless, a physician who examined her at the behest of the defendant stated in his report that the plaintiff did not give an accurate history of injury in failing to reveal her neck problems from a prior accident. Indeed, in a report related to that accident her symptoms were reported, among other things, as severe neck, back, shoulder and lower back pain, headache, and tenderness over the left knee. It was stated at that time that she would continue to feel the effects of those injuries. However, the plaintiff maintained that the symptoms from that accident existed only for two months, and that she had fully recovered by the time of the present accident.

The Indiscriminate Requirement of an Analysis Challenged. The defendant filed a summary judgment motion based on the plaintiffs failure to meet the verbal threshold standard under the Automobile Insurance Cost Reduction Act (AICRA), 39 N.J.S.A. 6A:1.1 *et seq.*, failed to provide a certification of permanency as required by AICRA, and did not provide her physicians comparative analysis as required by *Polk, supra*, 268 N.J.Super. 568 (App. Div. 1993). The trial court granted summary judgment on the basis that the analysis was required since the plaintiff suffered similar injuries to the same body parts in three separate accidents. Thus, the plaintiff produced no evidence to vault AICRA's verbal threshold. The Appellate Division rejected that approach. It noted that the plaintiff was not claiming that prior injuries were aggravated by the current accident. It also rejected the blanket approach adopted by other panels of requiring a *Polk* analysis in the context of non-aggravation claims. *Davidson*, 189 N.J. at 176.

The Supreme Court Clipped *Polks* Reach. The Court noted that, since the passage of AICRA, *Polks* comparative analysis requirement has been seen in different lights by the panels: (1) requiring comparative analysis regarding an aggravation claim; (2) requiring the analysis where injuries are claimed to the same body parts; (3) viewing the analysis as unnecessary in the context of summary judgment motions. *Davidson*, 189 N.J. at 182-3. The Court limited the reach of *Polk* in observing that a plaintiff does not have to present automatically a comparative analysis to oppose a summary judgment motion. Rather, the necessity for comparative evidence should depend upon whether the factual construct presented by the moving papers calls into question whether any reasonable jury could find that plaintiff incurred a permanent injury resulting from the subject automobile. *Id.* at 184.

Is *Polk* Still Relevant Post-AICRA? The Court questioned whether *Polks* comparative analysis requirement is still relevant post-AICRA. Prior to AICRA, *Polk* was relevant in the context of establishing serious impact on a plaintiff's life. Practitioners are aware that a plaintiff no longer needs to prove impact post AICRA. See *DiProspero v. Penn*, 183 N.J. 477, 84 A.2d 1039 (2005). Plaintiffs no longer have to recount a litany of sufferings in order to overcome the injury threshold although they still do so at depositions and trial. *Polks* analysis requirement is relevant when the need for a plaintiff to produce evidence is based on traditional principles of causation and burden allocation to tort cases only. Any other approach is wide of the mark. *Davidson*, 189 N.J. at 184. Thus, it is only when aggravation of a previous injury is pled that a plaintiff is required to produce a comparative analysis in order to establish causation between accidents and injuries to the same body parts.

A practical twist arises, the Court recognizes, when a plaintiff does not plead aggravation to pre-existing injuries, but there have been other injuries to a body part. Upon clarifying that a defendant cannot place the burden on a plaintiff to exclude all other injuries by comparative analysis, the Court yet recognizes that it is a defendant's prerogative to produce evidence to show that, even where a plaintiff does not allege aggravation, her present injury could have been caused by a previous condition. The Courts practical advice for practitioners is easily gleaned from the following comment:

We presume that defendants routinely will inquire during discovery about a plaintiff's prior injuries. In respect of the element of causation specifically, a plaintiff will risk dismissal on summary judgment if the defendant can show that no reasonable fact-finder could conclude that the defendant's negligence caused plaintiff's alleged permanent injury. Thus, the plaintiff who does not prepare for comparative medical evidence is at risk of failing to raise a jury-worthy

factual issue about whether the subject accident caused the injury. [*Davidson*, 189 N.J. at 188.]

Practical Considerations. Whether *Polk* is still good law is not really the practical issue. The aspect of *Polk* that requires a comparative analysis in the context of an aggravation claim is still alive. *Davidson* galvanized a number of interested constituencies who, other than the direct parties, submitted amicus curiae briefs in favor of the suspension or expansion of the comparative analysis requirement. The Court seemed at first to have given victory to the plaintiff bar in rejecting the automatic provision of a *Polk* analysis regardless of the nature of a claim. Read literally, this new approach would do away with the burden a plaintiffs attorney routinely faces in having to obtain, pay for and produce a *Polk* report. Clients sometimes cannot be found for updated examinations, and busy physicians can be expensive. Where the report cannot be produced in time, dismissal sometimes occurs, summary judgment motions are granted, and arbitration awards are reduced. Yet, the cautious practitioner will be very careful in making the decision as to whether to produce the analysis or not. In this area of practice, it is more likely that injuries extend across the body and do not confine themselves to distinct body parts. Moreover, it is often the case that a client provides new information about injuries that heretofore had not been suggestive of aggravation. Depending on the stage of discovery, the new information could prove fatal if it is too late to produce the analysis. If that information is revealed during testimony at trial, or more dangerously a defendant can successfully prove aggravation then, it is unlikely that the case will be saved. Therefore, it behooves a plaintiffs practitioner to err on the side of obtaining the analysis unless current injuries are clearly distinct from previous injuries. Defense counsel, on the other hand, should probe deeply into all forms of injury to assess whether aggravation is a factor and move for summary judgment when it is and had not been competently established through comparative analysis.

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Jean-Claude Labady, Esq. has been a member of the New Jersey bar since 1992. He formerly served as the Managing Partner of Labady & Randolph and headed up the litigation department of the firm. He received his B.A. with honors and M.A. magna cum laude from Rutgers University. Mr. Labady is also a 1992 graduate of the Seton Hall University School of Law. Upon graduation from law school, Mr. Labady served as Judicial Law Clerk to the Hon. Reginald Stanton, Assignment Judge, New Jersey Superior Court (retired). Following his clerkship, Mr. Labady has primarily focused his practice on insurance defense work and has defended insured parties and insurance companies in complex coverage disputes. Mr. Labady was a pioneer in the area of complex fraud litigation on behalf of insurance carriers in New Jersey. He is responsible for decisions of first impression in both health care law and fraud law. Mr. Labady can be reached by email at jlaby@verizon.net.

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Best on People v. MacLeod

2008 Emerging Issues 2182

Arthur Best on People v. MacLeod, 176 P.3d 75 (Colo. 2008)

By Arthur Best

April 16, 2008

SUMMARY: The Colorado Supreme Court applies the Rape Shield Statute to statements introduced for purposes other than to prove the truth of what they assert. Arthur Best, Professor of Law at the University of Denver Sturm College of Law, comments on *People v. MacLeod*, 176 P.3d 75 (Colo. 2008).

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Cite as: Best, Arthur. The Colorado Supreme Courts Application of the Rape Shield Statute to Statements Introduced for Purposes Other Than to Prove the Truth of What They Assert. LexisNexis Expert Commentary, (*Insert date you accessed the document online*).

Overview

Colorados Rape Shield statute defines certain types of evidence as presumptively inadmissible and imposes procedural requirements for consideration of whether they may be admissible in a particular case. This case considers whether the statute should apply when a witnesss past statements about her sexual history would be relevant whether or not they were true.

Summary of the Case

The defendant was accused of sexually assaulting his daughter multiple times. Two counts, sexual assault on a child and sexual assault on a child by one in a position of trust, went to the jury, and the defendant was found not guilty of both charges.

The defendant and the daughters mother were divorced. The defendant claimed that the charges were false, and that his daughter had made them so that she could live permanently with her mother. At trial the defendant was permitted to ask the mother if she had told her daughter that she had been sexually assaulted and if she had told her daughter not to make the same mistake she had made by not reporting the sexual abuse. In addition to asking the mother whether she

had made statements to her daughter about having been sexually abused, the defendant was permitted to ask the mother whether she had, in fact, been sexually abused as a child. The claimed relevance of this inquiry was that it would show that the defendant's daughter had learned that sexual abuse was of special concern to her mother so that if she claimed she had been a victim of sexual abuse her mother would likely increase the likelihood that she would be permitted to live with her mother.

The prosecution objected to these questions on the ground that the defendant had never filed a rape shield offer of proof. The trial court allowed the questions, stating:

[T]he case law also says that the purpose [of the rape shield statute] is to prevent protection [sic] from humiliating and embarrassing public fishing expeditions into past sexual conduct. The Court agrees with [the defendant] that in this case it doesn't even matter whether it occurred. The only issue is whether the daughter was told it occurred[,] whether the daughter was encouraged to report and had that knowledge and that is very relevant to this case and the Court will allow it.

People v. MacLeod, 176 P.3d 75, n.6 (Colo. 2008)

Pertinent Legal Principles

C. R. S. 18-3-407. Victim's and witness's prior history--evidentiary hearing--victim's identity--protective order.

(1) Evidence of specific instances of the victim's or a witness's prior or subsequent sexual conduct, opinion evidence of the victim's or a witness's sexual conduct, and reputation evidence of the victim's or a witness's sexual conduct may be admissible only at trial and shall not be admitted in any other proceeding except at a proceeding pursuant to paragraph (c) of subsection

(2) of this section. At trial, such evidence shall be presumed to be irrelevant except:

(a) Evidence of the victim's or witness' prior or subsequent sexual conduct with the actor;

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease, or any similar evidence of sexual intercourse offered for the purpose of showing that the act or acts charged were or were not committed by the defendant.

(3) In any criminal prosecution for class 4 felony internet luring of a child, as described in section 18-3-306(3) or under sections 18-3-402 to 18-3-405.5, 18-6-301, 18-6-302, 18-6-403, and 18-6-404, or for attempt or conspiracy to commit any of said crimes, if evidence, that is not excepted under subsection (1) of this section, of specific instances of the victim's or a witness's prior or subsequent sexual conduct, or opinion evidence of the victim's or a witness's sexual conduct, or reputation evidence of the victim's or a witness's sexual conduct, or evidence that the victim or a witness has a history of false reporting of sexual assaults is to be offered at trial, [procedures specified in the remaining sections of the statute shall be followed]...

***In re People v. Weiss*, 133 P.3d 1180 (Colo. 2006).** Interpreting the statute's reference to evidence of a history of false reporting of sexual assaults, the court held that one who seeks to make an offer of proof that a victim had a history of falsely reporting sexual assaults must prove that the accusations had been actually false, and not merely that the victim had previously made accusations that were not prosecuted.

The Supreme Courts Decision

Relying on the language of the statute its policy of protecting witnesses from irrelevant, immaterial or repeated public examination as the price for testifying in sexual assault cases, the court held that the statute applies no matter the purpose for which the proponent is offering the evidence of a witness's sexual history. The court stated that there would be no exception for instances when the proffered evidence is not being offered for the truth of the matter asserted.

Legislative History. The court reviewed the history of the rape shield statute. Ordinarily, the rules of evidence favor admissibility. The rape shield statute was adopted to reverse the common practice of humiliating alleged victims in sex crime cases by requiring them to make public all kinds of information about their past sexual conduct. In reaction to that abuse, the statute reflects an intent to change standard evidence law to declare that evidence of a witness's sexual history is presumptively irrelevant. It also creates an offer-of-proof procedure that must be followed in order to rebut the presumption and to introduce evidence of a witness's sexual history at trial. The act requires the proponent to prove its relevance and materiality before trial. It also limits the public exposure of the witness. Public examination of the witness about the witness's sexual history may occur only once, that is, at trial, because the required pretrial hearing must be held in camera.

Plain Language. The statute makes no reference to instances when material of the type its provisions specify might be relevant even if it was untrue. In the words of the court, The statutes language includes no purpose exception that would enable the statutes requirements to be avoided if the proponent were not offering the evidence for the truth of the matter asserted.

Significance of Statutory Procedural Requirements. The court stated that treating some inquiries regarding a witness's sexual conduct as outside the coverage of the statute would hamper the application of the statutes procedural protections. The statute requires an in camera hearing and permits inquiries about a witness's sexual conduct only at trial, when a prior in camera hearing has held that the statutes presumption of irrelevance has been overridden. Allowing inquiries about sexual conduct to be made without adherence to that procedure in instances when their claimed relevance does not depend on their truth would, the court reasoned, would allow witnesses to be surprised by the introduction of that topic, no matter how marginal the evidences relevancy, materiality or veracity.

Distinction Between Relevance and Hearsay. The court noted that the concept of evidence being introduced for a purpose that does not require that the evidence be true is the central concept in the law of hearsay, which treats out-of-court statements differently depending on whether their relevance depends or does not depend on the truth of what they assert. Hearsay and relevance are different, the court noted, and its concepts should not affect application of the rape shield statute.

Broad Application of Statute. The court supported its result by referring to *In re People v. Weiss*, 133 P.3d 1180 (Colo. 2006). In that case the court interpreted the statutes provision about evidence of prior false claims as requiring that the proponent of the evidence prove that the claims actually were false, rather than just show that they did not lead to any prosecution. This interpretation was motivated in part to provide the broadest possible coverage under the statute.

Comments

Colorados rape shield statute excludes more evidence than the similar statutes and rules of many states, because of its explicit treatment of false claims. In many states, the act of making a claim of having been the victim of a sex crime is not treated as equivalent to sexual conduct and is therefore outside the scope of the rape shield provisions. Given the broad coverage and clear social policy manifest in the Colorado statute, the courts decision rejecting an approach that would decrease the power of the statute is understandable.

See Chapter 312, Colorado Evidence Courtroom Manual, and Colorado Evidentiary Foundations § 6[B] for

discussions of Colorado's rape shield statute.

The court's suggestion that not for the truth asserted is a concept that belongs only to hearsay and cannot be helpful in the context of relevance inquiries may require additional analysis. Many topics in evidence law recognize that the purpose for which evidence is presented may control the decision on its admissibility. Here, where a party suggests that a statement about sexual conduct would be relevant regardless of its truth, it is arguable that bringing that statement to the attention of a jury is completely different from showing that the person who made the statement had actually engaged in the sexual conduct that the statement described.

Practice Tip. Depending on the circumstances of a particular case, if a non-truth use of a witness's statements about past sexual conduct were highly significant in a defendant's defense, constitutional issues might arise if provisions of the rape shield statute were used to preclude introduction of the evidence.

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Arthur Best on United States v. Nuccio, 2008 U.S. App. LEXIS 5702 (10th Cir. 200

2008 Emerging Issues 2183

Arthur Best on the Tenth Circuits Treatment of Expert Testimony on Economics for Insider Trading Issues, United States v. Nuccio, 2008 U.S. App. LEXIS 5702 (10th Cir. 2008)

By Arthur Best

April 16, 2008

SUMMARY: Arthur Best, Professor of Law at the University of Denver Sturm College of Law, comments on the Tenth Circuits treatment of expert testimony on economics for insider trading issues, including application of *Rule 16 of the Federal Rules of Criminal Procedure*, *Daubert*, and Rules 403, 602, 702 and 703 of the *Federal Rules of Evidence*. *United States v. Nuccio, 2008 U.S. App. LEXIS 5702 (10th Cir. 2008)*.

PDF LINK: [Click Here](#) for Enhanced PDF of Commentary

ARTICLE: Cite as. Best, Arthur. The Tenth Circuits Treatment of Expert Testimony on Economics for Insider Trading Issues. LexisNexis Expert Commentary, *(Insert date you accessed the document online)*.

Overview

The defendant was convicted of nineteen counts of insider trading, in connection with his sales of stock in Qwest Communications International, Inc. At trial, the defendant sought to introduce testimony by an expert who would have concluded that the defendant's trades were inconsistent with what one would expect them to be if the government's claims were true. The trial court ruled that this testimony should be excluded, because the defendant had made an inadequate disclosure under *Rule 16 of the Federal Rules of Criminal Procedure*, because the testimony fell short of the requirements of *Daubert* and *Kumho Tire*, because the testimony would not have been helpful to the jury, and because the proposed expert lacked personal knowledge of the facts that were the basis for his opinion. The Tenth Circuit rejected each of these rationales for exclusion and remanded the case for retrial before a different judge.

Summary of the Case

In 2000 and 2001, when the defendant was the CEO of Qwest, he assured investors that the company was on track to meet its public guidance statements. At the same time, he received internal reports regarding sales and revenue that may have made it unlikely that the company would perform that well. During this period, the defendant sold over a million shares of Qwest stock. A few months after he made these sales, the company was forced to lower its guidance

statements and the stock lost half its value. These sales are the basis of the government's charge that the defendant was trading on inside information. The defendant argued that a full understanding of the context of his sales would prove otherwise.

At trial, the defendant filed a Rule 16 disclosure describing the experts qualifications as an academic, his research and teaching in law and finance, and his previous experience consulting and testifying. It gave a "Summary of Opinions and Bases for Opinions," explained that the expert had conducted a "study of the Questioned Sales in relation to various benchmarks," and provided his opinion that the defendant's sales were inconsistent with what one would expect them to be if the government's claims were true. It stated that the expert had studied stock data and assorted public information and stock analysis and had concluded that Qwest's stock price was not significantly affected when the allegedly material information was released.

The trial court rejected the experts testimony on the basis of that Rule 16 disclosure, stating that the experts methodology was absolutely undisclosed in this expert disclosure. The judge separately concluded that the testimony would not be helpful to the jury under *Federal Rule of Evidence 403* or *702*, because expert economic analysis would "invit[e] the jurors to abandon their own common sense and common experience and succumb to this expert's credentials." In addition, the judge concluded that the expert did not have personal knowledge of the facts that formed the basis for his opinions.

The defendant was convicted. He appealed on a number of grounds, including the argument that exclusion of the expert testimony was erroneous and that the error was not harmless.

Pertinent Legal Principles

Rule 16, Federal Rules of Criminal Procedure. The Federal Rules of Criminal Procedure require a defendant under certain circumstances to provide to the government, upon request, "a written summary of any testimony that the defendant intends to use [at trial] under *Rules 702, 703, or 705 of the Federal Rules of Evidence*." *Fed. R. Crim. P. 16(b)(1)(C)*. This includes expert testimony. "The summary must describe the witness's opinions, the bases and reasons for these opinions, and the witness's qualifications." *Id.*

For detailed analysis of Rule 16, see 25-616 Moore's Federal Practice--Criminal Procedure Scope, Discovery and Inspection.

Daubert and Kumho Tire. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) requires expert testimony to be based on reliable methodology. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999) is commonly referred to as part of the *Daubert* requirements: it held that the explicit screening function that *Daubert* required the trial judge to carry out for scientific opinion testimony should be applied also to technical testimony based on the experts experience.

Rule 403, Federal Rules of Evidence. This rule allows the exclusion of relevant evidence if the trial judge finds that its probative value is substantially outweighed by various dangers, including the dangers of confusion of issues or misleading the jury.

Rule 602, Federal Rules of Evidence. This rule requires that a witness have personal knowledge of the subject of his or her testimony. It explicitly states that its requirement is subject to the specific provisions of Rule 703 regarding expert testimony.

Rule 702, Federal Rules of Evidence. This rule governs the admissibility of expert testimony, stating that it is

admissible if it will assist the trier of fact to understand the evidence or to determine a fact in issue.

For an overview of Rule 702 and related rules governing expert testimony, see 1-702 Weissenbergers Federal Evidence § 702.1, Testimony by Experts.

Rule 703, Federal Rules of Evidence. This rule permits an expert to base his or her testimony on information that is of a type reasonably relied on by experts in the field, regardless of whether it would be admissible in evidence.

The Tenth Circuits Decision

Rule 16. The Tenth Circuit paid particular attention to proper application of Rule 16, noting that the trial court may have confused the civil and criminal rules for disclosures related to expert witnesses. A Rule 16 disclosure must contain only "a written summary of any testimony" and "describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." *Fed. R. Crim. P. 16(b)(1)(C)*. In a civil case, however, an expert's written report must include all of the data or other information considered in forming the opinion, all summary or supporting exhibits, and the compensation he was paid, as well as "a complete statement of all opinions the witness will express and the basis and reasons for them." *Fed. R. Civ. P. 26(a)(2)(B)(i)*, and his qualifications, *R. 26(a)(2)(B)(iv)*. The Tenth Circuit noted that a comment by the trial judge that the criminal expert disclosure requirement is "pretty close to what is required in the civil area," was wrong, since the civil rule imposes broader requirements.

The Tenth Circuit held that the defendant's disclosure satisfied Rule 16. The defendant's disclosure listed the expert's opinions on several topics. It explained that the opinion was "based on" analysis of the defendant's trades, data on stock prices, executive options, and stock sales, and on analysis of press reports, analysts' reports and forecasts, and SEC filings. It also contained the reasons for the expert's ultimate opinions. It disclosed, for example, that he would have testified that principles of risk reduction and the pattern of the defendant's sales were inconsistent with reliance on adverse material inside information. Additionally, the disclosure described the expert's work at a law-and-economics consulting firm, his academic positions, his academic research, his previous experience as an economic consultant and adviser, and his curriculum vitae.

Daubert and Kumho Tire. The trial court, having ruled that the defendant's Rule 16 disclosure was inadequate, refused to permit the defendant to make arguments about the proposed expert testimony in the context of the *Daubert* and *Kumho* factors. The Tenth Circuit rejected that position, holding that the trial court did not have a basis for making an informed decision on whether the testimony satisfied the *Daubert* and *Kumho Tire* factors since the court chose not to hear testimony or to receive submissions on that issue in some other form. The trial judge's exclusion of the testimony was not proper in terms of *Daubert* or *Federal Rule of Evidence 702*, the Tenth Circuit held. It noted that in admitting expert testimony, courts are required to make "specific findings on the record" rather than rule "off-the-cuff." *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1223 (10th Cir. 2003) (quoting *Goebel v. Denver & Rio Grande W.R.R.*, 215 F.3d 1083, 1088 (10th Cir. 2000)) (internal quotation marks and emphasis omitted). Courts must create "a sufficiently developed record in order to allow a determination [on appeal] of whether the district court properly applied the relevant law." *Goebel*, 215 F.3d at 1088 (quoting *United States v. Nichols*, 169 F.3d 1255, 1262 (10th Cir. 1999)) (internal quotation marks and further citation omitted).

The Tenth Circuit had not, prior to this case, considered whether the same procedural requirements apply before a judge excludes an expert. The court did not precisely resolve that issue in this case, however. It concluded that at a minimum it is an abuse of discretion to exclude an expert witness because his methodology is unreliable without allowing the proponent to present *any* evidence of what the methodology would be. The proponent bears the burden of

establishing the admissibility of the evidence under Rule 702, but it must be given an opportunity to do so before the testimony may be ruled inadmissible. *United States v. Nacchio*, 2008 U.S. App. LEXIS 5702, *30 (10th Cir. 2008).

Federal Rules of Evidence 403 and 702. The trial court concluded that the testimony would not be helpful to the jury under *Federal Rule of Evidence* 403 or 702, because expert economic analysis would "invit[e] the jurors to abandon their own common sense and common experience and succumb to this expert's credentials." The Tenth Circuit rejected these conclusions. It stated that expert economic testimony is routine when a materiality determination requires the jury to decide the effect of information on the market and that expert testimony can properly ask jurors to abandon their own common sense, because Armchair economics is not the way to decide complex securities cases. *United States v. Nacchio*, 2008 U.S. App. LEXIS 5702, *35 (10th Cir. 2008).

Federal Rules of Evidence 602 and 703. The Tenth Circuit rejected the trial court's conclusion that "the bulk of [the proposed expert's] testimony is simply a recitation of facts which is improper under Rule 602." The trial court stated that the proposed expert did not have personal knowledge of Qwest's stock price, of the contents of analysts' reports, or of the guidance issued by other telecommunications companies. The Tenth Circuit noted that the expert disclosure said that the expert and his staff had reviewed Qwest's stock prices, the analysts' reports, and other data. That reflects personal knowledge. For example, in *Bryant v. Farmers Ins. Exch.*, 432 F.3d 1114 (10th Cir. 2005), the Tenth Circuit held that Rule 602 permitted a lay witness to testify about the contents of a list of audit reports. Also, the Tenth Circuit has held that "[t]he standards [of personal knowledge] applied to lay and expert witnesses differ." *Durflinger v. Artilles*, 727 F.2d 888, 892 (10th Cir. 1984). Rule 703 "permits an expert to base an opinion on any facts or data, admissible or not, which are of a type reasonably relied on by experts in the particular field . . ." *Id.* (emphasis added) (internal quotation marks and citation omitted). For these reasons, the trial court erred in treating lack of personal knowledge as a basis for excluding the testimony.

Comments

This opinion clarifies the fact that the procedural requirements for disclosure in advance of expert testimony are easier to satisfy in criminal than in civil cases. Also, for all cases, it shows that the Federal Rules of Evidence in general have a pro-admissibility orientation. With regard to expert testimony, this case provides a helpful reaffirmation of several basic points.

Practice Tip 1. Where complicated economic or business information is central to a case, jurors' experience with daily life and typical business transactions cannot preclude a role for economic expert testimony.

Practice Tip 2. The experts' knowledge of the facts that are a basis for the experts' opinion can come in a wide variety of ways, including reliance on otherwise inadmissible material so long as experts in the field would typically rely on it.

Practice Tip 3. Findings on the record for application of *Daubert* should be made both when testimony is accepted and when it is excluded.

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Garcia on Gianocostas v. Interface Group-MA, Inc.

2008 Emerging Issues 2197

Grace V.B. Garcia on Gianocostas v. Interface Group-MA, Inc., 2008 Mass. LEXIS 132 (Feb. 26, 2008)

By Grace V. B. Garcia

April 16, 2008

SUMMARY: The Supreme Judicial Courts decision in *Gianocostas v. Interface Group-MA, Inc.* illustrates a rare grant of dismissal on the ground of *forum non conveniens* and raises some issues for those who would travel to destinations where the standards for medical care might differ from those at home. In this commentary, Grace V.B. Garcia, examines the Courts analysis and offers some cautionary lessons to be drawn from the outcome.

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ARTICLE: Cite as: Garcia, Grace V.B. *Gianocostas v. Interface Group-MA, Inc.* LexisNexis Expert Commentary, (Insert date you accessed the document online).

Cautions for Selecting a Forum and, Perhaps, for Selecting a Vacation Spot

In *Gianocostas v. Interface Group-MA, Inc.*, 2008 Mass. LEXIS 132 (Sup. Jud. Ct. Feb. 26, 2008), Massachusetts highest court, the Supreme Judicial Court, evaluated a *forum non conveniens* challenge to a negligence based case. As a result of its analysis, the court remanded the case to the trial court for an entry of dismissal based on *forum non conveniens*. It is rare for the court to dismiss a case based on *forum non conveniens*. This case highlights for practitioners the strong factual situation it takes for such a challenge to be successful. It also reminds all of us about the risks of traveling to foreign countries where the standard of medical care may differ, and reminds travel professionals and those who counsel them to be cautious in what they promise about the facilities and care in a foreign county.

Facts Make the Case. Plaintiffs, administrators of their daughters estate, asserted claims for negligence against a hotel in the Dominican Republic, and its related corporate entities, as well as negligence and negligent misrepresentation claims against a Massachusetts-based tour operator. With respect to the negligence claim against the tour operator, the claim was based on negligent selection, meaning that the tour operator had taken insufficient steps to ensure the competence of medical staff at the hotel clinic. *Gianocostas*, 2008 Mass LEXIS at *18 n.11. The claims arose after the plaintiffs daughter, a Massachusetts resident and insulin-dependant diabetic, died after receiving what the plaintiffs alleged to be sub-standard medical care while she was vacationing at the defendant hotel in the Dominican Republic on a trip arranged by the defendant tour operator. Specifically, the facts indicated that the plaintiffs daughter

became sick on the second day of her week long vacation, was seen several times throughout the week by the hotels clinic and doctors, but the medical personnel did not test her blood glucose level for four days. At that point, the plaintiff was hallucinating and had to be transferred to the local hospital. Five days after first falling ill, plaintiffs daughter was transferred, through arrangements made by the plaintiffs, to a Miami hospital where she died a month later due to grossly deficient insulin availability.

The plaintiffs filed their complaint in Massachusetts and the defendants sought dismissal based on *forum non conveniens*, arguing that the Dominican Republic was the proper forum to hear and rule on the case. Several years after their initial motion, and after four other decisions in the case (*Gianocostas v. Riu Hotels, S.A.*, 2001 Mass. Super. LEXIS 236 (2001) (allowing defendants motions to dismiss based on *forum non conveniens*); *Gianocostas v. Riu Hotels, S.A.*, 59 Mass. App. Ct. 753, 759 (2003) (vacating the dismissal and remanding the case for a determination of whether it is proper to dismiss the case against the Massachusetts-based tour operator based on *forum non conveniens* and if so, whether the action should be tried together or separately from the Dominican hotel defendants); *Gianocostas v. Riu Hotels, S.A.*, 2005 Mass. Super. LEXIS 12 (2005) (allowing the tour operators motion to dismiss for *forum non conveniens* with respect to the negligence claim, but not the negligent misrepresentation claim); *Gianocostas v. Riu Hotels, S.A.*, 2006 Mass. Super. LEXIS 266 (2006) (denying the Massachusetts tour operators motion to reconsider dismissal and granting it summary judgment on plaintiffs claim of negligent misrepresentation)), the Supreme Judicial Court vacated the trial courts summary judgment decision in favor of the tour operator and remanded the case to the trial court for dismissal based on *forum non conveniens*.

Forum Non Conveniens Analysis. Generally, if the jurisdiction and venue are proper, Massachusetts courts rarely will dismiss a case on the grounds of *forum non conveniens*, an argument that the plaintiffs chosen forum is not the best forum to address the claims asserted. *Kearsage Metallurgical Corp. v. Peerless Ins. Co.*, 383 Mass. 162, 169 (1981). If personal and subject matter jurisdiction exist, courts do not want to disturb a forum selection because it involves a decision to decline jurisdiction which is constitutionally permissible. *Carlson Corp. v. Univ. of Vt.*, 380 Mass. 102, 109 n. 10 (1980). *Forum non conveniens*, however, is an argument based on a Massachusetts statute that provides for dismissal [w]hen the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just. M.G.L. c. 223A, § 5.

It is an exercise of the courts discretion and there is no universal formula that the courts apply in order to decide motions based on *forum non conveniens*. *Universal Adjustment Corp. v. Midland Bank, Ltd.*, 281 Mass. 303, 316 (1933). In order to decide such a motion, however, a court must apply some general principles: whether justice is attainable in the offered alternative forum and whether the balance of private and public concerns favors the dismissal. Only if the interests strongly favor the defendants alternative jurisdiction will a court disturb the plaintiffs original forum choice. *Id.* at 315. It should be noted, however that both by statute and case law, as is seen in the *Gianocostas* line of cases, a court is not obligated to grant a full dismissal of an action on *forum non conveniens* grounds, but rather may choose to grant a partial dismissal of an action. Thus, a defendant who brings a motion to dismiss based on *forum non conveniens* takes a risk of defending the claims of a case in more than one forum if the court decides only to dismiss some claims.

Availability of an Alternative Forum. The moving party, or defendant, has the burden of proving that the alternative forum permits recovery for the type of case the plaintiff has asserted. *Gianocostas*, 2008 Mass. LEXIS at *20. It is important to understand, however, that the fact that the proceedings and remedies available in the foreign jurisdiction differ from, or are possibly less favorable [to a plaintiff] than, those in the Commonwealth does not render the alternative system inadequate. *Gianocostas*, 59 Mass. App. Ct. at 758.

In *Gianocostas* for example, the Supreme Judicial Court had evidence regarding the Dominican Republic as an

alternative forum from six lawyers licensed to practice in the Dominican Republic. Although only four of them, by way of affidavit, stated that the plaintiffs could assert a similar action in the Dominican Republic, while the other two did not state that jurisdiction would be viable, the court found that the evidence was sufficient to find that the plaintiffs did, in fact, have an adequate alternative forum for their case.

It should be noted, however, that an alternative forum may not be available if for instance, the refiling of the case is barred by the applicable statute of limitations. This was a potential problem in *Gianocostas* and the court noted that its decision to remand the case for dismissal was conditioned on defendants waiver of defenses, such as proper jurisdiction and the statute of limitations, as well as the acceptance of such a waiver by the Dominican court. Such waivers are important because they can make alternative jurisdictions, which would not be technically available to hear the case, deemed available.

Assessing the Private Interests. The presumption in favor of a plaintiffs choice of forum may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum. *Gianocostas*, 59 Mass. App. Ct. at 759 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981)). With regard to private interests in the context of *forum non conveniens*, a case may be dismissed if the access to proof, the availability of compulsory process for forcing the attendance of an unwilling witness, the costs of obtaining attendance of willing witnesses, and the enforceability of any judgment favor another forum. *Green v. Manhattanville College*, 40 Mass. App. Ct. 76, 80 (1996); *W.R. Grace & Co. v. Hartford Acc. & Indem. Co.*, 407 Mass. 572, 578 (incident occurred in New York and all witnesses and reports were in New York).

In arguing the private interests, the parties must focus on what the heart of the litigation entails. For instance, in *Gianocostas*, the litigation was going to focus on the testimony concerning the quality of medical care the plaintiffs daughter received while in the Dominican Republic, as well as her physical condition while receiving that care. The important witnesses, such as the medical personnel who were in contact or provided care to the plaintiffs daughter, were in the Dominican Republic. Such witnesses, who the defendants argued were vital, could not be compelled to Massachusetts to give testimony. In addition, the critical medical records were also located in the Dominican Republic. Thus, the court agreed that the defendants would be at a severe disadvantage in preparing their defense because the potential parties, such as the medical clinic and hospital, had no offices or employees in the United States, and thus the defense cannot join critical parties; cannot compel critical testimony, and they cannot obtain critical documents. *Gianocostas*, 2001 Mass. Super. LEXIS *21.

Assessing the Public Interests. The doctrine of *forum non conveniens* not only protects the interest of private litigants, but also is designed to serve the public interests. In determining motions to dismiss courts review public interest factors, such as the best use of judicial resources, the administrative burden the litigation imposes, and the interest the state has in enforcing its substantive law on the issue.

In *Gianocostas*, the court noted that the case centered on whether actions involving the care of plaintiffs daughter were negligent. Clearly, Massachusetts has an interest in keeping its residents safe while traveling, regulating the travel industry that conducts business in Massachusetts, and seeing that Massachusetts residents are compensated for improper conduct. In this case, however, the questions surrounding care, which were tied to the negligence claims, depended on the standard of care in the Dominican Republic. Therefore, the court found that, on balance, the public interest favored the dismissal.

Practical Implications for Practitioners. The *Gianocostas* line of cases presents to practitioners the considerations they should evaluate to both challenge a case, or oppose such a challenge, based on a *forum non*

conveniens argument. Plaintiffs should file the case in the venue where it is most convenient and favorable to them, assuming personal and subject matter jurisdiction is proper. Defendants may move to dismiss based on *forum non conveniens*, but a defendant should know that despite the outcome in *Gianocostas*, it is a motion that the courts rarely grant and depends to a very great extent upon the facts of each case.

Therefore, prior to making a *forum non conveniens* argument, a defendant should take carefully outline the arguments that he or she would make to the court to dismiss the action. Then the defendant should determine whether the cost of going forward with a motion to dismiss on *forum non conveniens* is merited. Additionally, if the defendant decides to go forward with the motion, the defendant may want to consider offering to waive certain defenses if the motion is allowed, such as defenses based on the statute of limitations or defenses relating to proper jurisdiction in the alternative forum, to improve their chances to succeed on the motion.

Additionally, practitioners who represent those in the travel industry should advise their clients to be cautious in what they promise about the facilities and care in a foreign county, so as to avoid claims such as negligence and negligent misrepresentations. Moreover, this case can remind us all of the risks of traveling to foreign countries where medical care may differ from what we receive at home.

For additional discussion of *forum non conveniens*, see MA Pleading and Practice § 4.57 (Jurisdictional Facts). See also Moore's Federal Practice -- Civil § 111.70 et seq. (Analysis of Common Law Doctrine of Forum non Conveniens).

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Joe McDonnell on Sabados v. Planned Parenthood of Greater Indiana

2008 Emerging Issues 2133

Joe McDonnell on Sabados v. Planned Parenthood of Greater Indiana, 2007 Ill. App. LEXIS 1370 (December 28, 2007)

By Joseph B. McDonnell

April 16, 2008

SUMMARY: The Appellate Court of Illinois, in *Sabados v. Planned Parenthood of Greater Indiana*, refused to permit an Illinois resident who received treatment out of state and later suffered injury and damage in Illinois to require the defendant clinic to appear and defend against her complaint. This commentary, written by Joe McDonnell discusses the implications of this important decision.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: A Refresher On Long Arm Jurisdiction. Most lawyers will remember from their law school days *Pennoyer v. Neff* 95 U.S. 714 (1877) in which the United States Supreme Court first grappled with the concept of state court jurisdiction over a non-resident. *Pennoyer*, and the later equally-famous case of *International Shoe Company v. Washington* 326 U.S. 310 (1945), set the standards for the exercise of *in personam* jurisdiction, standards which remain essentially unchanged. On the basis of those standards, every state has created its version of what have become known as the long-arm statutes, which empower the courts of the state to reach out to non-residents and exert power over them to respond to legal process instituted within the state. Probably the most familiar example is the provision of state vehicle codes, stating in substance that the driver of any motor vehicle who is involved in an accident within the state consents to the exercise of jurisdiction over his or her person with respect to any suit for injury or property damage that might be filed as a result of the accident. The consent, of course, is a legal fiction; so far as is known, no driver has ever expressly agreed with the authority of a state to compel the driver to voluntarily return to the state to defend any suit that may be filed as a result of driving within the state. As is true of so many other legal fictions, however, the requirement is justified on public policy grounds as a reasonable trade-off, in the federalist form of American government, for the privilege of moving freely from state to state, for either personal or business reasons, and engaging in conduct within such state that results in injury or damage to another.

Besides the operation of a motor vehicle, there are, of course, other acts that may subject a non-resident to the jurisdiction of the courts of a state. In Illinois, those acts are codified in 735 ILCS 5/2-209, which lists a total of 14 different kinds of conduct that may enable a plaintiff to bring a non-resident into Illinois to answer the plaintiff's claim. 735 ILCS 5/2-209(a). Apart from the specific acts so listed, the court may exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States. 735 ILCS 5/2-209(c).

Specifics of the Illinois Statute. An important *caveat*: with respect to those acts enumerated in Section (a) of the

statute (specific jurisdiction), plaintiff may assert only a cause or causes of action which arise from the doing of such act or acts. 735 ILCS 5/2-209(f). This is consistent with the theory behind the long-arm statutes: that it is the performance of an act within the state that justifies the exercise of that states judicial power over the person of the individual or corporation performing the act. Equally important, however, is the fact that, as to causes of action arising under the catch-all provisions of Section (b), plaintiff need only demonstrate that the defendants activities within the state met constitutional standards of due process for the exercise of general jurisdiction, even though no specific act as described in Section (a) was committed.

Whos Crossing Which Line? *Sabados v. Planned Parenthood of Greater Indiana*, 2007 Ill. App. LEXIS 1370 (3rd Div. 2007) discussed both the specific acts basis of jurisdiction under Section (a) of the Illinois statute and the general jurisdiction concept under Section (b).

Plaintiff, an Illinois resident, had traveled four miles to defendants clinic in Hammond, Indiana, where she received a prescription for birth control pills. Returning to Illinois, and after ingesting the pills for two months, plaintiff developed a blood clot. She later filed suit against the defendant in Cook County, Illinois. The defendant filed a special and limited appearance, contesting the Illinois courts jurisdiction, and, after permitting limited discovery on the jurisdictional issue, the trial judge denied the motion to dismiss. On appeal, the judgment was reversed, the first district finding no basis under either Section (a) or Section (b) to find that defendant had subjected itself to the jurisdiction of the Illinois courts.

The appellate court initially pointed out that since the legislative amendment to the statute in 1989 creating the catch-all provisions for the exercise of personal jurisdiction over non-residents the exercise of such jurisdiction need only be consistent with constitutional guarantees of due process. This requires a showing that the defendant had minimum contacts with the forum state such that the exercise of jurisdiction over it does not offend traditional notions of fair play and substantial justice. Slip op. 5 (citing *International Shoe v. Washington*, 326 U.S. 310, 316 (1945)). In addition, the action must arise out of the defendants contacts with the forum state to such an extent that it is reasonable to require the defendant to answer the complaint in that forum (citing *Crum & Forster Specialty Insurance Co. v. Extended Stay America*, 375 Ill.App.3d 654, 664 (2007)).

In arguing for affirmance of the trial courts order, plaintiff contended that the defendant had committed a tort in Illinois (Sec. 2-209(a)(2)) because the effects of the defendants wrongful conduct were experienced in Illinois. The court rejected this argument (characterized as the portable tort theory which originated with *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432 (1961)), stating that the courts now focus on where the defendants services occurred, since this is the place of the receivers.need. Slip op. at 7 (citing *Wright v Yackley*, 459 F.2d 287, 289 (9th Cir. 1972)). Turning the rationale of long-arm statutes on its head, the court said that a plaintiff who travels out of state to seek personal services and then returns to her own state should expect to travel back to the state where the services were rendered in order to seek redress. *Sabados*, Slip op. at 8. Accordingly, the court found that the record failed to establish the requisite minimum contacts to justify the exercise of personal jurisdiction.

Plaintiffs argument based on the concept of general jurisdiction under Section (c) of the statute was equally unavailing. General jurisdiction, said the court, may be exercised only where the non-resident has continuous and systematic business contacts within the forum state. Slip op. at 10 (citing *Illinois Commerce Commission v. Entergy-Kock Trading, LP*, 362 Ill.App.3d 790, 796 (2005)). The Illinois Supreme Court has held that such contacts must demonstrate that the non-resident is present and doing business within Illinois (*Braband v. Beech Aircraft Corp.*, 72 Ill.2d 548, 554-55 (1978)) on a basis not merely occasional or causal, but with permanence and continuity. *Id.* The relatively few Illinois residents who utilized the defendants services; the lack of any office facilities or services or sales performed in Illinois; and even placement of ads in several telephone directories in Illinois (amounting to mere solicitation) were insufficient to demonstrate that continuous and permanent presence required to justify general jurisdictional principles.

Tips for Practitioners. It is no longer necessary to file a special and limited appearance in order to challenge

personal jurisdiction. *Sec. 2-301 of the Code of Civil Procedure* allows a party to object to the courts jurisdiction on the basis that the party is not amenable to process in Illinois, so long as the motion is made before the filing of any other substantive pleading. 735 ILCS 5/2-301(a). Where such challenge is made, it is the normal practice to seek leave of court to conduct discovery, limited to the jurisdictional issue. Counsel for all parties should strive to develop all facts relevant in arguing for and against jurisdiction, including the volume of business done, maintenance of offices or outlets within the state, the frequency of forays within the state, etc. Plaintiffs must focus on the nature and quantity of defendants contacts with the forum, and defendants on the lack of meaningful presence within the state. It is also a good idea for the defense to emphasize that it is basically unfair to require a nonresident to appear in Illinois to answer the complaint of an Illinois resident who came to the defendants state to obtain services in the first place.

For Additional Discussion on Long Arm Jurisdiction, see Illinois Civil Procedure Ch. 2, The Prerequisites To A Civil Lawsuit: Jurisdiction And Venue; Illinois Jurisprudence, *Civil Procedure* § 2:09 Jurisdiction And Venue.

ABOUT THE AUTHOR(S):

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Motion to Dismiss Burden: Vairo on Walk Haydel & Assoc. v. Coastal Power Prod.

2008 Emerging Issues 2138

Motion to Dismiss Burden: Vairo on Walk Haydel & Assoc. v. Coastal Power Prod.

By Georgene Vairo

April 16, 2008

SUMMARY: In *Walk Haydel & Assocs. v. Coastal Power Prod. Co.*, the Fifth Circuit provides guidance on what type of evidentiary showing is sufficient to defeat the motion and what happens to the plaintiffs burden if the court opts to conduct a pretrial evidentiary hearing on the issue of personal jurisdiction. This commentary, by Moores Federal Practice Editorial Board member Georgene Vairo, analyzes this important case.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: *Walk Haydel & Assocs. v. Coastal Power Prod. Co.*, 2008 U.S. App. LEXIS 2668 (5th Cir. Feb. 6, 2008), involves the correct procedures and burdens of proof for making motions to dismiss. The Fifth Circuit held that the district court erred when, on a motion to dismiss for lack of personal jurisdiction, the district court held the plaintiff to a burden above the prima facie level without holding a full evidentiary hearing. The case is important because it clarifies how the district court must handle motions to dismiss for lack of personal jurisdiction.

Background. A Louisiana corporation alleged third party claims against a Chicago-based law firm for fraud, breach of contract, and breach of fiduciary duty. The suit, filed in a Louisiana state court and removed to federal court by the law firm, arose out of an attempt by the Louisiana corporation and others to acquire a contract to build a power plant in El Salvador. The joint venturers had won a bid to negotiate the contract. The Louisiana corporation alleged that the defendant law firm agreed to provide legal representation for the joint venturers during this process. However, it further alleged that the law firm enabled another of its clients, which had become involved in the negotiations, to obtain the contract. The law firms motion to dismiss for lack of personal jurisdiction was met with a motion for discovery to support the Louisiana corporation's claims of general and specific jurisdiction. The district court denied discovery on general jurisdiction and almost all discovery on specific jurisdiction. After a hearing, granted the motion to dismiss, finding that the law firm was not subject to personal jurisdiction in Louisiana.

Usual Procedure: Plaintiff Presents Prima Facie Case. The Fifth Circuit began by reciting the applicable procedural rules: When the defendant disputes the factual bases for jurisdiction, the court may receive interrogatories, depositions, or other discovery to help it resolve the jurisdictional issue. The district court has discretion as to the type and amount of discovery to allow. But even if the court receives discovery materials, unless there is a full and fair hearing, it should not act as a fact finder and must construe all disputed facts in the plaintiff's favor and consider them along with the undisputed facts. At this stage, the plaintiff is required to present only a prima facie case for personal

jurisdiction. Any greater burden such as proof by a preponderance of the evidence would permit a defendant to obtain a dismissal simply by controverting the facts established by a plaintiff through affidavits and supporting materials.

Application of Preponderance of Evidence Standard. Ultimately, the plaintiff must show by a preponderance of the evidence that jurisdiction is proper. Often, this is resolved at trial along with the merits. This is especially likely when the jurisdictional issue is intertwined with the merits and therefore can be determined based on jury fact findings. However, when the court holds a pretrial evidentiary hearing confined to the jurisdictional issue and both sides have the opportunity to present their cases fully, the district court can decide whether the plaintiff has established jurisdiction by a preponderance of the evidence.

Need for Jurisdictional Discovery. The hearing in this case was inadequate to justify raising the plaintiff's burden above the prima facie level. A pretrial evidentiary hearing is intended to serve as a substitute for the resolution of factual and legal disputes relevant to jurisdiction at trial. Accordingly, both parties must be allowed to submit affidavits and to employ all forms of discovery on the jurisdictional issue, subject to the district court's discretion. Furthermore, if requested by the parties, the district court often should convene a hearing and entertain live testimony. Here, the district court had substantially curtailed discovery, had not allowed any depositions, and had not allowed live testimony. Because the court had not allowed relevant discovery and had not held an evidentiary hearing to help resolve the factual disputes, it should not have held the plaintiff to a higher standard than a prima facie showing.

Comment. The Fifth Circuit has helped to unravel a mystery pertaining to personal jurisdiction. Ultimately, the plaintiff must be able to prove that personal jurisdiction exists. However, because that effort requires evidence, and our procedural system is designed to get to the merits of a litigation as soon as possible, the general approach is to rely on a plaintiff's prima facie jurisdictional case. If the defendant seeks to wage war with the plaintiff on a pretrial motion to dismiss, then the court must either refuse to dismiss if the plaintiff makes out a prima facie case, or, if it seeks to hold the plaintiff to the ultimate preponderance level, it must provide appropriate discovery and a trial-like hearing to resolve the issues of fact.

Specific Jurisdiction. Reviewing the dismissal on a prima facie standard, the Fifth Circuit reversed. The plaintiff had established a prima facie case for specific personal jurisdiction. The defendant's alleged formation of an attorney-client relationship with the plaintiff, a Louisiana corporation, was not by itself sufficient to confer jurisdiction. Nor would an attorney's visit to a state, by itself, likely be sufficient. However, minimum contacts existed because of those contacts as well as the defendant's alleged misrepresentations and omissions directed toward Louisiana, the forum. Once a plaintiff has established minimum contacts, the burden shifts to the defendant to show that the assertion of jurisdiction would be unfair. Here, because a cause of action for fraud committed against a resident of the forum was directly related to the tortious activities giving rise to personal jurisdiction, the exercise of that jurisdiction was fair.

Comment. Having established the correct procedure and standard, the Fifth Circuit engaged in a straightforward application of the alleged facts and correctly found that the plaintiff's prima facie case merited a finding of specific personal jurisdiction.

References. 2 Moore's Federal Practice (3d Ed.) §§ 12.31, 108.143[2].

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Georgene Vairo is a Professor of Law and William M. Rains Fellow at Loyola Law School, Los Angeles. Professor Vairo received her B.A. from Sweet Briar College, and was awarded a M.Ed., with Distinction, in Social Studies from the University of Virginia. She graduated first in her class from Fordham University School of Law. She served as a law clerk to the Honorable Joseph M. McLaughlin, U.S. Court of Appeals for the Second Circuit, when he sat with the U.S. District Court for the Eastern District of New York; practiced antitrust law with Skadden Arps Slate Meagher & Flom; and joined the faculty of the Fordham University School of Law in 1982, where she also served as Associate Dean from

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Eli Wald on Ineffective Assistance of Counsel and Habeas Corpus

2008 Emerging Issues 2162

Eli Wald on Ineffective Assistance of Counsel and Habeas Corpus

By Eli Wald

April 16, 2008

SUMMARY: In *Wright v. Van Patten*, 128 S. Ct. 743 (U.S. 2008) the Supreme Court decided two important issues. It clarified its ineffective assistance of counsel jurisprudence explaining the relationship between the general rule of *Strickland* and the exception promulgated in *Cronic*, and it explored the circumstances under which federal courts will defer to state courts interpretation of the Sixth Amendment right to counsel.

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ARTICLE: Overview

In *Wright v. Van Patten*, 128 S. Ct. 743 (U.S. 2008) the Supreme Court decided two important issues. It clarified its ineffective assistance of counsel jurisprudence explaining the relationship between the general rule of *Strickland v. Wash.*, 466 U.S. 668 (U.S. 1984) and the exception promulgated in *United States v. Cronic*, 466 U.S. 648 (U.S. 1984), and it explored the circumstances under which federal courts will defer to state courts interpretation of the Sixth Amendment right to counsel. This Commentary, written by Professor Eli Wald, a legal ethics expert and member of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct and the Colorado Bar Association Ethics Committee, studies both prongs of this decision.

Factual Background

Van Patten pleaded no-contest to a reduced charge. His counsel was not present in person at the plea bargain hearing but was linked to the courtroom by speaker phone. After the state trial court imposed the maximum term of imprisonment, Van Patten retained different counsel and moved in the state court of appeals to withdraw his no-contest plea arguing that his Sixth Amendment right to counsel had been violated by his trial counsel's physical absence from the plea hearing. *Van Patten*, at 744.

Procedural Background

The state court of appeals construed the applicable state law and denied Van Patten's post-conviction motion to withdraw his no-contest plea. After the state supreme court declined further review, Van Patten petitioned for a writ of habeas corpus under 28 U.S.C.A. § 2254 in Federal District Court. The District Court denied relief, but the Court of Appeals for the Seventh Circuit reversed. It held that Van Patten's Sixth Amendment claim should have been resolved, not under *Strickland v. Washington*, 466 U.S. 668 (1984), which requires a showing of deficient performance and prejudice to the defendant, but under the standard discussed in *United States v. Cronin*, 466 U.S. 648 (1984), under which prejudice may be presumed. The resolution was in Van Patten's favor.

While the prison warden's petition for certiorari was pending, the Court decided *Carey v. Musladin*, 127 S.Ct. 649 (2006), construing § 2254, which bars relief on any claim adjudicated on the merits in state court, unless the state court's decision was contrary to, or involved an unreasonable application of, *clearly established Federal law, as determined by the Supreme Court of the United States*. 28 U.S.C. § 2254(d)(1) (emphasis added). Musladin's explanation of the clearly established Federal law requirement prompted the Court to remand Van Patten's case to the Seventh Circuit for further consideration. The remand order implied that the Court did not believe that the state supreme court unreasonably applied Federal Law and thus that the Court of Appeals had no grounds to grant a habeas corpus. A majority of the Court of Appeals panel reaffirmed its original judgment. The Court reversed.

The Pertinent Questions

(1) Under what "ineffective assistance of counsel" circumstances does the *Cronin* exception apply in lieu of the *Strickland* rule?

(2) Does defense attorneys participation in a plea-bargaining hearing via telephone constitute ineffective assistance of counsel per *Strickland*?

(3) Should defense attorneys participation in a plea-bargaining hearing via telephone constitute ineffective assistance of counsel per *Cronin*?

(4) Under what circumstances will federal courts defer to a state court's interpretation of the ineffective assistance of counsel clause of the Sixth Amendment?

The Decision

Strickland: The general rule of law regarding ineffective assistance of counsel claims. The Court held that *Strickland* generally applies to claims of ineffective assistance of counsel. *Van Patten*, at 746. *Strickland* states that a defendant who asserts ineffective assistance of counsel must demonstrate not only that his attorney's performance was deficient, but also that the deficiency prejudiced the defense. *Id.*

Cronin: The exception. The Court clarified that *Cronin* recognized a narrow exception to *Strickland*. Citing *Cronin*, the Court explained that a Sixth Amendment violation may be found without inquiring into counsel's actual performance or requiring the defendant to show the effect it had on the trial, in circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. *Cronin*, at 658. *Cronin* applies when ... the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so

small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial, *Cronic* at 659660, and one circumstance warranting the presumption is the complete denial of counsel, that is, when counsel [is] either totally absent, or prevented from assisting the accused during a critical stage of the proceeding. *Id.* at 659.

Application in *Van Patten*

Having resolved the relationship between *Strickland* and *Cronic*, the Court turned to the facts of *Van Patten* and concluded that contrary to the approach taken by the Court of Appeals, *Strickland* applied to the case.

The Court found that its precedents do not clearly hold that counsel's participation by speaker phone should be treated as a complete denial of counsel, on par with total absence. The Court was willing to assume that a lawyer physically present in a courtroom will tend to perform better than one on the phone, but held that: The question is not whether counsel in those circumstances will perform less well than he otherwise would, but whether the circumstances are likely to result in such poor performance that an inquiry into its effects would not be worth the time. *Van Patten*, at 746. Pointing out that the state court of appeals held counsel's performance by speaker phone to be constitutionally effective, and having held that its precedents do not clearly hold that counsel's participation by speaker phone should be treated as a complete denial of counsel, the Court concluded that *Cronic* did not clearly control the case.

Rejecting the applicability of *Cronic* proved fatal to Van Patten's petition, because on the facts of the case he could prove neither element of *Strickland*. *Van Patten*, at 746747. The Court turned to *Musladin* and in summary fashion concluded that Because our cases give no clear answer to the question presented, let alone one in Van Patten's favor, it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law. Consequently, under the explicit terms of § 2254(d)(1), therefore, relief was unauthorized.

Analysis

(1) Circumstances under which the *Cronic* exception applies in lieu of *Strickland*. The Court held that the *Cronic* exception applies, that is, a petitioner may establish ineffective assistance of counsel without inquiring into counsel's actual performance or requiring the defendant to show the effect it had on the trial

. when ... the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. The presumption is warranted when, for example, counsel [is] either totally absent, or prevented from assisting the accused during a critical stage of the proceeding, *Cronic*, at 659660; or

. when there [is] a breakdown in the adversarial process, *Cronic*, at 662, such that counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, *id.* at 659.

(2) Does defense attorneys participation in a plea-bargaining hearing via telephone constitute ineffective assistance of counsel per *Strickland*? The Court never decided this issue. Rather, it explicitly stated: Our own consideration of the merits of telephone practice, however, is for another day, and this case turns on the recognition that no clearly established law contrary to the state court's conclusion justifies collateral relief. *Van Patten*, at 747 .

(3) Should defense attorneys participation in a plea-bargaining hearing via telephone constitute ineffective assistance of counsel per *Cronic*? The Court previously decided that the presence of lawyers is essential because they are the means through which the other rights of the person on trial are secured. *Cronic*, at 653.

The Court of Appeals apparently read the presence of counsel in *Cronic* to mean the presence of counsel *in open*

court. *Van Patten v. Deppisch*, 434 F.3d 1038, 1042 (7th Cir. 2006). The Court of Appeals explained that It is well-settled that a court proceeding in which a defendant enters a plea is a critical stage where an attorney's presence is crucial because defenses may be ... irretrievably lost, if not then and there asserted (citation omitted). *Id.*

Applying the *Cronic* standard, the Court of Appeals found that Van Patten stood alone before judge and prosecutor, without effective assistance of counsel. It reasoned that since Van Patten's counsel was physically absent, Van Patten could not turn to his lawyer for private legal advice, to clear up misunderstandings, to seek reassurance, or to discuss any last-minute misgivings. Listening over an audio connection, counsel could not detect and respond to cues from his client's demeanor that might have indicated he did not understand certain aspects of the proceeding, or that he was changing his mind. If Van Patten wished to converse with his attorney, anyone else in the courtroom could effectively eavesdrop. *Id.* at 1042-1043.

For the compelling reasons stated by the Court of Appeals, defense attorneys' physical absence from the courtroom during a plea-bargaining hearing renders him totally absent and prevents him from assisting the accused during a critical stage of the proceeding. *Cronic*, at 659-660. Consequently, defense attorneys' participation in a plea-bargaining hearing via telephone triggers *Cronic* and constitutes ineffective assistance of counsel.

(4) Van Patten's demise: form over substance. The state court did not agree with the Court of Appeals' interpretation of *Cronic*. It did not construe the presence of counsel to mean the presence of counsel in open court. To the contrary, it found that attorney participation in plea-bargain negotiations can be effective even if defense counsel is present only over the phone.

Unfortunately for Van Patten, the Court never got to assess the merits of telephone practice. *Van Patten*, at 747. As Justice Stevens, concurring in the opinion, explained, the question before the Court was not the reasonableness of the federal court's interpretation of *Cronic*, but rather whether the state court's narrower reading of that opinion was objectively unreasonable. *Van Patten*, at 747-48. To be clear, the Court was not asked to render its substantive judgment and side with either the Court of Appeals or with the state court. Furthermore, the Court was not asked to decide whether the state court's narrow reading of *Cronic* was correct or not. It only was asked to decide whether the state court's decision was unreasonable.

Justice Stevens clearly stated: I emphasize that today's opinion does not say that the state court's interpretation of *Cronic* was correct, or that we would have accepted that reading if the case had come to us on direct review rather than by way of 28 U.S.C. § 2254, concluding [A]n unreasonable application of federal law is different from an incorrect application of federal law (citation omitted). *Van Patten*, at 747-748.

To be sure, if *Cronic* had stated that counsel is totally absent when defendant is deprived the presence of counsel *in open court* (emphasis added), then Federal Law would have been settled per *Musladin*, *Cronic* would have applied to Van Patten's case and the Court would have sided with the Court of Appeals grant of habeas corpus. Alas, as Justice Stevens noted: in 1984, when *Cronic* was decided, neither the parties nor the Court contemplated representation by attorneys who were not present in the flesh. *Van Patten*, at 748. Because the Court did not consider the possibility of attorney appearance over the phone, it did not add *in open court* after the word *present*.

Justice Stevens concluded: An unfortunate drafting error in the Court's opinion in *Cronic* makes it necessary to join the Court's judgment in this case. *Van Patten*, at 747.

Technically, Justice Stevens is correct: if the Court in *Cronic* did not contemplate representation by physically absent attorneys, then per *Musladin* *Cronic* was not clearly established Federal law given the facts of *Van Patten*, and pursuant to § 2254 federal courts must defer to state courts' interpretation of the Sixth Amendment in this instance.

The outcome, however, is somewhat troubling. The Seventh Circuit Court of Appeals and the Supreme Court, at least according to Justice Stevens, would have found, on the merits, that representation over the phone in a plea-bargain hearing violates the defendant's right to effective assistance of counsel under the Sixth Amendment. Procedural form,

however, took precedence over substance and the high level federal courts ended up deferring to a lower state courts interpretation of federal constitutional law.

ABOUT THE AUTHOR(S):

Eli Wald is a professor at the University of Denver Sturm College of Law, where he teaches in the areas of legal ethics and legal profession. He is the author of numerous law review articles examining topics such as the regulation of the corporate bar in the post-corporate scandals era, increased lawyer mobility, attorney-client communications and the rise and fall of Jewish law firms.

Prof. Wald, a Continuing Legal Education instructor and expert witness, is a member of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct and a member of the Colorado Bar Associations Ethics Committee.

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Grace V.B. Garcia on Liss v. Studeny, 450 Mass. 473 (2008)

2008 Emerging Issues 2191

Grace V.B. Garcia on Liss v. Studeny, 450 Mass. 473 (2008)

By Grace V. B. Garcia

April 16, 2008

SUMMARY: In a decision that is a flashing caution light for all attorneys who use contingent fee agreements, the Supreme Judicial Court of Massachusetts, in *Liss v. Studeny, 450 Mass. 473 (2008)*, affirmed the denial of an award of fees both under a poorly drafted agreement and also under the equitable remedy of quantum meruit. This commentary, written by Grace V.B. Garcia, examines the important lessons to be learned from this case.

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ARTICLE: The Importance of Drafting a Clear Contingent Fee Agreement

In *Liss v. Studeny, 450 Mass. 473 (2008)*, the Supreme Judicial Court affirmed summary judgment for the defendant, finding that the plaintiff attorney was not entitled to any payment for work performed on a contingent fee case because the contingency itself had not occurred and, thus, the expectation for payment was not reasonable. This case cautions attorneys to be careful in drafting contingent fee agreements so as to ensure that the terms clearly cover the attorneys expectations for payment.

The Agreement at Issue. In July 1998, plaintiff, attorney Liss, and defendant, Studeny, entered into a contingent fee contract for the plaintiff to pursue a wrongful termination claim. The contingent contract stated that Studeny shall not be liable to pay compensation otherwise than from amounts collected for him by [Liss], except as follows: Payments of [Liss reasonable] expenses and disbursements . . . ; otherwise None except from amounts collected. The contract also provided that Studeny would advance Liss money for expenses and disbursements and that [w]hen the balance of the foregoing advance is less that \$500.00, [Studeny] shall pay to [Liss] a further advance in amount to be determined by [Liss and Studeny] at the time based upon an estimate of future expenses and disbursements to be incurred by [Liss]. Further, the contract provided that [f]ailure to pay said expenses and disbursements promptly upon request will constitute a material breach of this agreement by [Studeny] and will be grounds for [Liss] to withdraw from any pending litigation and otherwise to discontinue his services. *Liss, 450 Mass. at 474.*

As the case progressed, Studeny made certain advances for expenses. In April 2000, Liss requested a further advance from Studeny to prepare the case for trial. Studeny refused to advance further funds and Liss moved for, and was granted, permission to withdraw as counsel. After the motion to withdraw was allowed, Liss returned the legal files and the remaining \$1,874, which had been advanced, to Studeny. Studeny then represented himself pro se at his wrongful termination trial and lost. Thereafter, based on the contingent fee agreement, Liss filed a complaint seeking \$39,360 in fees. Among the counts he alleged against Studeny were breach of contract and quantum meruit.

Popularity of Contingent Fee Agreements. In certain civil cases, contingent fee agreements are popular among attorneys and their clients because they allow attorneys to assess, and accept, the risk that they will be paid from the outcome of a case, while a client may proceed with a case that he or she may not otherwise have been able to fund. Contingent fee agreements between attorneys and clients are subject to ethical rules and in most cases must be in writing. See **Mass. R. Prof. C. 1.5(c)**. As with many contracts in which ambiguities are read against the drafter, any ambiguity in a fee agreement is construed against the attorney who drafted it. *Cambridge Trust Company v. Hanify & King*, 430 Mass. 472, 479 (1999).

Reading This Contingent Fee Agreement Against the Drafter. Contingent fee agreements, like all contracts, should clearly spell out the terms of the contract. In *Liss*, the attorney-plaintiff lost his \$39,360 case because the terms of the contingent fee agreement did not support his position for either breach of contract or recovery under quantum meruit.

Liss argued that Studeny breached the contract when he failed to advance further funds to Liss to prepare for the trial. Liss based his argument on the requirement that Studeny would advance funds for future expenses and disbursements. The court, however, found that Liss's breach of contract argument failed for two reasons. First, the contract did not state that Studeny was required to advance funds whenever they were requested. Rather, the contract provided that such advancement would be determined by *both* Liss and Studeny. Second, the contract provided that the advancement of funds was only to be determined if the amount previously advanced fell below \$500. At the time that Liss withdrew from the case, there was \$1,874 remaining in funds previously advanced by Studeny. Thus, Studeny had not breached the terms of the agreement as they were written.

Liss's argument for quantum meruit also failed. At its core, quantum meruit is a theory of recovery that assumes that a valid contract covering the subject matter does not exist. *Boswell v. Zephyr Lines, Inc.*, 414 Mass. 241, 250 (1992). It is a theory that allows one to obtain compensation for the reasonable value of his or her services, thereby preventing an unjust enrichment of one party and unjust detriment to the other party. *Salamon v. Terra*, 394 Mass. 857, 859 (1985). Often, discharged attorneys who had a contingent fee agreement use the quantum meruit theory to recover the reasonable value of their services because they generally do not have a right to recover fees under the contingent fee contract itself. *Malonis v. Harrington*, 442 Mass. 692, 701 (2004); cf. *Opert v. Mellios*, 415 Mass. 634, 636-7 (1993) (stating that there are some occasions when a discharged attorney *may* be able to seek compensation through the contingent fee contract).

To recover under quantum meruit, an attorney must prove not only that the attorney conferred a measurable benefit to the former client, but also that the right to recover under quantum meruit has accrued. *Liss*, 450 Mass. at 478. In *Liss*, the court found that Liss's preparation of the case provided a benefit to Studeny in that it allowed him to try his case against his former employer. However, [t]he fact that a person has benefited from another is not of itself sufficient to require the other to make restitution therefor. *Liss* at 479, quoting *Keller v. OBrien*, 425 Mass. 774, 778 (1997).

The problem Liss faced in recovering under a theory of quantum meruit is that although a party does not recover on the contract itself under quantum meruit, a court may look to the terms of the underlying contract to help determine appropriate recovery . . . *Liss* at 480. Thus, in *Liss*, the court looked at the terms of the contingent fee contract and found that a reasonable person would not believe that Liss would be entitled to any compensation unless he collected funds from Studeny's former employer. As that contingency did not occur, the court found that the right to recover under quantum meruit did not accrue because it would run counter to the reasonable expectation of the parties to require

compensation where no amounts are collected. *Id.*

In affirming the general, although not absolute, rule that the contingency must occur in order to obtain quantum meruit recovery, the court noted that the rule was simply a function of practicality. Specifically, the court stated that an award in the matter that is the subject of the contingent fee contract would give a judge a basis from which to determine what a reasonable recovery for the work performed would be based on the result achieved. The court noted that, if the contingency did not occur, a judge would have no practical method by which to determine the fair and reasonable compensation for the work performed by the attorney.

Lessons for the Practitioner. Practitioners who use, or who contemplate using, contingent fee agreements must take care that the terms of such contracts are clear and that the terms cover all expectations that the attorney has for payment. The agreement must be in writing. In addition, the agreement should plainly state the method by which the attorneys fee is determined and how expenses and disbursements are to be handled. It is good practice to ensure that terms provide for payment under different scenarios, such as settlement, trial or appeal. Additionally, learning from *Liss*, it is important that the terms be definite, and leave no room for speculation, such as by providing (as *Liss* did) that the client will advance funds to be determined by the attorney and client. Rather, practitioners who want to ensure that such determinations are made by them should plainly state that in the agreement.

To protect themselves in the event that a contingent fee agreement is deemed unenforceable, it is also advisable that attorneys keep records of the time spent on the case in order to support a claim for quantum meruit. These time records will address the courts concerns, raised in *Liss*, about determining fair and reasonable compensation.

For additional discussion of contingent fee agreements, see Massachusetts Tort Damages 2d § 15-1 (Chapter 15. Costs, Interest and Attorneys Fees); Winning Through Settlement § 1.6 (Negotiating with Ones Client); Representing a Plaintiff in a Wrongful Termination Case § 4.35 (Enter into an Appropriate Written Fee Agreement with the Client); MCLE Ethical Lawyering in Massachusetts § 4.1.11 (Prerepresentation Contracts and Caveats); MCLE Ethical Lawyering in Massachusetts § 5.4 (Contingent Fees); Massachusetts Pleading and Practice § 8.58 (Complaint for Attorney Fees on Contingent Fee Contract Where Client Settled-Form).

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Susan M. Brazas on Karas v. Strevell, Nos. 104123, 104133 (Feb. 22, 2008)

2008 Emerging Issues 2192

Susan M. Brazas on Karas v. Strevell, Nos. 104123, 104133 (Feb. 22, 2008)

By Susan M. Brazas

April 16, 2008

SUMMARY: In *Karas v. Strevell*, the Illinois Supreme Court considered an ice hockey player's claims against a member of an opposing team and against the youth hockey club and its officials, including a civil conspiracy claim. This commentary, written by Susan Brazas, explores the heightened standard for pleading applied in *Karas* and also addresses the assumption that only conventional sources of authority will be considered by courts.

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ARTICLE: Get in the Game: Illinois Supreme Court Raises the Bar on Fact-specific Pleading for Injuries Occurring in Full Contact Sports

In *Karas v. Strevell*, the Illinois Supreme Court addressed the standard for recoverable injuries sustained in the full-contact sport of ice hockey. The *Karas* court did not specifically overrule its decision in *Pfister v. Shusta*, 167 Ill. 2d 417 (1995), which defined the minimum standard for recoverable injuries in contact sports: that the injury resulted from intentional or willful and wanton conduct. The *Pfister* court had broadened the scope of the contact sports exception to the duty of ordinary care beyond organized sports to include unorganized, informal, and even spontaneous sports activities and games.

Instead, the *Karas* court articulated a new standard for liability for full- contact sports, which the court identified as including football and ice hockey: that the injury resulted from conduct which was either done with intent to injure, or which was totally outside the range of the ordinary activity associated with the sport. The *Karas* court acknowledged that this was a newly-defined standard for pleading, and thus remanded almost all counts of the plaintiff's action to the circuit court.

The *Karas* analysis is surprising in what it does not include: no explanation was given for distinguishing ice hockey from the sport at issue in the *Pfister* case, a spontaneous game of kick-the-can which the *Pfister* court likened to a hockey game. Further, no comparison was made with the First District's opinion in *Savino v. Roberston*, 273 Ill. App. 3d 811, 652 N.E.2d 1240 (1st Dist. 1995) (youth hockey league injury to player by fellow teammate during pre-game warm-up), or the opinion in *Azzano v. Catholic Bishop of Chicago*, 304 Ill. App. 3d 713, 710 N.E.2d 117 (1st Dist. 1999) (injury in daily game of killerball played at school recess).

Importantly, the *Karas* court also did not mention the seminal Illinois case on the contact sports exception, *Nabozny v. Barnhill*, 31 Ill. App. 3d 212, 334 N.E.2d 258 (1975) (injury caused by soccer league player kicking goalie in the head while he ran for the ball, although kicking ball in the penalty area was prohibited by game rules).

Practical Implications for Practitioners. It is expected that the *Karas* decision will be cited by defense counsel as a limiting precedent for actions involving other sports and even, perhaps, other non-sport activities and games that carry an inherent element of danger. The presence of opponents and the extent to which danger is volatile and potentially significant will be key to the extension of this standard to other sports or activities.

The fact that the court did not distinguish the cases cited above is also troubling for attorneys preparing for argument: they cannot safely assume that prior case law of the appellate courts, even when involving a sport or activity of the same type, will be given great weight by the reviewing court. In particular, these attorneys should be prepared to distinguish, or to argue the applicability of, a given case depending on the circumstances. A case that sets forth a different standard, even if it is from another jurisdiction, may be of greater interest than a case with a similar fact pattern.

Applicability to Non-Participants. The *Karas* court identified the question of whether the contact sports exception applied to non-participants as an issue of first impression. The *Karas* plaintiff named the officials' association and the youth hockey league as defendants, and alleged, among other things, a conspiracy between the two to not enforce the rules against back-checking. The *Pfister* opinion had not addressed non-participants, and instead held that the contact sports exception applied to participants in the sport.

The *Karas* court explicitly extended its holding, and applying the *Pfister* court's contact sports exception, stated that the full contact sports exception applies to non-participants. However, the *Karas* court added that when a *non-participant* is charged with failure adequately to enforce the rules in a full-contact sport, plaintiff must allege either (1) that the defendant acted with intent to cause the injury or (2) that the defendant engaged in conduct totally outside the range of the ordinary activity of coaching or officiating. This mirrors the *Karas* court's holding that *participant* liability in a full-contact sport requires that the plaintiff allege either (1) that the participant intentionally injured the co-participant, or (2) that the participant engaged in conduct totally outside the range of the ordinary activity of the sport.

Standards for Pleading. Of necessity, all complaints setting forth a cause of action for injuries sustained in a sport or sporting activity should specify as much detail as possible about the conduct of the defendant, and should spell out that this conduct was completely outside the range of the ordinary activity associated with the sport.

One interesting aspect of the *Karas* opinion is that it seems to broaden fact-pleading requirements to fact with detail pleading. The *Karas* court remarked that the plaintiff had failed to identify where the hockey puck was at the time of the alleged wrongful conduct. Although the plaintiff had specified that he was in the corner of the rink, next to the boards, was partially bent down and was struck from behind by the defendant, this was not sufficiently descriptive of where the play was occurring, noted the *Karas* court.

Nonetheless, the *Karas* court took the unusual step of striking, upon motion of the defendants, a portion of the *amicus curiae* brief of the trial attorneys group (ITLA) which advocated for change from fact pleading to notice pleading. Although the latter standard applies in federal courts and in several states, the *Karas* court firmly declined to jump into the fray. Noting that no party had raised the issue of abolishment of fact pleading, the Court stated that it was concerned only with those issues raised by the parties to the appeal.

More Lessons for Practitioners. The attorney pleading a novel or little-recognized scenario for recovery, or

pleading willful and wanton conduct, is well-advised to spell out every possible aspect of the egregious conduct in the pleadings. If the setting is one unfamiliar to the average person, counsel should set forth precise details about all the circumstances of the incident to educate the court on the atrocity of the conduct. The *Karas* court has set the standard high for full-contact sports, meaning that counsel must include in the complaint all information about what the range of the ordinary activity of the sport is and about why the conduct alleged was totally outside of this range.

Implications for Argument and Briefing. Once again, as with several of its recent opinions, in *Karas* the Illinois Supreme Court relied on persuasive, rather than precedential, case law from other jurisdictions in its analysis. See, e.g., *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343 (Jan. 25, 2008); *Brucker v. Mercola*, 2008 Ill. LEXIS 29 (Dec. 28, 2007); and *Townsend v. Sears, Roebuck & Company*, 2007 Ill. LEXIS 1701 (November 29, 2007).

Indeed, the new pleading standard for full contact sports identified in *Karas* is adopted verbatim from a California case, *Knight v. Jewett*, 3 Cal. 4th 296, 320, 834 P.2d 696, 711, 11 Cal Rptr. 2d 2, 17 (1992). The *Karas* court does not identify the sport involved in the *Knight* case, but draws from a law review article in exploring the nature of the sport of ice hockey. The *Karas* court even went so far to cite to an out of state case which it acknowledged was factually distinguishable (a novice swimmer alleged that the team's coach had not properly instructed her to dive from a starting block into a racing pool). This cited case illustrated the *Karas* court's prediction, drawing from *Pfister*, that a flood of litigation (or, per a Connecticut court, a surfeit of lawsuits) would result if simple negligence were allowed to support liability for contact sports injuries.

Yet, it could be argued that the *Karas* court has drawn a clear distinction between full-contact sports and those which are less-than-full-contact sports, that is, contact sports. The *Karas* court noted that the *Pfister* court did not consider the appropriateness of a willful and wanton standard to full-contact sports. Perhaps the *Karas* court wished to emphasize the critical nature of this distinction by relying heavily on another jurisdiction's case law to define this new standard. In any event, counsel are urged to make a careful assessment of whether to argue that precedential Illinois case law renders moot alternative case authority, even if factually on point.

The continuing challenge for attorneys seeking a departure from established Illinois precedent is to locate, and argue the applicability of, alternative approaches from non-traditional authority. Law review articles on the subject should be offered, especially if the articles advocate a position based on a jurisdiction's plainly articulated standard.

Further, novel theories of recovery should not be overlooked. In *Karas*, the plaintiff pleaded willful and wanton conduct and civil conspiracy, and the Supreme Court acknowledged that the plaintiff could attempt to re-plead under these theories if the facts so warranted.

Counsel Must Educate the Court. The *Karas* court made its analysis of the wrongful conduct in question by drawing assumptions about the sport of ice hockey, including the assumption that dictionary definitions are adequate. Plaintiff had pleaded that the defendant had back-checked from behind, but the Supreme Court concluded, based on its reference to a definition in a 1993 edition of a dictionary, that the plaintiff must have really meant body-checked from behind. Much of the *Karas* court's analysis seems based on the court's assertion (and the parties' agreement) that body-checking is allowed in ice hockey.

Counsel would thus be well advised to cite reliable authoritative sources on the sport or activity in question to minimize the risk that the court might make mistaken assumptions about the sport and, thus, reach erroneous conclusions about the types of conduct that fall totally outside the range of ordinary activity. Similarly, counsel should consider carefully whether using sport jargon would predispose the court to conclude that the named conduct was to be expected and was thus within the range of ordinary activity.

For additional discussion of the contact sports exception and pleading requirements, see Illinois Tort Law § 14.03 (standard of care); Illinois Civil Procedure § 3.01 (pleading a cause of action).

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Pleading Standards: Vairo on Phillips v County of Allegheny

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Pleading Standards: Vairo on Phillips v County of Allegheny

By Georgene Vairo

April 16, 2008

SUMMARY: In *Phillips v. County of Allegheny*, the Third Circuit sets out a framework for analyzing the sufficiency of complaints in light of the Supreme Court's decision in *Bell Atlantic v. Twombly*. This commentary, by Moores Federal Practice Editorial Board member Georgene Vairo, discusses how the Third Circuits approach can serve as a useful guide for applying *Twombly*.

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ARTICLE: In *Phillips v. County of Allegheny*, 515 F.3d 224, 2008 U.S. App. LEXIS 2513 (3d Cir. Feb. 5, 2008), the Third Circuit finds that the United States Supreme Courts 2007 *Bell Atlantic Corp. v. Twombly* decision did not replace established *Fed. R. Civ. P. 8* notice pleading standards.

Facts and Procedural Background. After her son was murdered, the plaintiff sued various defendants alleging violations of her son's civil rights under 42 U.S.C. § 1983, and also raised wrongful death and survivorship claims under state law. The facts were quite horrific. The plaintiffs son and girlfriend were killed by the girlfriends former boyfriend. The former boyfriend was a 911 dispatcher who had obtained confidential information about her new boyfriends whereabouts from his own use of confidential 911 information, as well as information obtained from other 911 workers. The district court dismissed all the claims under *Fed. R. Civ. P. 12(b)(6)*. The Third Circuit found it necessary to pause here to re-evaluate our de novo standard of review in light of the Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) [discussed in July 2007 MOORES FEDERAL PRACTICE UPDATE, p. 149].

Bell Atlantic Corp. v. Twombly. In *Twombly*, the Supreme Court held that the plaintiffs had failed to state a claim under § 1 of the Sherman Antitrust Act. The plaintiffs had alleged that the defendants had engaged in parallel conduct, but had not pleaded facts making it plausible that the conduct was the product of a conspiracy. The Supreme Court also retired long-standing language from *Conley v. Gibson* [355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)], that a complaint may not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Third Circuits Take on *Twombly*. The Third Circuits opinion illustrates the bipolar nature of the Supreme Courts *Twombly* decision. On the one hand, the Third Circuit notes that *Twombly* introduces a new plausibility paradigm for

establishing the sufficiency of complaints. On the other hand, *Twombly* expressly indicates that it intended no drastic change in pleading standards. Even in retiring *Conley*'s no set of facts language, the Third Circuit said that the Supreme Court did not appear to have believed that it was really changing the *Fed. R. Civ. P. 8* or *Fed. R. Civ. P. 12(b)(6)* framework. Rather, *Twombly* expressly restated the text of *Fed. R. Civ. P. 8* as requiring only a short and plain statement of the claim showing that the pleader is entitled to relief. Additionally, the Court reaffirmed that the purpose of the Rule 8 requirement is to ensure a statement of claims sufficient to give the defendant fair notice of what the claim is and the grounds on which it rests. Further, the *Fed. R. Civ. P. 8* standard does not require detailed factual allegations. Additionally, *Twombly* reaffirmed that the facts alleged must be taken as true and a complaint may not be dismissed merely because it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on the merits. Nor did the Court speak to or appear to change the rule that reasonable inferences must be drawn in favor of the plaintiff.

Comment. By emphasizing how *Twombly* adheres to past understandings of *Fed. R. Civ. P. 8*, the Third Circuit clearly is setting itself up to limit the reach of *Twombly*. Although, the Third Circuit identified three new concepts in *Twombly*, the Third Circuit finds that the *Twombly* opinion is not as far-reaching as some commentators and courts have suggested.

Factual Allegations May Be Necessary to Satisfy Fair Notice Requirement. First, the Supreme Court elevates the importance of the word showing in *Fed. R. Civ. P. 8*. While a complaint does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of entitlement to relief requires more than labels and conclusions. A formulaic recitation of the elements of a cause of action will not do. Rather, *Fed. R. Civ. P. 8* expressly requires a showing, rather than a blanket assertion, of entitlement to relief. The plaintiff's factual allegations must be enough to raise a right to relief above the speculative level. While the Supreme Court expressly reaffirmed that *Fed. R. Civ. P. 8* requires only a short and plain statement of the claim and its grounds, the new emphasis on a showing requires courts to more carefully analyze the facts alleged.

Accordingly, the Third Circuit creates another new concept to provide content to the showing requirement: the showing requirement requires a focus on the context of the required short, plain statement. In other words, context matters in notice pleading. Fair notice under *Fed. R. Civ. P. 8* depends on the type of case and some cases will require at least some factual allegations to make out a showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests. [Quoting *Twombly*, 127 S. Ct. at 1964, 167 L. Ed. 2d at 940.] The Third Circuit then found that *Twombly* and the Court's contemporaneous opinion in *Erickson v. Pardus*, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007), in which the Court took a more liberal approach to a pro se complaint, instructed that situations may arise where the factual detail in a complaint is so undeveloped that it does not provide a defendant the type of fair notice of claim that *Fed. R. Civ. P. 8* contemplates. Put another way, in light of *Twombly*, *Fed. R. Civ. P. 8(a)(2)* requires a "showing" rather than a blanket assertion of an entitlement to relief. The Third Circuit cautioned that without some factual allegations in the complaint, a claimant cannot satisfy the requirement that he or she has provided not only fair notice, but also the grounds on which the claim rests.

Comment. Whether the Third Circuit's notion that looking at the context of the claim will help determine whether the plaintiff has made a sufficient showing to satisfy *Fed. R. Civ. P. 8*'s fair notice requirement remains to be seen. However, it is a sensible approach, and provides a good segue to the plausibility standard, discussed below, enunciated by the Supreme Court in *Twombly*.

Rejection of *Conley* Language. Second, the Supreme Court clearly disavowed indeed retired the no set of facts language from *Conley*. That formulation may no longer be used as part of the *Fed. R. Civ. P. 12(b)(6)* standard. The Supreme Court, the Third Circuit said, appears to have rejected a hyper-literal understanding of *Conley*'s language. The no set of facts language could, in isolation, be read as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown on the face of the pleadings. Thus, a wholly conclusory statement of the claim would survive a motion to dismiss whenever the pleading left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery. The Supreme Court emphasized, however, that it was neither demanding a heightened pleading of specifics nor imposing a probability requirement.

Accordingly, under the Third Circuit's reading, the notice pleading standard of *Fed. R. Civ. P. 8* remains intact, and courts may generally state and apply the *Fed. R. Civ. P. 12(b)(6)* standard, attentive to context and a showing that the pleader is entitled to relief, sufficient to give the defendant fair notice. It remains an acceptable statement of the *Fed. R. Civ. P. 12(b)(6)* standard that courts accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.

Plausibility Standard Not Limited to Antitrust Cases. The third, and most difficult, new concept the Third Circuit wrestled with is the plausibility standard enunciated in *Twombly*. Arguably, *Twombly* did not apply in the context of the civil rights case before the Third Circuit. The certiorari petition in *Twombly* involved the question of pleading in antitrust cases. Nonetheless, as suggested in our analysis of *Twombly* [discussed in July 2007 MOORES FEDERAL PRACTICE UPDATE, p. 149], the Third Circuit concluded that this aspect of *Twombly* applies to the *Fed. R. Civ. P. 12(b)(6)* standard in general and is not limited to antitrust cases. The numerous references to plausibility in *Twombly*, the Third Circuit said, seem to counsel reliance on the concept as a standard for notice pleading generally. Yet the *Twombly* decision repeatedly indicated that the Court was not adopting or applying a heightened pleading standard. We are not alone in finding the opinion confusing. . . . The issues raised by *Twombly* are not easily resolved, and likely will be a source of controversy for years to come. Therefore, we decline at this point to read *Twombly* so narrowly as to limit its holding on plausibility to the antitrust context.

Comment. Given the somewhat confusing nature of *Twombly*, the Third Circuit would have been well within its rights to take a narrow approach to the plausibility element, rather than a broader reading. However, the Third Circuit is correct that plausibility is related to the *Fed. R. Civ. P. 8* requirement of a showing. By adding the idea of context, the Third Circuit provides a way of understanding how to bridge from the showing requirement to the plausibility requirement. The concept of a showing requires notice of a claim and its grounds sufficient to show that the pleader is entitled to relief. That is, there must be some showing, given the context of the claim C be it antitrust or civil rights or whatever claim is alleged C sufficient to justify moving the case beyond the pleadings to the next stage of litigation. In other words, as the Supreme Court put it, it is not imposing a probability requirement at the pleading stage." Rather, the plaintiff must allege "enough facts to raise a reasonable expectation that discovery will reveal evidence of" the necessary elements of the claim.

Application. According to the Third Circuit, the complaint here clearly satisfied this pleading standard with respect to some defendants, by making a sufficient showing of enough factual matter (taken as true) to suggest the required elements of the plaintiff's claims. Thus, the district court erred in dismissing these claims. With respect to other defendants, there was no error in the dismissal. However, a district court must provide a plaintiff an opportunity to amend (in the Third Circuit, even if the pleader does not request it) unless an amendment would be inequitable or futile. So, all these claims were remanded to allow repleading. With respect to a third group of defendants, remand was unnecessary as the plaintiff could not plead a valid case against them and so repleading would be futile.

Conclusion. The Third Circuit opinion nicely blends the Supreme Courts new pleading concepts with its own. This blend provides a tool that should result in *Fed. R. Civ. P. 8* and *Fed. R. Civ. P. 12(b)(6)* being applied in the way that the framers of notice pleading originally intended. Certainly, the framers did not intend plaintiffs to be able to come into court and simply say they were injured by a particular defendant. Rather, by requiring a showing they intended that enough information be provided to defendants to justify moving to the discovery stage of litigation, which, as we all know, is the real ballgame.

The context idea provides the district judge with a way of determining whether the plaintiff has pleaded enough to move forward. While preparing the complaint, plaintiffs attorneys need to keep in mind that they need to plead enough facts to provide the district judge with the context for determining that the discovery plaintiff seeks will be worthwhile. The danger from the plaintiffs perspective is that the Third Circuit, like the Supreme Court, may be giving the courts some ability to engage in a cost benefit approach to whether a case will be allowed to live on.

References. 2 *Moore's Federal Practice (3d Ed.)* §§ 8.04, 12.34; 1 *Federal Litigation Guide* 1.34.

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Discovery Sanctions: Vairo on Qualcomm Inc. v. Broadcom Corp.

2008 Emerging Issues 2123

Discovery Sanctions: Georgene Vairo on Qualcomm Inc. v. Broadcom Corp.

By Georgene Vairo

April 16, 2008

SUMMARY: This commentary, written by Georgene Vairo, Professor and author and editor of several books including several chapters in Moores Federal Practice, outlines the courts reasoning in awarding high sanctions and notes the relationship between retained and corporate attorneys when conducting broad e-discovery.

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ARTICLE: Qualcomm Inc. v. Broadcom Corp., -- F.R.D. -, 2008 U.S. Dist. LEXIS 911 (S.D. Cal. Jan. 7, 2008), is a high-profile patent infringement case in which a magistrate judge imposed one of the highest monetary discovery sanctions awards ever, as well as serious non-economic sanctions. The sanctions order raises serious questions about the problems associated with conducting broad electronic discovery in large business organizations and in large complex cases, the relationship between inside and outside counsel conducting such discovery, the sanctioning power of the court, and the role ethical considerations should play in e-discovery. However, the district court vacated the magistrate judge's order, holding that the outside counsel ought to have been allowed to pierce the attorney-client privilege to defend themselves. Qualcomm Inc. v. Broadcom Corp., -- F.R.D. -, 2008 U.S. Dist. LEXIS 16897 (S.D. Cal. March 5, 2008).

Sanctions Imposed by Magistrate Judge. The magistrate judge in the United States District Court for the Southern District of California sanctioned both a party and its counsel when it was discovered through trial testimony that the party failed to disclose thousands of e-mails and other documents relevant to the case. The court ordered the plaintiff to pay all the defendant's attorneys' fees and costs, \$8.5 million, for "monumental and intentional discovery violation." In addition, the court found that six Qualcomm attorneys engaged in "intentionally hiding or recklessly ignoring relevant documents... and blindly accepting Qualcomm's unsupported assurances that its document search was adequate." The court ordered the six attorneys to submit to state ethics authorities, and ordered Qualcomm's legal department to engage in a comprehensive internal investigation of its discovery practices, and to report its findings and recommendations to the court.

Background. Qualcomm filed a patent infringement action alleging Broadcom Corporation's infringement of certain Qualcomm patents. Broadcom filed a counterclaim alleging that at least one of the patents was unenforceable due to inequitable conduct. Broadcom also asserted the affirmative defense of waiver predicated on Qualcomm's participation in the Joint Video Team ("JVT"), a standards-setting body that created the H.264 standard, which governs

video coding. The allegedly infringing products were based on the H.264 standard.

Over the course of discovery, Broadcom expressly and specifically had sought information about Qualcomm's participation in and communications with the JVT through a variety of discovery means, including requests for production of documents, interrogatories, and multiple Rule 30(b) deposition notices. As the case progressed, Qualcomm strenuously argued that it did not participate in the JVT during the time the JVT was creating the H.264 standard. This argument was essential to Qualcomm because if it had participated in the creation of the H.264 standard, it would have been required to identify its patents that reasonably may be essential to the practice of the H.264 standard, and to license them royalty-free or under nondiscriminatory, reasonable terms. Thus, participation in the JVT during the creation of the H.264 standard would have prohibited Qualcomm from suing companies utilizing the H.264 standard.

After trial had commenced, and while preparing Qualcomm witness Viji Raveendran to testify, one of Qualcomm's attorneys discovered an August 6, 2002 email to this witness, welcoming her to the mailing list for the JVT. Several days later, the attorney and Raveendran searched her computer and discovered 21 other emails from the JVT mailing list, none of which Qualcomm had produced in discovery. Raveendran had maintained them on her computer for more than four years. The Qualcomm trial team decided not to produce these newly discovered emails to Broadcom, later claiming they were not responsive to Broadcom's discovery requests. Furthermore, the trial team failed to conduct any investigation to determine whether there were more emails from the JVT team to Qualcomm employees during the period the H.264 standard was being developed. In addition, one of Qualcomm's attorneys argued in a sidebar discussion against admission of the JVT email list, stating to the judge, "there's no evidence that any email was actually sent to this list."

During Raveendran's direct testimony, Qualcomm's attorney pointedly did not ask her any questions that would reveal the fact that she had received any of the 21 emails. Rather, he asked whether she had "any knowledge of having read" any emails from the mailing list. But on cross-examination, Broadcom's attorney asked the right question and Raveendran was forced to admit that she had received emails from the mailing list. Immediately following this admission, in response to Broadcom's request for the emails, and despite the fact that he had participated in the decision three days earlier not to produce them, another Qualcomm lawyer told the Court at sidebar: "[I]t's not clear to me [the emails are] responsive to anything. So that's something that needs to be determined before they would be produced .. I'm talking about whether they were actually requested in discovery.. . I'm simply representing that I haven't seen [the emails], and [whether Broadcom requested them] hasn't been determined." Nevertheless, during the lunch break that day, Qualcomm produced the 21 emails.

At the conclusion of the trial, the trial judge found "by clear and convincing evidence that Qualcomm, its employees, and its witnesses actively organized and/or participated in a plan to profit heavily by (1) wrongfully concealing the patents-in-suit while participating in the JVT and then (2) actively hiding this concealment from the Court, the jury, and opposing counsel during the present litigation." The judge also found that Qualcomm's attorneys participated "in an organized program of litigation misconduct and concealment throughout discovery, trial, and post-trial." The trial judge granted Broadcom's motion of an award of attorney's fees and litigation costs reasonably incurred by Broadcom in the defense of this case.

Following trial, Qualcomm continued to dispute the relevancy and responsiveness of the 21 emails. Qualcomm also resisted Broadcom's efforts to determine the scope of Qualcomm's discovery violations. However, Qualcomm's outside attorneys and its General Counsel eventually admitted to the trial judge that Qualcomm had searched the email archives of twenty-one employees and had located more than forty-six thousand documents (totaling more than three hundred thousand pages), which had been requested but not produced in discovery. They also noted that their review of these documents "revealed facts that appear to be inconsistent with certain arguments" made on Qualcomm's behalf at trial. Counsel apologized "for not having discovered these documents sooner and for asserting positions that [they] would not have taken had [they] known of the existence of these documents."

Broadcom made a motion for discovery sanctions, which the trial judge referred to the magistrate judge.

Authority for Imposition of Sanctions. The magistrate judge began by discussing the sources of its authority to award sanctions. *Rule 37 of the Federal Rules of Civil Procedure* authorizes a party to file a motion to compel an opponent to comply with a discovery request when the opponent fails to do so initially. The court is required to award reasonable attorney's fees to the prevailing party in such a motion, unless the court finds that the losing party's position was "substantially justified" or other circumstances make such an award unjust. Depending on the circumstances, the court may require the attorney, the client, or both to pay the awarded fees [see *Fed. R. Civ. P. 37(a)*]. If the court grants a discovery motion and the losing party fails to comply with the order, the court may impose additional sanctions against that party [see *Fed. R. Civ. P. 37(b)*].

Discovery sanctions are also available under Rule 26(g), which provides that an attorney must certify that "to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is: consistent with the rules and law, not interposed for an improper purpose, and not unreasonable or unduly burdensome or expensive." If an attorney makes an incorrect certification without substantial justification, the court must sanction the attorney, party, or both and the sanction may include an award of reasonable attorney's fees. If a party, without substantial justification, fails to amend a prior response to discovery as required by Rule 26(e)(2), the court may also impose sanctions.

Finally, in addition to this rule-based authority, federal courts have inherent power to sanction litigants to prevent abuse of the judicial process.

Limits on Broadcom's Remedies Under Rules 37 and 26. Qualcomm argued that Broadcom was not entitled to sanctions under Rule 37(a) or (b) because Broadcom never filed a motion to compel. The magistrate judge noted that Broadcom had no reason to file a motion to compel because Qualcomm produced documents and answered interrogatories (even though falsely and incompletely). Unfortunately for Broadcom, nonetheless, the failure to file a motion to compel did restrict Broadcom's remedies to sanctions other than those available under Rule 37(a) and (b). Furthermore, Rule 26(g) only imposes liability on the attorney who signed the discovery request or response. Under a strict interpretation of the rules, the only attorney who could be held responsible for the discovery failure was the sole attorney who signed the false discovery responses. However, numerous Qualcomm attorneys were involved in the discovery proceedings in this case. Moreover, Qualcomm's suppression of the documents actually put its retained attorneys in a better legal position than they would have been in if Qualcomm had refused to produce the documents and Broadcom had been forced to compel their production.

Comment. The magistrate judge rightly criticized Qualcomm's gamesmanship. Why should Broadcom file a motion to compel when Qualcomm had agreed to produce the documents? As a practical matter, Qualcomm's argument would require the filing of prophylactic motions to compel to preserve their rights in case the other side hides documents. Fortunately for the wronged party, there are other sanctions mechanisms that provide a remedy without the filing of such motion. Those mechanisms were used by the court to exact onerous sanctions on Qualcomm and some of its attorneys.

Duty of Good Faith Discovery. Citing the Advisory Committee Note to the 1983 amendment to Rule 26, the magistrate judge read into Rule 26(g) a duty to respond to discovery in good faith. [See *Fed. R. Civ. P. 26* Advisory Committee Notes (1983 Amendment) (Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37)]. This duty is heightened in this age of electronic discovery when attorneys may not physically touch and read every document within the client's custody and control. The magistrate judge opined that this "good faith requirement" falls heavily on the attorney, who should ensure that clients conduct a comprehensive and appropriate document search. Producing 1.2 million pages of marginally relevant documents while hiding 46,000 critically important ones does not constitute good faith and does not satisfy either the client's or the attorney's discovery obligations. The court concluded that Qualcomm intentionally withheld tens of thousands of decisive documents from its opponent in an effort to win this case and gain a strategic business advantage over Broadcom. Qualcomm could not have achieved this goal without some type of assistance or deliberate ignorance from its attorneys. Accordingly, the magistrate judge concluded that it should sanction both

Qualcomm and some of its retained attorneys under its inherent power.

Comment. The magistrate judge later correctly stated that the applicable discovery rules do not adequately address the misconduct in this case. Rule 26(g) only imposes liability upon the attorney who signed the discovery request or response. Similarly, Rule 37(a) authorizes sanctions against a party or attorney only if a motion to compel is filed; Rule 37(b) authorizes sanctions against a party or an if the party fails to comply with a discovery order; and Rule 37(c) only imposes liability upon a party for the party's failure to comply with various discovery obligations. Under a strict interpretation of these rules, only one attorney would be responsible for the discovery failure because he signed the false discovery responses. However, the magistrate judge read into Rule 26(g) and the federal rules "a duty of good faith and reasonable inquiry on all attorneys involved in litigation who rely on discovery responses executed by another attorney." The court warned that attorneys may not use inadequate or misleading discovery responses to present false and unsupported legal arguments. Additionally, given the egregious conduct in this case, the facts of the Qualcomm case also justified the imposition of sanctions against all attorneys involved in the suppression of relevant e-discovery pursuant to the Court's inherent power.

How (Not) to Comply with Good Faith Duties Part One: The Corporation. The magistrate judge distinguished between the conduct of the corporation and the retained attorneys. First, it found that Qualcomm had violated its discovery obligations by failing to produce more than 46,000 emails and documents that were requested in discovery. Further, Qualcomm did not establish "substantial justification" for its failure to produce the documents, or, indeed, any evidence attempting to explain or justify its failure to produce the documents. Despite the fact that it maintained detailed records showing whose computers were searched and which search terms were used, Qualcomm did not present any evidence establishing that it searched for the relevant records or emails on its computer system or email databases, or that it searched the computers or email databases of the individuals who testified on its behalf at trial or in depositions. Failing to perform these basic searches at any time before the completion of trial indicated that Qualcomm intentionally withheld the documents. Once the documents surfaced, it still did not produce them, and instead, opposed Broadcom's efforts to obtain the documents.

Additionally, Qualcomm's claim of inadvertence was belied by the massive volume and direct relevance of the suppressed documents. It was inexplicable that it was able to locate the documents that either supported, or did not harm its arguments, but was unable to locate the documents that hurt its arguments. The bottom line for the court: it was "inconceivable that Qualcomm was unaware of its involvement in the JVT and of the existence of these documents."

Finally, Qualcomm failed to heed several warning signs that should have alerted it to the fact that its document search and production were inadequate. For example, with respect to the depositions of two employees, Irvine and Ludwin, testifying as the Qualcomm employee most knowledgeable about its involvement in the JVT, Qualcomm did not search either person's computer for JVT documents, did not provide either person with relevant JVT documents to review, and did not make any other efforts to ensure each person was in fact knowledgeable about Qualcomm "s JVT involvement. When a witness is testifying as an organization's most knowledgeable person on a specific subject, the organization has an obligation to conduct a reasonable investigation and review to ensure that the witness does possess the organization's knowledge. The magistrate judge concluded that Qualcomm intentionally withheld tens of thousands of decisive documents from its opponent in an effort to win a case and to gain a strategic business advantage over Broadcom.

Comment. Beyond the obvious wrongdoing and willful inadvertence, so to speak, the opinion provides a primer on how to conduct proper discovery. It states: "An adequate investigation should include an analysis of the sufficiency of the document search and, when electronic documents are involved, an analysis of the sufficiency of the search terms and locations. In the instant case, a reasonable inquiry should have included using the JVT, avc and H.264 search terms and searching the computers of Raveendran, Irvine, Ludwin (and other Qualcomm employees identified in the emails discovered on the computers of these witnesses). This minimal inquiry would have revealed the existence of the suppressed documents. Moreover, the fact that Broadcom alleged, and Qualcomm agreed or acquiesced, that Irvine was not sufficiently knowledgeable about Qualcomm's JVT involvement or adequately prepared for her deposition, should

also have alerted Qualcomm to the inadequacy of its document search and production."

Additionally, the opinion neatly distinguishes between inside and outside counsel's obligations. Qualcomm had made self-serving statements that "outside counsel selects .. the custodians whose documents should be searched" and the paralegal does not decide "what witnesses to designate to testify on behalf of the company." Hiding behind retained counsel, or blaming the paralegal, does not relieve a corporate party of its obligations to the court. Qualcomm made no showing of any evidence establishing what actions, if any, it took to ensure it designated the correct employee, performed the correct computer searches, and presented the designated employee with sufficient information to testify as the corporation's most knowledgeable person. Hiding behind outside counsel was inappropriate also because Qualcomm did not present any evidence that outside counsel knew enough about the corporation's organization and operation to identify all of the individuals whose computers should be searched and determine the most knowledgeable witness. Most importantly, because Qualcomm is a large corporation with an extensive legal staff; it clearly had the ability to identify the correct witnesses and determine the correct computers to search and search terms to use.

How (Not) to Comply with Good Faith Duties Part Two: Retained Counsel. The magistrate judge did not spare the rod with retained counsel either. Rather, it found that Qualcomm could not have achieved its litigation goals without some type of assistance or deliberate ignorance from its retained attorneys. It began by questioning the assertions of Qualcomm's attorneys that they "innocently" failed to discover the intentionally hidden documents or even suspect their existence. The charge against outside counsel was not intentional concealment but willful blindness and tacit complicity in the client's discovery misbehavior. The Court discussed four scenarios that might explain outside counsel's role in connection with the client misconduct: 1) Qualcomm intentionally effectively hid the documents from its retained lawyers so that the lawyers did not know or suspect that the suppressed documents existed; 2) the retained lawyers failed to discover the intentionally hidden documents or suspect their existence due to their complete ineptitude and disorganization; 3) Qualcomm shared the damaging documents with its retained lawyers (or at least some of them) and the knowledgeable lawyers worked with Qualcomm to hide the documents and all evidence of Qualcomm's early involvement in the JVT; or 4) while Qualcomm did not tell the retained lawyers about the damaging documents and evidence, the lawyers suspected there was additional evidence or information but chose to ignore the evidence and warning signs and accept Qualcomm's incredible assertions regarding the adequacy of the document search and witness investigation.

The magistrate judge rejected the first two scenarios, successful client deception of the lawyers or lawyer ineptitude, as "inconceivable" given the impressive credentials of plaintiff's outside counsel, the massive nature of the non-production, and the numerous corporate employees involved in the misconduct. The judge also found no direct evidence showing intentional, knowing involvement by counsel in client misconduct. It thus held that the lawyers engaged in sanctionable misconduct under scenario four:

"[T]he Court finds it likely that ... one or more of the retained lawyers chose not to look in the correct locations for the correct documents, to accept the unsubstantiated assurances of an important client that its search was sufficient, to ignore the warning signs that the document search and production were inadequate, not to press Qualcomm employees for the truth, and/or to encourage employees to provide the information (or lack of information) that Qualcomm needed to assert its non-participation argument and to succeed in this lawsuit. These choices enabled Qualcomm to withhold hundreds of thousands of pages of relevant discovery and to assert numerous false and misleading arguments to the court and jury."

Comment. Retained counsel who choose to ignore evidence and warning signs that the client's document search was inadequate do so at their peril. The court emphasized that the attorneys failed to conduct a reasonable inquiry, under their "good faith" duty, to determine whether discovery responses were sufficient and proper. At the very least, a reasonable inquiry should have included searches using fundamental terms such as "JVT," "H.264," and the JVT's email list on computers belonging to knowledgeable people such as Raveendran and other Rule 30(b)(6) witnesses. None of the computers of the Rule 30(b)(6) deponents selected to speak on behalf of the corporation were searched for JVT-related emails until after trial. At the very least, before signing off on discovery responses, Qualcomm's retained

counsel should have insisted on reviewing Qualcomm's records regarding the locations searched and the terms utilized.

Sanctions Imposed. The magistrate judge imposed monetary sanctions against Qualcomm, and referred some of the Qualcomm attorneys to the State Bar for further investigation. Qualcomm was sanctioned the cost of all of Broadcom's litigation expenses -- fees and costs -- in the sum of \$8,568,633.24, with an offset to the extent it made payments to its adversary pursuant to the district court's liability findings. Because of the size of the award, the magistrate judge declined to impose a fine.

With respect to retained counsel, the court enumerated the sanctionable conduct of six of the attorneys responsible for the discovery violations, and specifically exonerated others because they were not involved in the suppression or could have prevented it. The sanctions imposed on the six attorneys, in addition to referral to state disciplinary authorities, consisted of a finding that "the Sanctioned Attorneys assisted Qualcomm in committing this incredible discovery violation by intentionally hiding or recklessly ignoring relevant documents, ignoring or rejecting numerous warning signs that Qualcomm's document search was inadequate, and blindly accepting Qualcomm's unsupported assurances that its document search was adequate. The Sanctioned Attorneys then used the lack of evidence to repeatedly and forcefully make false statements and arguments to the court and jury. As such, the Sanctioned Attorneys violated their discovery obligations."

More creative, however, was the magistrate's order that Qualcomm and the sanctioned attorneys participate in a comprehensive Case Review and Enforcement of Discovery Obligations (CREDO) program. This is a collaborative process to identify the failure in the case management and discovery protocol utilized by Qualcomm and its in-house and retained attorneys in this case, to craft alternatives that will prevent such failures in the future.

At a minimum, the CREDO protocol must include a detailed analysis: (1) identifying the factors that contributed to the discovery violation; (2) creating and evaluating proposals, procedures, and processes that will correct the deficiencies identified in subsection (1); (3) developing and finalizing a comprehensive protocol that will prevent future discovery violations; (4) applying the protocol that was developed in subsection (3) to other factual situations, such as when a client does not have in-house counsel, when the client has a single in-house lawyer, when the client has a large legal staff, and when there are two law firms representing one client; (5) identifying and evaluating data tracking systems, software, or procedures that corporations could implement to better enable inside and outside counsel to identify potential sources of discoverable documents; and (6) any other information or suggestions that will help prevent discovery violations in the future.

Comment. Unquestionably, the magistrate's opinion is significant and provides guidance going forward as to how retained and corporate attorneys must cooperate and undertake discovery to meet their good faith obligations. Indeed, the district court already has vacated the portion of the magistrate judge's opinion with respect to retained counsel, holding that the magistrate judge should have granted retained counsels' motion to pierce the attorney-client privilege. *Qualcomm Inc. v. Broadcom Corp.*, -- F.R.D. -, 2008 U.S. Dist. LEXIS 16897 (S.D. Cal. March 5, 2008).

District Court Proceedings. The district court noted that the retained attorneys had filed a Motion for an Order Determining that the Federal Common law Self-Defense Exception to Disclosing Privileged and/or Confidential Information Applies to the sanctions motion before the magistrate judge. The motion was denied. Thereafter, as discussed above, the magistrate judge imposed the sanctions on Qualcomm, some of its attorneys and six retained counsel. The district court, on appeal from the sanctions order, confirmed that the magistrate judge had jurisdiction to award the sanctions. However, it ruled that on remand, the retained attorneys should be permitted to pierce the attorney-client privilege on the grounds of self-defense. After Qualcomm refused to waive the privilege before the sanctions proceeding before the magistrate judge, it filed declarations that were critical of the retained counsel. "This introduction of accusatory adversity between Qualcomm and its retained counsel regarding the issue of assessing responsibility for the failure of discovery changes the factual basis which supported the court's earlier order denying the self-defense exception to Qualcomm's attorney-client privilege." Accordingly, it vacated and remanded the sanctions order with respect to the six retained attorneys.

The district court also provided ground rules for any further hearings ordered by the Magistrate Court. It ruled that the retained attorneys may defend their conduct by any procedures permitted by the Magistrate Court, including declarations, depositions and testimony of the retained attorneys as well as any other percipient witnesses. It also specifically noted that in the proceedings, the retained attorneys may not be prevented from defending their conduct by the attorney-client privilege of Qualcomm and its employees and representatives.

It also granted Broadcom the right to fully participate. Additionally, Qualcomm was provided the right, but not required, to fully participate in any further sanctions proceedings without any exposure to further sanctions of Qualcomm or any of its employees. The district court noted that the order with respect to Qualcomm was final and was, in fact, nearly fully satisfied. Finally, the district court noted that the magistrate judge's "discretion regarding responsibility and sanctions, if any, are not limited, either upwardly or downwardly, by the Order of Remand."

Comment. It is notable that the district court did not suggest that the magistrate judge was incorrect in originally denying the motion to pierce the privilege. Rather, changed circumstances dictated their right to pierce. Similarly, the district court's comment about the magistrate judge's discretion demonstrates that the retained attorneys are not necessarily out of the woods. Recall that the magistrate judge imposed sanctions against the retained attorneys after finding that they had failed to conduct a reasonable inquiry and had blindly accepted the client's assertions. According to the magistrate judge, they recklessly ignored relevant documents and numerous warning signs that Qualcomm's document search was inadequate, and they blindly accepted unsupported assurances that Qualcomm's document search was adequate.

It is also notable that the district court order goes beyond the usual situations where attorneys are permitted to pierce the privilege, such as malpractice suits, State Bar disciplinary proceedings, and fee disputes, to the introduction of accusatory adversity. In other words, once the attorney and the client start to blame each other, the court will allow piercing, which would prevent clients from gaming the system by pointing to the attorney while hiding possible wrongdoing of their own.

Nonetheless, it is difficult to predict what will happen on remand. The retained attorneys will get their full due process, but given the harsh tone, specific basis for awarding sanctions, as well as the meticulous recitation of the shortcomings of the six sanctioned attorneys, in the magistrate judge's sanctions order, it is questionable whether anything revealed in further proceedings will lead to their exoneration. Stay tuned.

References. 6 *Moore's Federal Practice* (3d Ed.) § 26.154; 7 *Moore's Federal Practice* (3d Ed.) §§ 37A.50, 37A.53.

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Wald on Inadvertent Disclosure

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Wald on Inadvertent Disclosure

By Eli Wald

March 18, 2008

SUMMARY: In *Rico v. Mitsubishi Motors Corp.*, 42 Cal. 4th 807, 68 Cal. Rptr. 3d 758, 171 P.3d 1092 (Cal. 2007), the California Supreme Court explored the duties owed by an attorney who receives privileged documents through inadvertence to opposing counsel and held that a lawyer may not read the documents more closely than is necessary to ascertain that they are privileged. Once it becomes apparent that the documents are privileged, an attorney must promptly notify the opposing counsel and try to resolve the situation. An attorney who fails to meet this standard of professional conduct and makes full use of the privileged documents, causing irreversible damage to opposing counsel, may be disqualified. This Commentary, written by Professor Eli Wald, a legal ethics expert and member of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct and the Colorado Bar Association Ethics Committee, summarizes the pertinent legal issues decided by the Court, and offers Practice Tips and examples for attorneys.

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Overview

In *Rico v. Mitsubishi Motors Corp.*, 42 Cal. 4th 807, 68 Cal. Rptr. 3d 758, 171 P.3d 1092 (Cal. 2007), the California Supreme Court explored the duties owed by an attorney who receives privileged documents through inadvertence of opposing counsel and held that a lawyer may not read the documents more closely than is necessary to ascertain that they are privileged. Once it becomes apparent that the documents are privileged, an attorney must promptly notify the opposing counsel and try to resolve the situation. An attorney who fails to meet this standard of professional conduct and makes full use of the privileged documents, causing irreversible damage to opposing counsel, may be disqualified. This Commentary, written by Professor Eli Wald, a legal ethics expert and member of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct and the Colorado Bar Association Ethics Committee, summarizes the pertinent legal issues decided by the Court, and offers Practice Tips and examples for attorneys.

Factual Background

Defense attorney Yukevich deposed plaintiffs expert witness at the offices of plaintiffs counsel Johnson. A document privileged under the work product rule prepared by Yukevich found its way into the hands of Johnson. Yukevich argued that the document was removed from his file while he was out of the room; Johnson maintained that the document was accidentally given to him by the court reporter and the trial court found that Johnson came into possession of the document through inadvertence. *Rico v. Mitsubishi Motors Corp.*, 42 Cal. 4th 807, 810811, 68 Cal. Rptr. 3d 758, 171 P.3d 1092 (Cal. 2007). Johnson admitted that he knew within a minute or two that the document related to defendants case, that Yukevich did not intend to produce it and that that the document could be used to impeach defendants expert witnesses testimony. Nonetheless, Johnson made a copy of the document and used it at the subsequent deposition of plaintiffs experts. *Rico*, at 811. As soon as Yukevich realized that Johnson had a copy of his privileged document, he wrote to Johnson demanding the return of all duplicates and moved to disqualify Johnson and plaintiffs entire legal team. *Rico*, at 813.

Pertinent Legal Questions

- (1) What action is required of an attorney who receives privileged documents through inadvertence?
- (2) What is the appropriate remedy against an attorney who fails to take required action following inadvertent disclosure of privileged documents by opposing counsel?

The Decision

(1) Action required of an attorney who receives privileged documents through inadvertence of opposing counsel. Regarding the action required of an attorney who receives through the inadvertence of opposing counsel privileged documents, the Court adopted a standard promulgated by the California court of appeals in *State Comp. Ins. Fund v. WPS, Inc.*, 70 Cal. App. 4th 644, 656657 (1999) (hereinafter *State Fund*):

When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified.

Rico, at 817.

The Court reasoned that the *State Fund* standard supports the work product doctrine, Cal. Code Civ. Proc. § 2018.030, is consistent with Californias policy to [p]reserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare for their cases thoroughly *Rico*, at 818, citing Cal. Code Civ. Proc. § 2018.020(a), and is necessary given contemporary practice realities of massive discoveries, under which a contrary standard could severely disrupt the discovery process. *Rico*, at 818.

Practice Tip #1. The *Rico* standard is an objective one. In considering whether a document inadvertently disclosed is privileged an attorney should consider:

- . Whether reasonable competent counsel, knowing the relevant circumstances of the litigation, would have concluded the document was privileged.

- . The extent and scope of review reasonably necessary to draw that conclusion.

- . When counsels examination of the document in question should have ended.

Rico, at 818.

Example #1. A document may reasonably be deemed privileged even in the absence of prominent notations of privilege or confidentiality.

Practice Tip #2. Under the *Rico* standard, an attorney must promptly notify opposing counsel that he or she is in possession of inadvertently disclosed privileged documents.

Practice Tip #3. The *Rico* holding holds attorneys to a reasonable standard of conduct when privileged or confidential documents are inadvertently disclosed by opposing counsel. An attorney has an obligation to protect his or her clients interests, but, under *Rico*, a lawyer should also respect the legitimate interests of fellow members of the bar in representing their clients.

Rico, at 818.

The Court found that Johnsons admissions and subsequent conduct demonstrated a violation of the *State Fund* standard. Johnson admitted he realized shortly after beginning to examine the document in question that it was privileged, yet he did not promptly notify Yukevich and instead made a copy of the document and used it to impeach the defendants expert witnesses.

(2) Appropriate remedies against an attorney who fails to meet the requirements of the *Rico* standard and makes full use of the privileged document. The Court explained that disqualification should generally be frowned upon as a remedy against lawyers violating standards of professional conduct because such a sanction interferes with a partys right to representation by chosen counsel. *Rico*, at 819. An appropriate remedy could be an award of monetary sanctions. *Id.* at 817. The Court reasoned further, however, that in circumstances where the offending attorney makes full use of the privileged information causing unmitigable damage to, and placing the other party at a great disadvantage, disqualification may be appropriate. *Id.* at 819.

Applying the rule, the Court found that Johnsons use of the privileged document undermined the defense experts opinions and caused the defendants irreversible damage; the Court upheld the disqualification order. *Id.*

Analysis

(1) When does an attorney know that a document is privileged? *Rico* does not explicitly address the question of when an attorney knows that a document is privileged. Rather, the Court states: Once it becomes apparent that the content is privileged, counsel may immediately notify opposing counsel and try to resolve the situation. *Rico*, at 810. The Court does note, however, that the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged. *Id.* at 817.

The *Rico* holding--not adopting a bright line rule regarding when a lawyer knows a document is privileged--is consistent with the approach taken by the American Bar Association Model Rules of Professional Conduct. Rule 4.4,

entitled Respect for Rights of Third Persons, reads in subsection (b): A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender. ABA Model Rule 1.0(f) defines knowledge of an attorney to mean actual knowledge which may be inferred from the circumstances, ABA Model Rule of Professional Conduct, R. 1.0(f) (2007), and Rule 1.0(j) defines "reasonably should know" when used in reference to a lawyer to mean that a lawyer of reasonable prudence and competence would ascertain the matter in question. ABA Model Rule of Professional Conduct, R. 1.0(j) (2007).

Indeed, the *Rico* Courts promulgation of a standard to evaluate whether a document is privileged--cautioning attorneys against examining the materials any more than is essential to ascertain if the materials are privileged -- *Id.* at 817, is also consistent with the approach adopted by the ABA and other jurisdictions. *See*, ABA Formal Ethics Op. 92-368 (1992) (a lawyer who receives privileged documents inadvertently must notify the sender and resist the temptation to examine the materials further). *See generally*, Gloria A. Kristopek, To Peek or Not to Peek: Inadvertent or Unsolicited Disclosure of Documents to Opposing Counsel, 33 *Val. U. L. Rev.* 643 (1999).

(2) The appropriate remedy against an attorney who fails to meet the requirements of the *Rico* standard.

Courts faced with the problem of unringing the bell after inadvertent disclosure, *see, Rico*, at 813, have considered remedies ranging from ordering return of the materials in question to the sender and destruction of all copies in possession of the recipient, *see, Resolution Trust Corp. v. First of Am. Bank*, 868 *F. Supp.* 217 (*W.D. Mich.* 1994), to awarding monetary sanctions and to, in appropriate circumstances, disqualifying the offending attorney, *Rico*.

In *Elkton Care Ctr. Assocs. LP v. Quality Care Mgmt., Inc.*, 805 A.2d 1177 (*MD.* 2002), the Maryland Court of Appeals explored the consequences of inadvertent disclosure and reasoned compellingly that the outcome must balance the violation of standards of professional conduct by the receiving attorney against the culpability of the sending attorney inadvertently disclosing the privileged materials. *See, id.* at 1184; CO Ethics Op. 108 (2000). *See generally*, Andrew M. Perlman, Untangling Ethics Theory from Attorney Conduct Rules: The Case of Inadvertent Disclosures, 13 *Geo. Mason L. Rev.* 767 (2006), striking the balance between assessing the conduct of inadvertent senders and receivers of privileged materials by arguing that receiving lawyers should have an affirmative duty not to read and comply with senders instructions regarding the documents if the senders notify the recipients that the documents were inadvertently sent before the receiving lawyers have read the documents. However, if the senders do not discover their mistakes, receiving lawyers must immediately stop reading the documents once they realize they are privileged but have the discretion whether to notify sender about their mistakes. *See, id.* at 796-816. *See also*, Michael J. Dileria, Note: *Federal Rule of Civil Procedure 26(b)(5)(B)* and the Ethics of inadvertent Disclosure, 20 *Geo. J. Legal Ethics* 533 (2007) (balancing *F.R.C.P.* 26(b)(5)(B), which requires the producing party to assert its privilege claim before the recipient incurs any obligations, against ABA Model Rule 4.4 and ethics opinions which impose an immediate obligation on the recipient to notify the sender).

The *Rico* Court disqualified Johnson and did not consider Yukevich's inadvertent disclosure a mitigating factor, let alone a waiver of privilege, in assessing whether Johnson's disqualification was warranted. The Court's finding is explained by the extreme factual underpinnings of the case. While the Court did not find that Johnson rifled through and removed the document from Yukevich's file and instead found that Johnson came into possession of the document through inadvertence, *Rico*, at 812, it did find that Yukevich was at no fault at all. The document arguably came into Johnson's possession through the hands of the court reporter, Yukevich and his defense team inquired about the use of an unknown document by Johnson, *id.* at 813, and promptly upon learning that Johnson was using the document Yukevich demanded the return of all copies and moved to disqualify Johnson. *Id.* Thus, given the facts of the case, the Court did not fault Yukevich and did not consider his inadvertent disclosure a waiver.

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Hedges on Proposed Rule of Evidence 502

2008 Emerging Issues 1989

Hedges on Proposed Rule of Evidence 502

By Ronald J. Hedges

March 5, 2008

SUMMARY: For the first time since 1975, the U.S. Congress is considering legislation, Senate Bill 2450, that would create a new Federal Rule of Evidence affecting privileges. If enacted into law, proposed Evidence Rule 502 would substantially change current law pertaining to waiver of the attorney-client privilege and work product protection. Ronald J. Hedges, counsel at the New York office of Nixon Peabody LLP and former U.S. magistrate, discusses the history, purpose, and potential impact of this important new legislation, which was intended to help cut rising litigation costs, particularly in the area of electronic discovery, as well as clarify inconsistencies in the common law pertaining to inadvertent disclosure and the scope of waiver.

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ARTICLE: A sea change in the law of privilege and waiver may soon be upon us. That change will come should Senate Bill 2450 be enacted into law. S. 2450 is intended to address the waiver of the attorney-client privilege and the work product doctrine, and would create a new *Federal Rule of Evidence 502*. n1

Unlike other amendments to the federal rules of practice and procedure that take effect unless Congress acts affirmatively to modify, defer, or reject it, "[a]ny such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." *See 28 U.S.C. § 2074(b)*.

On February 27, 2008, the U. S. Senate approved S. 2450 by unanimous consent without amendment. The bill has gone on to be voted upon by the U. S. House of Representatives.

Overview. Rule 502 is intended to apply in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection. Attorney-client privilege and work-product protection are defined in Rule 502(g)(1) and (2). Senator Leahy of Vermont, who introduced S.2450 on behalf of himself and Senator Specter of Pennsylvania, explained its purpose as follows:

Billions of dollars are spent each year in litigation to protect against the inadvertent disclosure of privileged materials. With the routine use of email and other electronic media in today's business environment, discovery can encompass millions of documents in a given case, vastly expanding the risks of inadvertent disclosure. [This rule] is aimed at adapting to the new realities that accompany today's modes of communication, and reducing the burdens

associated with the conduct of diligent electronic discovery. n2

Senator Specter went on to cite the need to provide clear guidelines for when privilege is or is not waived, the desire to not allow an inadvertent disclosure to result in a broad subject matter waiver beyond what was disclosed, and the importance of protecting parties who enter into confidentiality agreements as motivation for the rule change. n3

Rule 502(a) provides that, when a disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together. n4

Rule 502(b) concerns inadvertent disclosure: When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following *USCS Fed Rules Civ Proc R 26 (b)(5)(B)*. n5

Rule 502(c) concerns a disclosure made in a State proceeding which is not the subject of a State-court order concerning waiver. n6 The disclosure does not operate as a waiver in a Federal proceeding if the disclosure: (1) would not be a waiver under this rule if it had been made in a Federal proceeding; or (2) is not a waiver under the law of the State where the disclosure occurred. n7

Rule 502(d) addresses the controlling effect of federal court orders: A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the Court in which event the disclosure is also not a waiver in any other Federal or State proceeding. n8 Rule 502(e) concerns the controlling effect of a party agreement: An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order. n9

Rule 502(f) addresses the controlling effect of the rule itself: this rule applies to state proceedings and to federal court-annexed and federal courtmandated arbitration proceedings, in the circumstances set out in the rule. n10 Rule 502(f) goes on to state that, notwithstanding Rule 501, this rule [502] applies even if State law provides the rule of decision. n11

Brief History. Rule 502 should be considered the substantive counterpart to *Fed. R. Civ. P. 26(b)(5)(B)*, which established a uniform procedure among the federal courts to address claims of inadvertent disclosure. The latter is a procedural rule only, and does not address whether the privilege or protection that is asserted after production was waived by the production. n12 The adoption process differs as well: Unlike other Federal court rules, any proposed rule that modifies an evidentiary privilege must be approved by Congress pursuant to the Rules Enabling Act. n13

The costs that waiver of privilege causes have long been a concern, and in 2006 the task of creating a new rule was delegated to the Advisory Committee on Evidence Rules. n14 The Committee approved a version of Rule 502 after a mini-conference in April 2006. n15 The proposed rule had two major purposes:

(1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of material protected by the attorney-client privilege or the work product doctrine specifically those disputes involving inadvertent disclosure and selective waiver.

(2) It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product protection have become prohibitive due to the concern that any disclosure of protected information in the course of discovery (however innocent or minimal) will operate as a subject matter waiver

of all protected information. This concern is especially troubling in cases involving electronic discovery. n16

After public comment and revision, Rule 502 was submitted to the Senate by the Judicial Conference of the United States on September 26, 2007. In that submission, authored by Judge Lee H. Rosenthal, Chair of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference, problems that Rule 502 was intended to address were set forth: (1) the rising costs of discovery due to the time and effort necessary to preserve privilege and to prevent inadvertent disclosure, (2) the inconsistency and uncertainty of current law on inadvertent disclosure and the scope of waiver, and (3) the fact that third parties are not bound by agreements setting forth what the effect of disclosure would be. n17

Rule 502(b) would address inadvertent production. Rule 502(d) and (e) would address party agreements and orders. Rule 502(a) would address another area of contention: intentional disclosure to an agency. In doing so, it would appear to incorporate prevailing law, at least with regard to the near-universal rejection by courts of the concept of so-called selective waiver. n18

Rule 502 and Claw Back or Quick Peek Agreements. One issue that 502 would address stems from the sheer volume of the electronically stored information over which plaintiffs claims are asserted. In this regard, [p]arties sometimes try to facilitate discovery by agreeing that the disclosure of a privileged document will not be deemed a waiver with respect to that document or other documents involving the same subject matter. Some courts, however, have refused to enforce such agreements. n19 These are commonly known as quick peek or claw back agreements. Under the former, there is a purposeful disclosure of information, without intending to waive a claim of privilege, prior to production with an express reservation of the right to assert privilege at a later point in the discovery process. n20 Under the claw back agreement, the parties agree to a procedure for the return of apparently privileged information within a reasonable time of its discovery. n21

A concern with claw back and quick peek agreements is that these may not be binding on non signatories. Will production of privileged materials under an agreement be deemed a waiver vis--vis third parties? n22 Judicial compulsion may be a means to avoid third-party waiver. At least one court has directed a party to allow an adversary to inspect allegedly privileged documents as part of a meet and confer and concluded that this judicially-compelled disclosure would not give rise to a waiver. n23 This approach appears to have been embodied in Rule 502(d).

Questions Arising Under Rule 502. Several questions are likely to arise if S.2450 is enacted:

. Nonparties will be bound by federal court orders entered under Rule 502(d). The nonparty will presumably be required to seek leave to intervene in the federal court issuing the order to challenge it. How effective will this procedure be?

. Rule 502(d) does not require a prior meet-and-confer and agreement of the parties. Is the intent of 502(d) to allow the issuance of orders without such agreement and regardless of whether a party undertakes a preliminary privilege review?

. Assuming that parties present an agreement to a federal judge to be embodied in an order, what level of judicial review, if any, is required? Should the judge require a showing of good cause or simply execute the consent order?

. What incentive is there for parties to execute an agreement under Rule 502(e)? Will incorporation of such agreements into orders become commonplace to secure the protection afforded under Rule 502(d)?

Practice Insights. If enacted, Rule 502 will require attorneys to consider various issues. First, clients may wish to cooperate with agencies in the face of investigations or the like. Attorneys must be prepared to weigh with their clients the benefits of cooperation against the possible loss of privilege. Second, as noted above, Rule 502 would appear to encourage attorneys to seek the entry of nonwaiver orders. An attorney representing a nonparty which is bound by any such order must consider the costs of attempting to mount a challenge to the order. Similarly, an attorney seeking a nonwaiver order must consider whether, given the volume of electronically stored information that might be produced in a given civil action, there might be a benefit in relying on an agreement between the parties rather than entering into a nonwaiver order.

Additional References. *Weinsteins Federal Evidence*, Chapters 501, 511, and 512; 6-1102 *Weinstein's Federal Evidence* § 1102.02; 6-26 *Moore's Federal Practice -- Civil* § 26.49 [5], 6-26 *Moore's Federal Practice -- Civil* § 26.70 [6].

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n1 . S. 2450, 110th Cong. § 1 (2007). S. 2450 was introduced on December 11, 2007. It was reported out of the Senate Judiciary Committee without amendment favorably on February 25, 2008. THOMAS (Library of Congress), http://thomas.loc.gov/home/bills_res.html (follow Search Bill Summary, Status, search for S. 2450 by bill number; then follow the hyperlink for All Congressional Actions).

n2

[2]. Floor statement of Senator Leahy, 154 Cong. Rec. S15141, S15142 (December 11, 2007).

n3

[3]. *Id.*

n4

[4]. S. 2450, 110th Cong. § 1 (2007).

n5

[5]. *Id.*

n6

[6]. *Id.*

n7

[7]. *Id.*

n8

[8]. *Id.*

n9

[9]. *Id.*

n10

[10]. *Id.*

n11

[11]. *Id.* Section 1(b) of S.2450 would amend the table of contents of the Federal Rules of Evidence to incorporate Rule 501. Section 1(c) sets forth the effective date of the rule.

n12

[12]. Advisory Committee Note to *Fed.R.Civ.P.* 26(b)(5)(B).

n13

[13]. Floor statement of Senator Leahy, 154 Cong. Rec. S15142-43 (December 11, 2007).

n14

[14]. A Bill to Amend the Federal Rules of Evidence to Address the Waiver of the Attorney-Client Privilege and the Work Product Doctrine, S. Rep. No. 110-264, at 4 (2008).

n15

[15]. *See* Committee on Rules of Practice and Procedure, Proposed New Evidence Rule 502 (2007) in Letter from Lee H. Rosenthal, Chair, Advisory Committee on Federal Rules of Civil Procedure, to Honorable David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure (September 26, 2007) (copy on file with author).

n16

[16]. *Id.* (citations omitted).

n17

[17]. Letter from Lee H. Rosenthal, Chair, Advisory Committee on Federal Rules of Civil Procedure, to Honorable David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure (September 26, 2007) (copy on file with author).

n18

[18]. *See, e.g., In re Qwest Communicns Intl, Inc.*, 450 F.3d 1179, 1186-1200 (10th Cir. 2006), *cert. denied*, 127 S. Ct. 584 (2006).

n19

[19]. Federal Judicial Center, Manual for Complex Litigation 63 (4th ed. 2004) (citations omitted).

n20

[20]. Ronald Hedges, United States Magistrate Judge for the District of New Jersey, LegalTech 2005 Keynote Address at the New York Hilton 16: Comments on Proposed Amendment to *Rules 26 and 37 of the Federal Rules of Civil Procedure* (January 31, 2005), available at <http://www.uscourts.gov/rules/e-discovery/04-CV-169.pdf>.

n21

[21]. Kenneth Withers, *Two Tiers and a Safe Harbor: Federal Rulemakers Grapple with E-Discovery*, *Federal Lawyer* 29 (Sept. 2004).

n22

[22]. In this regard, see Ronald Hedges, *A Critical Appraisal of Proposed Amendment to Federal Rule of Civil Procedure 26(b)(5)(B)* 5 *Digital Discovery & e-Evidence* (Mar. 2005).

n23

[23]. *Collaboration Props., Inc. v. Polycom, Inc.*, 224 *F.R.D.* 473, 478-79 (N.D. Cal. 2004).

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Sinclair and Harrison on Bayview Loan Servicing, LLC v. Simmons

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Sinclair and Harrison on Bayview Loan Servicing, LLC v. Simmons

By Prof. Kent Sinclair and Gessner H. Harrison

March 5, 2008

SUMMARY: In a real estate market experiencing an increase in the number of foreclosure sales, properly positioned investors and speculators are presented with opportunities to acquire properties at bargain prices. However, as illustrated in the recent opinion of the Supreme Court of Virginia in *Bayview Loan Servicing, LLC v. Simmons*, 275 Va. 114, 654 S.E.2d 898 (2008), these opportunities are not without attendant risks. In this case, the Supreme Court of Virginia teaches that, under Virginia law, one of the typical procedural steps leading up to a foreclosure sale -- the accrual of the creditor's right to accelerate the payments owed under a promissory note and accompanying deed of trust following the borrower's default -- is a matter governed not by statute, but by the language the parties have used in their contracts. This commentary, written by Professor Sinclair and Mr. Harrison, discusses the Court's analysis of the issues of whether the noteholder's right to accelerate the payments owed to it actually accrued on the facts presented and the steps taken by the parties, and whether it successfully exercised such right so as to permit it to conduct a valid foreclosure sale. It also makes observations with respect to the initiation of such sales, based on the language of the Court's ruling concerning the scope of Va. Code Ann. § 55-59.1.

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ARTICLE: Foreclosure Litigation and Accrual of the Right to Accelerate Payments in Virginia: A Matter of Contract or Statute?

In a real estate market experiencing an increase in the number of foreclosure sales, properly positioned investors and speculators are presented with opportunities to acquire properties at bargain prices. However, as illustrated in the recent opinion of the Supreme Court of Virginia in *Bayview Loan Servicing, LLC v. Simmons*, 275 Va. 114, 654 S.E.2d 898 (2008), these opportunities are not without attendant risks. In this case, the Supreme Court of Virginia teaches that, under Virginia law, one of the typical procedural steps leading up to a foreclosure sale -- the accrual of the creditor's right to accelerate the payments owed under a promissory note and accompanying deed of trust following the borrower's default -- is a matter governed not by statute, but by the language the parties have used in their contracts. This commentary discusses the Court's analysis of the issues of whether the noteholder's right to accelerate the payments owed to it actually accrued on the facts presented and the steps taken by the parties, and whether it successfully exercised such right so as to permit it to conduct a valid foreclosure sale. It also makes observations with respect to the

initiation of such sales, based on the language of the Court's ruling concerning the scope of Va. Code Ann. § 55-59.1.

Background. Bayview Loan Servicing, LLC, a loan servicing company (hereafter, "Bayview"), desiring to foreclose upon a parcel of real property owned by Janet M. Simmons and encumbered by a deed of trust securing the indebtedness she owed under a promissory note held by it, purportedly sent her a letter by first-class mail notifying her that the note would be accelerated and foreclosure proceedings would begin if the past due amount was not paid within 30 days. A little over 120 days later, a substitute trustee under the deed of trust notified Simmons by certified mail that her account was in default, that payment had been accelerated due to that default, and that the parcel would be sold at foreclosure. Simmons did not claim the letter and it was returned to the substitute trustee.

The foreclosure sale took place as scheduled and the parcel sold to a third party bidder for substantially less than its fair market value. Simmons learned of the sale two days later, and subsequently filed a complaint in the circuit court alleging that Bayview had breached provisions of the deed of trust by failing to personally deliver or send to her, via certified mail, a pre-acceleration notice of breach and the action required to cure the breach before accelerating the indebtedness secured by the deed of trust. Bayview, while not disputing that its initial letter was not sent by certified mail, contended that it had substantially complied with the requirements of the deed of trust in sending that letter, that Simmons had not provided credible evidence to overcome the presumption that she had received it, and that the notice of foreclosure sale under Va. Code Ann. § 55-59.1(A), which was later sent by certified mail by the substitute trustee, satisfied the pre-acceleration notice required by the deed of trust. After a hearing, the circuit court made the specific factual finding that Simmons had presented credible evidence that she had not received the initial letter. It then ruled in Simmons' favor based on her theory of the case, rejecting all of Bayview's contrary arguments and awarding Simmons a little over \$156,000 for her loss of equity in the parcel. Bayview appealed, stating as its sole assignment of error that "the circuit court erred in failing to hold that, under Va. Code Ann. § 55-59.1(A), the notice of proposed foreclosure sale from [the substitute trustee, which was sent via certified mail,] 'effectively exercise[d] the right of acceleration expressly contained in the deed of trust.'"

Helpful Information re: Foreclosure Sale Litigation. In *Sharpe v. Talley*, 215 Va. 615, 212 S.E.2d 273 (1975), the Supreme Court of Virginia provided the following description of the circumstances and claims of parties involved in and affected by that foreclosure sale:

The [debtors] allege that they have been deprived of their property and [that] the defendant [beneficiary under the deed of trust, who had acquired the debtors' real property at the foreclosure sale] has been unjustly enriched as the result of . . . unlawful, fraudulent and unconstitutional acts by the defendants [(the aforementioned beneficiary and the trustee under the deed of trust)]. The [debtors] seek from the [C]ourt the type of relief which was accorded the aggrieved parties in *Rohrer v. Strickland*, 116 Va. 755, 82 S.E. 711 (1914), and *Linney v. Normoyle*, 145 Va. 589, 134 S.E. 554 (1926). In these cases . . . there were foreclosure sales following default, and allegations were made of improper and inequitable conduct by the trustee and the beneficiary. In each case the property was sold under the deed of trust for an amount less than the secured debt, and subsequently resold by the beneficiary at an advanced price to a [third party] bona fide purchaser. A recovery was permitted in each case by the [debtors] for [the] fair value [of the property] after deducting the amount due on the deed of trust debt.

Sharpe, 215 Va. 615, 619, 212 S.E.2d 273, 275276.

Although not repeated in its *Bayview* opinion, this description accurately delineates the general contours of the *Bayview* litigation and is informative insofar as it generally explains the competing interests and motivations of the parties involved, and what is usually at stake in typical foreclosure sale litigation.

General Principles. The Court in *Bayview Loan Servicing* analyzed the issues of whether Bayview's right to accelerate the payments owed to it accrued and whether it had successfully exercised such right so as to permit it to

conduct a valid foreclosure sale, by stating the following principles of Virginia law:

. **Statutory language:** Va. Code Ann. § 55-59.1(A), which, as the Court noted, formed the basis of Bayview's sole assignment of error, provides that "[t]he written notice of proposed [foreclosure] sale when given as provided herein shall be deemed an effective exercise of any right of acceleration contained in such deed of trust or otherwise possessed by the party secured relative to the indebtedness secured." The statute further provides that "[t]he inadvertent failure to give notice as required by this subsection shall not impose liability on either the trustee or the secured party."

. **Prior case law:** In determining the impact, if any, of Va. Code Ann. § 55-59.1(A) upon its analysis of Bayview's assignment of error, the Court noted that in *Sharpe v. Talley*, it had previously "concerned [itself] with a noteholder's duty to apprise the makers of the note of the fact that by reason of their default the holder had accelerated the payment of their debt, principal and interest, and had declared their entire debt due and payable." 215 Va. 615, 619-620, 212 S.E.2d 273, 276 (1975). It further observed that it had held in that case that "notice of acceleration must be complete and effective prior to a foreclosure sale," and that ultimately, it had concluded that "the notice provided to the debtor . . . was ineffective," ultimately causing it to "remand[] the case for an award of monetary damages to the debtor against the beneficiary of the deed of trust." *Sharpe*, 215 Va. 615, 622-623, 212 S.E.2d 273, 277-278. In reaching this result, however, the Court in *Sharpe* had expressly stated that the defendants' reliance upon the then-effective version of Va. Code Ann. § 55-59(6), the predecessor of current Va. Code Ann. § 55-59.1(A), was "misplaced [because it] referred to notice of a trustee's sale" and did not address the issue of a noteholder's duty to notify a debtor of the acceleration of the indebtedness prior to initiating a foreclosure sale. *Sharpe*, 215 Va. 615, 622-623, 212 S.E.2d 273, 277-278.

Key Issue: Scope of Va. Code Ann. § 55-59.1(A) and putative effect of post-*Sharpe* amendment to its predecessor. Seizing upon the language in *Sharpe* that defendants' reliance in that case upon former Va. Code Ann. § 55-59(6) was "misplaced," Bayview asserted that the General Assembly subsequently amended that statute to include the language currently appearing in Va. Code Ann. § 55-59.1(A) and that this language "allow[s] the notice of acceleration to be merged with the notice of foreclosure sale, notwithstanding any contrary provision in [a] [d]eed of [t]rust." Bayview thus argued that the General Assembly had enacted this subsequent amendment "to derogate the decision" in *Sharpe*, and that as a result, Va. Code Ann. § 55-59.1(A) "superseded" any contractual pre-acceleration notice obligation imposed on it by the deed of trust at issue.

The Court ultimately rejected Bayview's argument, stating that "Bayview misreads the scope of Va. Code Ann. § 55-59.1(A) and any analogy to the *Sharpe* case."

With respect to Bayview's interpretation of the scope of Va. Code Ann. § 55-59.1(A), the Court acknowledged that "a notice of foreclosure sale . . . could act as the exercise of the 'right of acceleration'" under the deed of trust, but concluded that the statute "does not establish a statutory mandate as to whether such 'right of acceleration' is in existence and [is] capable of being exercised by the foreclosure notice." The Court explained that "[s]uch a determination remains a matter of contract between the parties" under Virginia law. The Court then examined the language of the notice provisions of the deed of trust and determined that "the parties [had] agreed no right of acceleration would be in existence to exercise (in other words, that no such right would have accrued to Bayview) until the condition precedent of providing the pre-acceleration notice had been satisfied." The Court also determined, from the language of the deed of trust, that this "condition precedent" required that the pre-acceleration notice be given "by personal delivery or certified mail." The Court then observed that "Bayview did not comply with the specific condition precedent," and that as a result, it "had not acquired the right to accelerate payment under the terms of the [d]eed of [t]rust." The Court then determined that "[t]he statutory cure of Va. Code Ann. § 55-59.1(A) is of no benefit to Bayview because it had not acquired the right to accelerate the indebtedness . . . when the foreclosure notice was issued."

With respect to Bayview's reliance upon *Sharpe*, the Court opined that "Bayview's citation to *Sharpe* is without merit and has no application to this case." The Court explained its reasoning, noting at the outset that "[i]n *Sharpe*, [215 Va. at 620, 212 S.E.2d at 276,] we determined that the language used in the deed of trust in that case created a condition subsequent, requiring notification to a borrower that his loan had been accelerated in order to complete the exercise of

the right of acceleration prior to foreclosure." Continuing, the Court reaffirmed its conclusion in *Sharpe*: "It is essential for a valid exercise of an option to accelerate the maturity of a note that the noteholder do some positive act to indicate that the option has been exercised." It further emphasized that "[w]hile such notice is not a condition precedent to an effective exercise of the option . . . it must reach the maker. The Court then distinguished *Sharpe*, explaining that "the notice in *Sharpe* was required after the noteholder had accelerated the indebtedness and there was no issue that a right of acceleration had accrued to the noteholder, only a question of how that existing right was exercised." Directly addressing Bayview's assertion regarding the subsequent statutory amendment, the Court concluded that "[e]ven if the General Assembly created Va. Code Ann. § 55-59.1(A) to overturn that result, it has no application when the right to accelerate has not accrued."

Accordingly, the Court ultimately held that "Va. Code Ann. § 55-59.1(A) does not cure Bayview's contractual breach under the [d]eed of [t]rust or immunize Bayview from its liability to Simmons for her lost equity in the Parcel sold in foreclosure," because "Bayview had no right of acceleration at the time that the notice of foreclosure sale was sent." As a result, it concluded that "the circuit court did not err by entering judgment in favor of Simmons" for \$156,809.46 in damages resulting from the foreclosure sale.

Importance of Ruling. In *Bayview Loan Servicing*, the Supreme Court of Virginia sends a clear message to those who seek to profit from foreclosure sales: Virginia law requires strict compliance with pre-acceleration notice obligations imposed upon trustees or beneficiaries by contractual language appearing in a deed of trust, and Va. Code Ann. § 55-59.1(A) does not control the issue of whether the right to accelerate has accrued. For trustees, noteholders, deed of trust beneficiaries, and others who play a part in the decision to initiate a foreclosure sale, the Court's holding has obvious significance. Yet, the burden that this holding imposes is neither onerous nor unfair, from an economic standpoint. Trustees, noteholders, and deed of trust beneficiaries typically enjoy unfettered access to the underlying loan documents and records of correspondence with each borrower. Thus, using this information, they can readily ascertain for themselves whether such obligations have been met prior to initiating any particular foreclosure sale.

Moreover, the trustees, noteholders and deed of trust beneficiaries involved in foreclosure sales are, like those involved in the foreclosure sale in *Bayview Loan Servicing*, typically sophisticated financial institutions and professional loan servicing companies who make use of standardized deed of trust and other lending form documents containing "boilerplate" language. Thus, they can easily avoid the significant financial consequences of conducting deficient foreclosure sales by imposing internal controls, such as uniform pre-acceleration notice provisions in every loan document and a "checklist"-type of record evidencing not only the substance, but the mode of delivery, of the pre-acceleration notice given to each borrower who is in default. Although some trustees, noteholders and deed of trust beneficiaries may find that the initial costs of implementing these internal controls are not insignificant, certainly, when they are compared to the magnitude of the cost of conducting a deficient foreclosure sale, few, if any, will deem the expense to be unjustified.

CVirginia Cross-References. For further analysis of the topics of Virginia law addressed herein, please consult the following sources:

Regarding deeds of trust generally, see Douglass W. Dewing, *A Virginia Title Examiners' Manual*, Chapter 17: Deeds Of Trust, Mortgages, And Vendors Liens (1998), and Michie's *Jurisprudence of Virginia & West Virginia*, Mortgages and Deeds of Trust, §§ 1-184 (2007).

Regarding the foreclosure process and foreclosure sales, see Douglass W. Dewing, *A Virginia Title Examiners' Manual*, § 17-13: Foreclosure by Trustee's Sale and § 17-14: Purchasers at Trustee's Sale (1998); see also Michie's *Jurisprudence of Virginia & West Virginia*, Mortgages and Deeds of Trust, § 93184 (2007).

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Professor Sinclair, an active member of the Virginia Bar, teaches the program in Virginia Law & Practice at the University of Virginia School of Law. He is Professor of Law and served for many years as Associate Dean of the Law School. He has written more than a dozen books, and is the author of *Sinclair & Middleditch, Virginia Civil Procedure* (4th ed. 2003 and annual supplements), and co-author of *Friend & Sinclair, Virginia Pleading and Practice* (2nd ed. 2007 with annual supplements). He is Chair of the Advisory Committee on Rules of Court for Virginia, and has served as Reporter for the Virginia Model Jury Project for a number of years. He has served on the Board of Governors of the Litigation Section of the Virginia Bar Association and the Boyd-Graves Conference on Virginia Law. He edits the Virginia Advance Court Rules and Practice Service for Lexis Law Publishing and is a frequent lecturer at continuing education programs for attorneys and Virginia judges. For the past 15 years he has been Reporter and Editor of the *Guide to Evidence in Virginia*, and starting in 2008 he is co-author of *Friend & Sinclair, The Law of Evidence in Virginia*.

Mr. Harrison has experience as a judicial clerk and as a practicing attorney, and presently serves as Senior Staff Attorney in the office of the Reporter of Decisions for the Supreme Court of Virginia. Mr. Harrison plays a major role in the Model Jury Instructions program in Virginia, and is primarily responsible for the identification of all new developments in Virginia law, and the finalization of jury instructions for the electronic and loose-leaf jury instructions volumes, published by Lexis Law Publishing, covering all areas of civil causes of action and criminal developments. He holds both J.D. and M.B.A. degrees, with advanced course work in legal research and information management, and is the author of multiple law review articles on subjects including criminal appellate procedure, constitutional law, crime victim's rights legislation, and environmental law. He has collaborated with Professor Sinclair on numerous projects in diverse areas of Virginia law.



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Sinclair and Harrison on Jones v. Brandt and Ott v. L&J Holdings

2008 Emerging Issues 1992

Sinclair and Harrison on Jones v. Brandt and Ott v. L&J Holdings

By Prof. Kent Sinclair and Gessner H. Harrison

March 5, 2008

SUMMARY: Given that a durable power of attorney is an instrument typically constituting an integral part of many family and estate plans, it is not surprising that disputes arise concerning the scope of authority conferred by such instruments. This is particularly true with regard to the authority conferred by the principal upon the attorney-in-fact to contract and to transfer and dispose of property, as these kinds of transactions oftentimes result in material changes in the size of the estate and, thus, the amount of money or property that the principal's heirs will receive. In two recent decisions, *Jones v. Brandt*, 274 Va. 131, 645 S.E.2d 312 (2007), and *Ott v. L&J Holdings, LLC*, 275 Va. 182, 654 S.E.2d 902 (2008), the Supreme Court of Virginia teaches that while the scope of the authority of the attorney-in-fact to contract and to transfer and dispose of property is a matter still strictly determined based on the express language used in a durable power of attorney with respect to such acts, courts should not construe a durable power of attorney so strictly that it results in a frustration of the purpose of that language, considering the power of attorney as a whole. In doing so, the Court takes a guarded, but nevertheless practical, approach to ascertaining the scope of authority conferred by a durable power of attorney. This commentary, written by Professor Sinclair and Mr. Harrison, examines the disputes the Court resolved in these cases and discusses the impact of the holdings reached in each.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: On What Authority? Interpreting Powers Conferred by a Durable Power of Attorney in Virginia.

Given that a durable power of attorney is an instrument typically constituting an integral part of many family and estate plans, it is not surprising that disputes arise concerning the scope of authority conferred by such instruments. This is particularly true with regard to the authority conferred by the principal upon the attorney-in-fact to contract and to transfer and dispose of property, as these kinds of transactions oftentimes result in material changes in the size of the estate and, thus, the amount of money or property that the principal's heirs will receive. In two recent decisions, *Jones v. Brandt*, 274 Va. 131, 645 S.E.2d 312 (2007), and *Ott v. L&J Holdings, LLC*, 275 Va. 182, 654 S.E.2d 902 (2008), the Supreme Court of Virginia teaches that while the scope of the authority of the attorney-in-fact to contract and to transfer and dispose of property is a matter still strictly determined based on the express language used in a durable power of attorney with respect to such acts, courts should not construe a durable power of attorney so strictly that it results in a frustration of the purpose of that language, considering the power of attorney as a whole. In doing so, the Court takes a guarded, but nevertheless practical, approach to ascertaining the scope of authority conferred by a durable power of attorney. This commentary examines the disputes the Court resolved in these cases and discusses the impact of the

holdings reached in each.

Background. In *Jones*, a lawyer who had represented the decedent for many years prepared a durable power of attorney at his request, appointing the lawyer as attorney-in-fact to act for him. The power of attorney contained express grants of authority, including the powers to sign, endorse, or assign any . . . instrument of any nature whatsoever, negotiable or non-negotiable, for deposit and to make, sign, acknowledge and deliver any contract . . . or other document relating to . . . personal property. The power of attorney also contained general grants of authority and instructions that it should be broadly construed. After a will was prepared, the decedent informed the attorney-in-fact that he would provide for the executrix, a widow with whom decedent lived for the last two years of his life, outside of the will. A few weeks before his death the decedent made an oral request that the attorney-in-fact designate the executrix as beneficiary payable on death (POD) of a certificate of deposit in the amount of \$250,000, that was in the decedents name at a local bank. The attorney-in-fact went to the bank the same day and executed such a POD designation, signing it in the decedents name by himself under the power of attorney, and the next day advised the decedent in a letter that his request had been complied with, enclosing a copy of the beneficiary designation in the letter. After the decedents death two months later, the executrix of the estate sought guidance and direction in the distribution of the estate, naming all parties in interest, including herself in her individual capacity, as defendants. The circuit court heard evidence ore tenus and ruled that the designation of the executrix as the beneficiary POD was valid and that the proceeds of the certificate of deposit were payable to her individually. Pursuant to VA Code Ann. § 8.01-670(B)(2), an interlocutory appeal was awarded to the decedents two daughters, who contended that the power of attorney did not specifically confer authority to the attorney-in-fact to make the change in the beneficiary designation on the certificate of deposit and that, as a result, the certificate of deposit became part of the estate that would be distributable to them.

In *Ott*, a husband executed a durable power of attorney naming his wife of 50 years his attorney-in-fact and granting her the authority to sell and convey real property, enter into binding contracts and manage his business affairs. The power of attorney also authorized the attorney-in-fact to make gifts, but only to family members and to such other persons or charitable organizations with whom [the husband had] an established pattern of giving." It likewise provided that his "Agent may not make gifts of [his] property to the Agent. Finally, the power of attorney additionally provided that it would not be affected by the husband's disability or lack of mental competence and would remain effective until his death unless revoked by written notice. He later suffered a debilitating stroke that left him unable to communicate or to manage his business affairs, and remained in a nursing home for 30 months until his death. The couple had for many years been in the business of developing real property, by subdividing and selling residential building lots. On advice of counsel, after the husband's stroke, but well before his death, the wife created a limited liability company (LLC), establishing the husband's membership interest at 80% and her own interest at 20%, and then signed an operating agreement for the entity, on her own behalf and as attorney-in-fact for her husband. Two months later she conveyed three parcels of land, with General Warranty and English covenants, to the LLC pursuant to an instrument captioned as a "deed of gift" reciting nominal consideration. Title to the smallest of the three parcels, which lay between the other two parcels, was in the name of the husband and wife as tenants by the entirety, but title to the other two parcels was in the husbands name alone. After the husband's death, his last will was admitted to probate. One of the couple's children qualified as the husband's personal representative and brought this suit challenging the deed of gift in a declaratory judgment proceeding against the wife, the LLC and two other unrelated entities that had contracted to purchase the land from the LLC. The personal representative argued that deed was void ab initio because it was a gift, that it failed to comply with the requirements of Va. Code Ann. § 11-9.5(C), and that it was beyond the powers granted to the attorney-in-fact by the power of attorney. All parties, by agreement, submitted the case to the circuit court upon the pleadings, exhibits, depositions and argument. The court ruled that the deed, despite its misleading caption, was not in fact a deed of gift and, because of ambiguity apparent on the face of the deed, parol evidence was properly received to determine the grantors intent. The circuit court found from that evidence that there was a valid business purpose for the deed, and that the conveyance was supported by valuable consideration. The circuit court entered a decree denying the relief prayed for and dismissing the declaratory suit, and the personal representative appealed, reiterating her argument that the deed should be set aside on the ground that it was a gift and thus exceeded the authority conferred upon the attorney-in-fact.

General Principles. In determining the issues concerning the scope of authority conferred by the power of attorney at issue in *Jones*, the Court, in a 4-to-3 majority opinion, stated the following well-settled principles of Virginia law regarding a durable power of attorney:

. **Strict construction and underlying policy:** Citing the landmark case of *Hotchkiss v. Middlekauf*, 96 Va. 649, 653, 32 S.E. 36, 3738 (1899), the Court observed in *Jones* that "[i]n Virginia, powers of attorney have been strictly construed for over a century." The Court then explained, citing *Hotchkiss* as support, that "[t]he authority granted by such an instrument is never considered to be greater than that warranted by its language, or indispensable to the effective operation of the authority granted[, and] [t]he authority given is not extended beyond the terms in which it is expressed." Reaffirming the continued validity of this general rule of construction with respect to current-day disputes, the Court explained that it "essentially provides that expansive language [appearing in the provisions of a power of attorney] should be interpreted as intending only to confer those incidental powers necessary to accomplish objects as to which express authority has been given to the attorney-in-fact." The Court then specified that the long-recognized policy underlying the rule was that "the power to dispose of the principals property is so susceptible of abuse that [it] should not be implied," and it also specifically acknowledged that the potential for abuse "is particularly dangerous in a case involving a durable power of attorney, which by its nature remains in effect after the principal has become incapable of monitoring the . . . conduct" of the attorney-in-fact. On this point, the Court clearly expressed its intention to continue to recognize and remain faithful to the underlying rule of strict construction: "We do not retreat from the rationale of these guidelines of construction."

In determining the issue concerning the scope of authority conferred by the power of attorney at issue in *Ott*, the Court stated the following well-settled principles of Virginia contract law regarding the use of parol evidence to ascertain the intent of the parties embodied within a deed, and when a conveyance qualifies as a gift:

. **When parol evidence may be considered:** As the Supreme Court had made clear in *Eure v. Norfolk Shipbuilding & Drydock Corp.*, 263 Va. 624, 632, 561 S.E.2d 663, 667668 (2002), the Court observed that the "parol evidence rule requires a court to construe a document according to its plain terms if it is clear and unambiguous on its face." Continuing, the Court explained that "[i]n such a case, the court will not look for meaning beyond the instrument itself," but that "[w]hen a document is ambiguous . . . the court will look to parol evidence[, i.e., evidence outside of the "four corners" of the writing itself,] in order to determine the intent of the parties."

. **When a writing is ambiguous:** Echoing an approach announced in *Video Zone, Inc. v. KF&F Props.*, 267 Va. 621, 594 S.E.2d 921 (2004), the Court observed that "[t]he language of an instrument is ambiguous if it may be understood in more than one way or when it refers to two or more things at the same time," and stated that "[s]uch an ambiguity, if it exists, must appear on the face of the instrument." Regarding the issue of "whether the disputed terms are ambiguous," the Court explained that the words employed in the writing were to be "considered . . . in accordance with their usual, ordinary and popular meaning." 267 Va. 621, 625626, 594 S.E.2d 921, 923924.

. **When a conveyance qualifies as a gift:** Citing the classic decision in *Spooner v. Hilbish*, 92 Va. 333, 341, 23 S.E. 751, 753 (1895), the Court observed that "[a] gift has been defined as a contract *without* a consideration." Continuing, the Court, applying an interpretation set forth by the Court of Appeals in *Theismann v. Theismann*, 22 Va. App. 557, 566, 471 S.E.2d 809, 813 (1996), identified "[d]onative intent on the grantors part" as being "an essential element of a gift."

Key Issue #1 (*Jones*): Is a broadly worded express grant of authority in a power of attorney effective despite the general rule of strict construction? In addressing the issue of whether the power of attorney in *Jones* conferred sufficient authority upon the attorney-in-fact to change the beneficiary designation on a certificate of deposit, the *Jones* majority observed that, from a practical standpoint, "[i]t is highly doubtful that every power of attorney, even . . . one carefully drawn by a skilled draftsman, will always expressly confer the authority necessary to address every specific

circumstance in which the principal nevertheless intends to give authority to the attorney-in-fact." As a result, the *Jones* majority noted that, "[u]ndoubtedly, standard provisions granting broad general power to the [attorney-in-fact] are intended by the principal to become applicable so as to avoid any potential unintended limitation in the authority expressly granted."

Bearing these principles in mind, the *Jones* majority turned its attention to examining the specific language appearing in two particular paragraphs of the power of attorney at issue in *Jones*. Regarding the first of these two paragraphs, the *Jones* majority observed that it specifically authorized the attorney-in-fact "[t]o sign, endorse or assign any note, check or other instrument of any nature whatsoever, negotiable or non-negotiable, for deposit, discount, collection or otherwise." Regarding the second paragraph, the *Jones* majority observed that it authorized the attorney-in-fact "[t]o make, sign, acknowledge and deliver any contract . . . or other document relating to . . . personal property." The *Jones* majority then noted that a third paragraph appearing near the end of the power of attorney at issue expressly conferred broad powers upon the attorney-in-fact and featured the following language: "[w]ithout limiting the above powers, generally to perform any other acts of any nature whatsoever, . . . in any circumstances as fully and effectively as I could do as part of my normal, everyday business affairs if acting personally."

Applying the language appearing in these three paragraphs of the power of attorney, the *Jones* majority found that "[a] certificate of deposit is an instrument for deposit" within the intendment of the language appearing in the first of these paragraphs. Continuing, the *Jones* majority found that "[a] certificate of deposit including the designation of the beneficiary . . . thereon is a contract between the depositor and the bank relating to personal property" within the intendment of the language appearing in the second of these paragraphs. Finally, construing the language appearing in the third of these three paragraphs, the *Jones* majority concluded that "[s]urely, the change of a beneficiary designation on a certificate of deposit is an act within 'the normal, everyday business affairs' of the owner of a certificate of deposit at a bank." As a result, the *Jones* majority ultimately held that the decedent, as the maker of the power of attorney, "sufficiently expressed the intent to authorize . . . the attorney-in-fact[] to make a change in the beneficiary designation under the provisions of [the three aforementioned] paragraphs . . . of the power of attorney when those provisions are considered in concert."

In the course of reaching this holding, the *Jones* majority also considered an argument by the appellants seemingly based on the maxim of *expressio unius est exclusio alterius* as it has been applied to the construction and interpretation of contracts, which provides that "the omission of a particular covenant or term from a contract reduced to writing shows an intent to exclude it." See *Bentley Funding Group v. SK&R Group*, 269 Va. 315, 609 S.E.2d 49 (2005). As a basis for their argument, the appellants pointed out that two other paragraphs of the power of attorney in *Jones*--one pertaining specifically to IRAs and employee benefit plans, and another pertaining to "insurance policies and any pension, profit sharing, stock ownership, or other retirement plans,"--expressly permitted the attorney-in-fact to change and/or select the beneficiaries thereof. They therefore argued that such specific grants of authority, coupled with the absence of express language specifically authorizing the attorney-in-fact to change and/or select the beneficiary of a certificate of deposit, strongly implied that the decedent had not intended to confer that type of authority on the attorney-in-fact. Pointing out that "all of these enumerated financial instruments or arrangements are entirely distinct financial matters from a certificate of deposit," the *Jones* majority nevertheless rejected the appellants' argument, concluding that "it is a reasonable assumption that [the decedent] felt it necessary to expressly address his intent with regard to them, while operating under the equally reasonable assumption that his intentions were adequately addressed in other paragraphs [of the power of attorney] with regard to any other instrument of any nature 'for deposit' and any 'contract' for personal property."

The dissenting opinion in *Jones* espoused a different view, however. While agreeing with the majority's citation to *Hotchkiss* for its statement of the general rule of strict construction applicable when construing the authority granted by a durable power of attorney, it relied on the interpretation of Virginia law made by the United States Court of Appeals for the Fourth Circuit in *Estate of Casey v. Commissioner*, which held that "broad general powers contained in a power of attorney . . . should be interpreted as intending only to confer those incidental, interstitial powers necessary to accomplish objects as to which authority has been expressly conferred." 948 F.2d 895, 901 (4th Cir. 1991). Continuing,

the dissenting opinion, based on the holdings in *Hotchkiss* and *Casey*, agreed with the appellants' argument akin to, but not specifically referencing, the *expressio unius maxim*:

Having explicitly included the power to change or select beneficiaries on the assets specifically named [in the power of attorney, i.e., IRAs, employee benefit plans, insurance policies, and any pension, profit sharing, stock ownership, or other retirement plans] the absence of a power to change beneficiaries as to other assets was a glaring omission on the principals part. He knew how to confer such an express power, but declined to extend it to certificates of deposit.

Thus, "[a]pplying the rule that the instrument is assumed to represent the entire understanding of the parties," the dissenting opinion concluded that "no power to change the beneficiary of a certificate of deposit was intended by [the decedent]."

Key Issue #2 (Ott): Did the trial court properly determine that the "deed of gift" was ambiguous and, therefore, properly consider parol evidence in determining whether the deed was within the scope of the authority conferred on the attorney-in-fact? In addressing the issue of whether the circuit court had erred in concluding that the deed was ambiguous and that parol evidence could be used to ascertain the grantor's intent underlying the deed, the Court concluded that it "agree[d] with the circuit courts analysis." In arriving at this conclusion, the Court also signaled its agreement with the circuit court's rejection of the personal representative's assertion that the mere fact that the deed initially recited that it was a "deed of gift" meant that the conveyance it embodied was "plainly and unambiguously a donation of the principals property" that was "beyond the authority of the attorney-in-fact." The Court confirmed the circuit court's determination that this recital was inconsistent with the statute recited in the deed to invoke an exemption from recordation taxes, Va. Code Ann. § 58.1-811(A)(10), because that statute did not apply to deeds of gift. It likewise confirmed the circuit court's conclusion that the deed's recital of valuable consideration, as well as its conveyance with General Warranty and English Covenants, were "inconsistent with a gift."

Based on the foregoing, the Court explained that that "[a]ll terms of the deed that were consistent with the grantors receipt of valuable consideration were inconsistent with donative intent on her part," and that as a result, "the deed could be understood in more than one way." Thus, the Court concluded that "the circuit court correctly decided that [the deed] was ambiguous and admitted parol evidence to resolve the ambiguity."

Regarding the issue of whether the parol evidence considered by the circuit court established that the deed was within the scope of the authority conferred on the attorney-in-fact, the Court began by noting that the circuit court had "found from the evidence that the deed was not, in fact, a deed of gift despite its caption [and] that it was given for a valuable consideration." Continuing, it observed that the circuit court had specifically determined that "the evidence showed no donative intent on [the] part [of the attorney-in-fact]." Instead, the Court noted that the circuit court had found that "the transfer of the property was undertaken for legitimate business reasons and that [the decedent] and [the attorney-in-fact] each received benefits, including possible future tax benefits, commensurate with their respective percentage interests [in the properties at issue], without any self-dealing on [the] part [of the attorney-in-fact]." Thus, the Court concluded that "the transaction was . . . within the powers granted by [the] power of attorney."

Importance of Rulings. *Jones* is obviously a pivotal ruling, even though it largely maintains the status quo first established in *Hotchkiss*. The majority opinion clearly indicates that most of the members of the Court believe that broad grants of authority included within a power of attorney should properly be viewed as an expression of the maker's intent to authorize the attorney-in-fact to take actions that, despite the absence of language specifically authorizing them, are consistent with other types of actions specifically authorized in the power of attorney. Yet, the dissenting opinion in *Jones* just as clearly indicates that the absence of language within a power of attorney specifically authorizing the attorney-in-fact to take an action has at least the potential to result in a judicial determination that the attorney-in-fact was not authorized to take that action, if there is little or no support in the language of the other provisions for the existence of such authority. Practitioners should thus be able largely to avoid the obvious tension between the majority and dissenting opinions in *Jones* through deliberate and conscientious drafting of the power of

attorney document, focusing on two basic guidelines.

[] First, as a general rule, practitioners should generally seek to err on the side of caution, being over inclusive and detailed when setting out and describing the various powers to be given to the attorney-in-fact.

[] Second, practitioners should strongly consider including a broad, general grant of authority similar to the one construed in *Jones* as a way to help ensure that any particular powers that were overlooked or otherwise not specifically set out in the power of attorney may nevertheless be within the scope of authority conferred upon the attorney-in-fact.

These two guidelines work in tandem to accomplish the true intent of the maker, inasmuch as *Jones* indicates that the detailed expression of specifically authorized acts will be considered in concert with a general broad grant of authority. The Court's ruling in *Ott* is likewise instructive on the issue of drafting, clearly showing that those persons who are exercising powers conferred upon them via a power of attorney would do well to ensure that any contract, deed, or other legal document that they execute as an attorney-in-fact unambiguously indicates that the underlying transaction is one which is clearly within the scope of the powers conferred upon them. By following these guidelines, practitioners and attorneys-in-fact should be able to avoid the types of disputes addressed in *Jones* in *Ott* and accomplish, rather than frustrate, the intent underlying the power of attorney.

CVirginia Cross-References. For further analysis of the topics of Virginia law addressed herein, please consult the following sources:

Regarding powers of attorney, see James P. Cox, Harrison on Wills and Administration for Virginia and West Virginia § 33.05: Durable Powers of Attorney (4th ed. 2007); see also Michie's Jurisprudence of Virginia & West Virginia, Agency, §§1-126, and Powers, §§1-10 (2007).

Regarding the use of parol evidence, see Charles E. Friend and Kent Sinclair, Friend's Virginia Pleading and Practice § 24.15: Parol Evidence Rule (2d ed. 2007); see also Michie's Jurisprudence of Virginia & West Virginia, Parol Evidence, § 130 (2007).

Regarding conveyances qualifying as gifts, see Michie's Jurisprudence of Virginia & West Virginia, Gifts, §§1-42 (2007).

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Brazas on Hudson v. City of Chicago, 2008 Ill. LEXIS 12 (Ill. 2008)

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Brazas on Hudson v. City of Chicago, 2008 Ill. LEXIS 12 (Ill. 2008)

By Susan M. Brazas

March 5, 2008

SUMMARY: The Res Judicata Peril of Voluntary Dismissal: The Thorny Issue of the Right to Refile. Just a few months ago, the Illinois Supreme Court proclaimed the sanctity of a plaintiff's absolute right to refile after a voluntary dismissal in *Case v. Galesburg Cottage Hosp.*, 227 Ill. 2d 207 (Ill. 2007). However, in *Hudson v. City of Chicago*, the Court minces no words about the danger lurking for a plaintiff who has chosen to exercise that absolute right. In an unusual move, the Court makes extensive analysis of the amicus curiae brief submitted by one lawyers' group. This commentary, written by Susan Brazas, points out the caution needed before presuming that no harm will come from a voluntary dismissal.

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ARTICLE: Illinois Supreme Court Clarifies Res Judicata Effect on a Refiled Action if Voluntary Dismissal Taken of Complaint in Which Any Portion Has Been Involuntarily Dismissed.

In *Hudson v. City of Chicago, 2008 Ill. LEXIS 12 (Ill. 2008)*, the Illinois Supreme Court addressed the interplay of the voluntary dismissal statute and the doctrine of res judicata. In affirming the trial court and the appellate court, the Supreme Court applied its decision of 12 years earlier to find that the plaintiff's refiled action was barred by res judicata, because the plaintiff could have, but did not, pursue his case to conclusion in the trial court after one count of his original action was involuntarily dismissed with prejudice.

In its *Case v. Galesburg Cottage Hosp.*, 227 Ill. 2d 207 (Ill. 2007) decision, the Supreme Court held that the one-year window of time, set forth in *Section 13-217 of the Code of Civil Procedure*, within which a voluntarily dismissed complaint may be refiled is an absolute right that must be protected. The *Case* holding was a confirmation of the Court's opinion on a similar factual scenario upholding the absolute right to refile, according to the predecessor to 735 ILCS 5/13-217 in *Aranda v. Hobart Mfg. Corp.*, 66 Ill. 2d 616, 620 (1977).

The *Hudson* Court devoted several paragraphs to the arguments advanced by the plaintiff and several more to those advanced by the Illinois Trial Lawyers Associations *amicus curiae* brief. Both of those positions argued against the applicability of the case upon which the *Hudson* most heavily relied, *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325

(1996). The *Hudson* Court noted that its decision was in furtherance of a policy against claim-splitting as identified in *Rein*. It is noteworthy that four Justices participated in the *Hudson* majority decision, but two Justices sharply dissented.

Practical Implications. A plaintiff's attorney cannot assume that the one-year window of time to refile a voluntarily dismissed action is an absolute right. The recent case of *Case v. Galeburg* seemed to proclaim the sanctity of this right, but under the circumstances where, as in *Hudson*, at least a portion of the complaint was involuntarily dismissed, this right is far from absolute.

Earlier cases had also described that Section 2-1009(a) of the Illinois Code of Civil Procedure gives plaintiffs an unfettered right to voluntarily dismiss their claims without prejudice, upon proper notice and payment of costs, 'at any time before trial or hearing begins.' *Morrison v. Wagner*, 191 Ill. 2d 162, 165 (2000). The *Rein* case, cited extensively in the *Hudson* decision, emphasized that a voluntary dismissal does not automatically immunize a plaintiff against the bar of res judicata or other legitimate defenses. *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 342-343 (1996); *Zuniga v. Dwyer*, 752 N.E.2d 491, 495 (1st Dist. 2001).

Loss of Consortium Claims. The *Zuniga* court clarified that the mandatory joinder rule set forth in *Brown v. Metzger*, 104 Ill. 2d 30 (1984) also trumps the plaintiff's right to a voluntary dismissal and subsequent refiling. Under that rule, a spouse's loss of consortium claim must be joined with the impaired spouse's cause of action, unless the spouse can prove that joinder is impossible.

Strategic Considerations. The harsh outcome of the *Hudson* case illustrates that great caution must be exercised whenever an involuntary dismissal is imminent. The more prudent approach in that instance may be to take a voluntary dismissal of the entire case, so that there can be no res judicata bar to a voluntary refiling. The refiled complaint could then remain free of the troublesome count or theory to avoid another risk of involuntary dismissal.

However, defense counsel will urge the court to decide its motion to dismiss first, before granting plaintiff's counsel leave to voluntarily dismiss. The court will likely rule first on the first-filed motion, meaning that prompt action to bring either motion will be critical. It is within the court's discretion to hear and decide a previously-filed dispositive motion prior to ruling on a plaintiff's motion for voluntary dismissal. *Morrison v. Wagner*, 191 Ill. 2d 162, 165 (2000).

A key consideration of the *Hudson* court's decision is that the plaintiff's counsel could have, but did not, litigate certain claims (which were sought to be refiled) to a conclusion. Therefore, the conditions, which served as an effective bar to litigating the claims to conclusion, should be specified, if that is the case. Examples are claims that could not stand alone without the dismissed claims could not have been litigated; or, even, an extremely slow docket that may have prevented the claims from moving forward.

Plaintiff's counsel can also request language in the dismissal order to clarify that the dismissal is without prejudice to the plaintiff's right to refile. Given the warnings in the *Hudson* footnotes, however, counsel must be cautious to avoid the appearance of harassing the defendant with successive suits. Note that an order of voluntary dismissal is final, for the purposes of taking an appeal, but it becomes non-final upon a complaint being refiled, thereby discouraging piecemeal appeals. Such refiled claims would thus be outside the jurisdiction of the appellate court. *Dubina v. Mesirow Realty Dev't, Inc.*, 283 Ill. App. 3d 36, 669 N.E.694, 696 (1st Dist. 1996).

Cautions Upon Refiling. The *Hudson* Court stressed that the subsequently-filed suit was not a continuation of the same suit, but instead was an entirely new action. Other cases using the *Rein* analysis of res judicata, which examined whether a later-filed suit arose from the same set of operative facts, found a res judicata bar when categorizing a second filing to be a separate action. *Zabel v. Cohn*, 283 Ill. App. 3d 1043, 670 N.E.877, 880-81 (1st Dist. 1996). Another way to describe the res judicata bar is that it prevents bringing a second action that arises out of the same controversy as the first. *Downen v. Country Mutual Ins. Co.*, 1811 Ill. App. 3d 716, 537 N.E.2d 445, 447 (5th Dist. 1989).

Thus, in anticipation of a res judicata argument, counsel should consider whether the two actions can be described as factually distinct, if the two suits allege different injuries. Careful analysis should be done before raising a res judicata argument, as the burden of establishing res judicata is upon the party invoking it. *Downen v. Country Mutual Ins. Co.*, 1811 Ill. App. 3d 716, 537 N.E.2d 445, 447 (5th Dist. 1989).

Cross References. Illinois Litigation Forms and Checklists Checklist 80.04: Dismissal by Court Order.

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Sinclair on Coston v. Bio-Medical Applications of Virginia

2008 Emerging Issues 1986

Sinclair on Coston v. Bio-Medical Applications of Virginia

By Prof. Kent Sinclair

March 4, 2008

SUMMARY: In *Coston v. Bio-Medical Applications of Virginia*, 275 Va. 1, 654 S.E.2d 560, 2008 Va. LEXIS 7, the Supreme Court of Virginia has yet again found it necessary to address the doctrine explaining when an expert witness is needed to state a prima facie case in a medical negligence action -- a topic at the intersection of Virginia's expert proof doctrines which, in civil cases, emphasize the possible assistance an expert may provide to the trier of fact, and the separate doctrines governing sufficient proof of medical negligence. The decision provides a useful perspective on a history of decisions which buck the trend by allowing a plaintiff, in very limited contexts, to reach the jury without an expert to address standards of care or causation in a medically-related context. This commentary, written by Kent Sinclair, discusses the implications of this important decision.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Expert Proof Revisited: Once Again the Supreme Court of Virginia Addresses the Issue of When an Expert is Required in a Medical Case -- What is Within the Jury's Natural Competence and Experience? Is it as Simple as Falling Off a Log (or Chair)?

The Supreme Court of Virginia has yet again found it necessary to address the doctrine explaining when an expert witness is needed to state a prima facie case in a medical negligence action -- a topic at the intersection of Virginia's expert proof doctrines which, in civil cases, emphasize the possible assistance an expert may provide to the trier of fact, and the separate doctrines governing sufficient proof of medical negligence. The decision provides a useful perspective on a history of decisions which buck the trend by allowing a plaintiff, in very limited contexts, to reach the jury without an expert to address standards of care or causation in a medically-related context.

Summary. In a medical negligence case alleging that employees of the defendant dialysis operator placed the plaintiff in a defective chair for a kidney dialysis procedure, even though they had knowledge that the chair was not safe -- and then put her back in the chair after it failed -- the Court holds that the allegations, if proven at trial, would be sufficient to establish a prima facie case of medical negligence without the necessity of expert testimony. Because of the everyday nature of the physical issues and safety judgments involved, the Court found that, based upon these allegations, the issue whether the acts or omissions constitute medical negligence is within a jury's common knowledge

and experience and, therefore, expert testimony was not necessary.

Factual Background. The plaintiff patient filed a civil action alleging that, in the course of receiving dialysis treatment from a facility that the defendant operated, she was injured when a chair in which she was seated collapsed to the ground. She alleged that despite the chair's defective condition, the defendant's employees placed her back in the chair, which failed again, causing her to strike the ground a second time.

During the pretrial phases of the litigation in *Coston*, the circuit court entered a scheduling order that required the plaintiff to identify her expert witnesses by a certain date, but she failed timely to identify any expert witness who would testify about the applicable standards of care and deviations from those standards. After the deadline for such designations passed, the defendants filed a motion for summary judgment asserting that plaintiff could not establish a prima facie case of medical negligence against them because she failed to identify any expert witnesses who would testify about the applicable standards of care.

After a prior appeal involving the application of the nonsuit statute, the circuit court held that the plaintiff was required to present expert testimony to establish the applicable standards of care and any deviations therefrom, and entered summary judgment for the defendant because the plaintiff had not identified an expert witness who would render such testimony.

Nonsuit Episode. Because of the frequency of nonsuits in modern Virginia practice, it may be worth noting that when the hearing was held on the defense motion for summary judgment, the plaintiff requested, and was granted, a voluntary nonsuit after the case had been submitted to the circuit court for decision. The Supreme Court granted the defendant's appeal and held that under Code § 8.01-380 the circuit court erred in granting the plaintiff's motion for a nonsuit because the case had been submitted to the court for decision. The case was remanded so that the circuit court could rule on the defendant's motion for summary judgment. *Bio-Medical Applications of Virginia, Inc. v. Coston*, 272 Va. 489, 495, 634 S.E.2d 349, 352 (2006). On remand, the circuit court held that the plaintiff was required to present expert testimony to establish the applicable standards of care and any deviations therefrom, and the court entered summary judgment on behalf of the defendant because the plaintiff had not identified an expert witness who would render such testimony.

In the present appeal the argument was advanced that failure to cross-appeal in the earlier proceeding to challenge the issue of requiring an expert witness barred a renewed effort at appellate review. The Supreme Court of Virginia rejected this argument, noting that the plaintiff *could not* have assigned as cross-error in the first appeal the circuit court's ruling that is the subject of the present appeal: the first appeal presented only the issue whether the circuit court erred by granting the plaintiff a nonsuit, which was a properly appealable issue. The Court noted that the plaintiff was not required to assign cross-error in the prior appeal because in the former proceeding in the circuit court, that court *had not granted* the defendant's motion for summary judgment.

Experts in Medical Cases The Legal Landscape. The Virginia Supreme Court has often noted in prior decisions that issues involving medical negligence often fall outside the realm of the common knowledge and experience of a lay jury. As a result, *in most instances expert testimony is required to assist a jury*. Expert testimony is usually necessary to establish:

the applicable standards of care, and

a deviation from those standards of care, and

that such deviation was a proximate cause of a plaintiff's damages.

Leading modern case law on these general principles is summarized in *Perdieu v. Blackstone Family Practice Center, Inc.*, 264 Va. 408, 420, 568 S.E.2d 703, 710 (2002); *Beverly Enterprises-Virginia, Inc. v. Nichols*, 247 Va. 264, 267, 441 S.E.2d 1, 3 (1994); and *Bly v. Rhoads*, 216 Va. 645, 653, 222 S.E.2d 783, 789 (1976).

In *Raines v. Lutz*, 231 Va. 110, 113, 341 S.E.2d 194, 196 (1986), the Court summarized the general rule in medical cases as follows:

[E]xpert testimony is ordinarily necessary to establish the appropriate standard of care, to establish a deviation from the standard, and to establish that such a deviation was the proximate cause of the claimed damages.

The Common Knowledge and Experience of Lay Jurors. Despite this general rule, in a handful of cases the Court has held that expert testimony is not necessary in a medical negligence case because the alleged acts of negligence clearly lie within the range of the jury's common knowledge and experience. Perhaps the earliest decision in the modern era -- i.e., after it was routinely recited that a plaintiff must *generally* produce expert testimony to address standards of care, deviations therefrom, and causation of the plaintiff's injuries -- to deal with the question of the need for an expert in a medical malpractice or negligence case was *Jefferson Hospital, Inc. v. Van Lear*, 186 Va. 74, 7677, 84, 41 S.E.2d 441, 441442, 445 (Va. 1947). In that case the trial court allowed a jury to decide a medical negligence action without the presentation of expert testimony, and confirmed the verdict for plaintiff. In *Jefferson Hospital*, the plaintiff fell and fractured his hip while trying to walk to a bathroom. Even though the plaintiff had utilized a device that activated a signal light plainly visible to the floor nurse, neither the nurse nor any other attendant responded to his call during the 20- or 30-minute period that the signal light was activated. The Supreme Court held that the evidence was sufficient to support a finding of negligence without expert testimony because the hospital personnel were aware of the plaintiff's physical condition and they knew, or should have known, that a delay in answering his call for assistance might induce him to leave his bed and attempt to use the bathroom without assistance. *Jefferson Hospital*, 186 Va. 74, 7880, 41 S.E.2d 441, 442-443.

Then just over a decade ago, the Court in *Beverly Enterprises* affirmed another circuit court's judgment confirming a jury verdict in favor of a plaintiff in a medical negligence action even though the plaintiff did not produce expert testimony. 247 Va. 264, 270, 441 S.E.2d 1, 34. In that case, the plaintiff's decedent was an elderly woman diagnosed with Alzheimer's disease. She could not care for herself, and she was unable to eat unassisted. She was admitted to a nursing home, and an administrator at the home was informed that the patient was unable to eat unassisted. Indeed, the Court noted that her sons also informed the administrator of prior incidents when the patient had choked while eating. Nonetheless, employees of the nursing home, on at least two occasions, delivered food to this patient without providing any personnel to assist her with her food. Even though the nursing home personnel knew that she "needed to be spoon fed" and that someone "had to keep an eye" on her, the employees failed to assist her and Nichols died when food obstructed a portion of her air passage and lodged in her windpipe. 247 Va. 264, 266-267, 441 S.E.2d 1, 23.

In *Beverly Enterprises* the Court held that the plaintiff was not required to present expert testimony to establish a prima facie case of medical negligence because "the question whether a reasonably prudent nursing home would permit its employees to leave a tray of food with an unattended patient who had a history of choking and who was unable to eat without assistance is certainly within the common knowledge and experience of a jury." 247 Va. 264, 269, 441 S.E.2d 1, 4.

A few years later, in *Dickerson v. Fatehi*, 253 Va. 324, 484 S.E.2d 880 (1997), the plaintiff alleged that during the course of surgery, a physician used a blunt tipped hypodermic needle, including a plastic attachment to the syringe, and that the physician negligently failed to remove the hypodermic needle from her neck at the conclusion of the procedure. After the surgery, she experienced severe pain in her right arm, hand, and neck. Approximately 20 months after the surgery, another surgeon discovered and removed the needle and plastic attachment from the patient's neck. On appeal the Supreme Court again considered whether expert testimony was necessary to establish the appropriate standards of care and breaches thereof in this particular circumstance. In response to the plaintiff's contention that -- based upon the specific facts alleged in her pleadings and the defendant's admissions expert testimony was not necessary to establish the appropriate standards of care and breaches thereof, the Court held that if the facts alleged by the plaintiff and admitted by the doctor were presented to a jury, the jurors,

"absent expert testimony, reasonably could determine, by calling upon their common knowledge and experience, whether [the doctor] was negligent and whether his negligence was a proximate cause of Dickerson's injuries. Therefore, the trial court erred in ruling that expert testimony was necessary to establish the standard of care."

253 Va. 324, 328, 484 S.E.2d 880, 882.

In its recent *Coston* decision the Court was again presented with what might be characterized as a physical, care-based circumstance not falling into the typical mold of expert medical judgment. Whether defendant's personnel acted negligently in placing the patient in a defective chair was an issue that ordinary jurors, who use chairs in all aspects of daily life, could comprehend. The Supreme Court therefore held that "the plaintiff's allegations that she was injured after she was placed in a defective chair, if proven at trial, would be sufficient to establish a prima facie case of medical negligence against the defendant without the necessity of expert testimony." The Court observed that -- based upon these allegations -- "a jury could find that defendant's employees placed the plaintiff in a defective chair even though they had knowledge that the chair was not safe."

Thus in *Coston* the Court found another example where it was clear that the issues involved in determining whether the defendant's acts or omissions in this case constitute medical negligence were easily within a jury's common knowledge and experience. Where circumstances in a given case present such a non-scientific issue, the Court found that expert testimony is for that reason not necessary.

The Fallout from *Perdieu*. A prominent recent decision from the Court, in the *Perdieu* case, has been thought by some members of the Virginia bar to signal an absolute requirement that the plaintiff establish the applicable standards of care and deviations therefrom with expert testimony. In *Coston* the Supreme Court took pains to explain that the broad implications of *Perdieu*, which had considered multiple medical personnel in various categories of training and activity, do not erect such an absolute requirement.

In *Perdieu*, the Supreme Court of Virginia held that a plaintiff in a medical negligence action must produce expert testimony to establish that:

a physician failed to supervise a resident physician; that a physician breached the standards of care by failing to timely diagnose an injury;

a nursing home was negligent in failing to attend, restrain, assist, diagnose, examine, and treat an inpatient; and

the nursing home was negligent in its failure to implement a care plan for the patient.

Thus, in that case the plaintiff was required to present expert testimony to establish a prima facie case of negligence.

In its recent *Coston* decision, the Court goes on to clarify that the *reason* why such expert proof was required in assessing claims against the various personnel in *Perdieu* was that the issues presented by the facts of that case were not within the common knowledge and experience of lay jurors. 264 Va. 408, 421-422, 568 S.E.2d 703, 711. Thus, while *Perdieu* characterized prior case law allowing a case to go to the jury without expert proof as "unique," and stressed that the defendants in that case knew of the patient's physical condition and her prior choking incidents, and despite this knowledge, left a tray of food in front of her and failed to provide her with the required assistance, *Coston* makes clear that *its implications are not limited* to the question whether a reasonably prudent nursing home would permit its employees to leave a tray of food with an unattended patient who had a history of choking and who was unable to eat without assistance is certainly within the common knowledge and experience of a jury.

Unlike the standard of care issues the Court discussed in *Perdieu*, in situations like the "defective chair" presented in *Coston*, the issue of the defendant's acts of medical negligence is seen as "quite simple and within the common knowledge and experience of a lay jury."

Conclusions in the Broader Context. By way of conclusion, it may be noted that there is an inherent tension in modern Virginia evidence law about experts which has clear analogies for the situation presented in *Coston*. While the Code of Virginia today establishes principles (borrowed from the Federal Rules of Evidence) *favoring* the admission of expert proof in any circumstances where it can be "helpful" to the trier of fact, traditional doctrine viewed expert proof more warily. In traditional case law, there was discussion of the prospect that the fact-finding prerogatives of the jury were being trammelled upon if a party adduced expert proof on a topic for which the jury's common life experiences equipped it to decide issues. See, for example, *David A. Parker Enters. v. Templeton*, 251 Va. 235, 467 S.E.2d 488 (1996), which recites the general principle that an expert's opinion is admissible in evidence if it will assist the fact finder -- while incorporating an express limitation that the subject of such an opinion must be "a matter that is not within the range of common knowledge." (Applying law to that effect noted in *Lyle, Siegel v. Tidewater Capital Corp.*, 249 Va. 426, 436, 457 S.E.2d 28, 34 (1995)). Such case law holds that, conversely, "an expert's opinion is inadmissible, however, if it relates to matters about which the fact finder is equally as capable as the expert of reaching an intelligent and informed opinion." *David A. Parker Enters.*, invoking *Kendrick v. Vaz, Inc.*, 244 Va. 380, 384, 421 S.E.2d 447, 449 (1992), and *Grasty v. Tanner*, 206 Va. 723, 726, 146 S.E.2d 252, 254 (1966). The draft Rules of Evidence for Virginia do not incorporate the requirement that expert opinion address a topic a distinct step above the common knowledge or experience of the trier of fact, but this Virginia doctrine remains high in the consciousness of many Virginia litigators and judges.

Further, resistance to the modern "ultimate opinion rule" (which by statute in Virginia does *not* bar opinions on key questions) is evident in the same case law. Va. Code Ann. § 8.01-401.3(B) is thus honored more in the breach than in the observance. The tension between the mere helpfulness standard, and a more demanding requirement of necessity for expert proof, if not the latter concern for preserving the proper province of the trier of fact's prerogatives to make key determinations without influence by hired witnesses, is just below the surface in the Court's recent *Coston* decision.

CVirginia Cross-References. For further analysis of the topics of Virginia law addressed herein, please consult the following sources:

With respect to general issues concerning the standards for admission of expert and scientific proof in Virginia, see Charles E. Friend, *The Law of Evidence in Virginia*, Chapter 14: Scientific Evidence, *The Law of Evidence in Virginia* § 17-18: Basis for Expert Opinion. See also the Boyd-Graves Conference (Kent Sinclair, Reporter), *The Guide to Evidence in Virginia* (2007), Section 702 (Experts). See also Sinclair, Kearfott, Sheridan & Imwinkelreid, *Virginia Evidentiary Foundations Guide* (Supp. 2004), passim.

In connection with managing expert proof at trial, see Virginia Civil Benchbook, Ch.4, § III: Opinion Evidence, and Virginia Criminal Benchbook, Ch. 7, § III: Opinion Evidence and § V: Scientific Evidence.

See generally Michies *Jurisprudence of Virginia and West Virginia: Evidence* (2007).

Draft Rules of Evidence for Virginia dealing with the issues of helpfulness, necessity for expert proof, and proof on an "ultimate issue" may be seen in the *Guide to Evidence*, 2008 edition, which incorporates in Sections 702, 703 and 704 many of the principles discussed in this article.

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Professor Sinclair, an active member of the Virginia Bar, teaches the program in Virginia Law & Practice at the University of Virginia School of Law. He is a Professor of Law and served for several years as Associate Dean of the Law School. He has written more than a dozen books, and is the author of *Sinclair & Middleditch, Virginia Civil Procedure* (4th ed. 2003 and annual supplements), and co-author of *Friend & Sinclair, Virginia Pleading and Practice* (2nd ed. 2007 with annual supplements). He is Chair of the Advisory Committee on Rules of Court for Virginia, and

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Sinclair on Hilton v. Martin

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Sinclair on Hilton v. Martin

By Prof. Kent Sinclair

March 4, 2008

SUMMARY: In its recent decision in *Hilton v. Martin*, 275 Va. 176, 654 S.E.2d 571, 2008 Va. LEXIS 18 (2008) the Supreme Court of Virginia revisited one of the classic issues in civil tort litigation in Virginia -- the question whether the "exclusive remedy" provision of the Virginia Workers' Compensation Act precludes a private civil action for damages. The context is one that arises with some frequency: Intentional conduct that might be characterized as assault or other volitional behavior. And the key issue is also one that arises in a large range of cases -- whether the cause of action asserted by a private plaintiff "arises out of the employment" of the victim as that term is interpreted under Va. Code § 65.2-101. This commentary, written by Kent Sinclair, discusses the implications of this important decision.

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ARTICLE: Civil Actions for Assault or Wrongful Death of Workers in Virginia -- When Is the Workers' Compensation Act the Exclusive Remedy Precluding a Private Cause of Action? Amorous Advances, Flirtation, and "Social" Assaults.

Scope & Importance. In its recent decision in *Hilton v. Martin*, 275 Va. 176, 654 S.E.2d 571, 2008 Va. LEXIS 18 (2008) the Supreme Court of Virginia revisited one of the classic issues in civil tort litigation in Virginia -- the question whether the "exclusive remedy" provision of the Virginia Workers' Compensation Act precludes a private civil action for damages. The context is one that arises with some frequency: Intentional conduct that might be characterized as assault or other volitional behavior. And the key issue is also one that arises in a large range of cases -- whether the cause of action asserted by a private plaintiff "arises out of the employment" of the victim as that term is interpreted under Va. Code § 65.2-101.

Summary. In an action to recover damages for personal injury and death resulting from an apparent assault on the victim by a fellow employee, the Supreme Court holds that a trial judge erred in concluding that the Virginia Workers' Compensation Act provided the exclusive remedy for the claims. Applying the "actual risk test," the Court concludes that the assault on this particular victim had no relationship with her status as an employee. On bizarre facts noted below, the Court found that -- whether the tortfeasor's behavior was intended as flirtatious, merely playful, or as harassment -- the assault was "purely personal" and thus the resulting injury and death did not "arise out of the

employment" under Va. Code § 65.2-101. The judgment was reversed and the case was remanded for further proceedings in the pending civil action for wrongful death.

Background Facts. Plaintiff's decedent (his daughter) was an emergency medical services employee, seated on the passenger side of the front seat of an ambulance owned by her employer. The driver of the vehicle, and a third individual riding in the back, were also employees of the same emergency medical services company. The three had visited a restaurant for an on-duty meal, and were returning to the medical services station to await further assignments.

As the vehicle proceeded along the road, the passenger in the rear of the vehicle -- the alleged individual tortfeasor -- had a bizarre idea. This individual, whom the pleadings alleged had a reputation as a kid in an adults body, and who had a tendency to harass his female co-workers and exhibited childish and immature behavior, focused on the decedent, a co-worker who was also riding in the ambulance. The tortfeasor turned on the power to a manual cardiac defibrillator that was in the rear of the ambulance, adjusted its energy to 150 joules, and picked up the defibrillator paddles. With the paddles in his hands, he turned toward the front of the ambulance and told the victim, Im going to get you. She screamed, Get those away from me, and pushed the tortfeasor back. He turned away from her and appeared to be replacing the paddles in the unit. Suddenly, he again came toward her, striking her with the paddles on the left shoulder and left breast, while simultaneously activating them. The victim screamed, [h]e shocked me, and appeared to be having a seizure. As a result of this electrocution, the victim experienced cardiac and respiratory arrest.

The victim's father qualified as administrator of her estate and brought this action against the individual tortfeasor, the employer and another medical professional. As eventually became pertinent, the complaint included counts for assault and battery against the individual tortfeasor and the medical service, and negligent hiring and negligent retention against that employer for allowing the individual tortfeasor to remain in the workplace.

The defendants filed pleas in bar, asserting that the plaintiffs sole remedy was provided by the Virginia Workers' Compensation Act (the "Act"). The parties submitted the case to the trial court on the pleadings, depositions and arguments of counsel, thus waiving the prohibition upon the use of depositions in summary adjudication.

The court, by letter opinion, ruled that the accident arose out of and in the course of the employment under Va. Code § 65.2-101. The trial court dismissed the complaint on these grounds, and the administrator pursued an appeal.

Note on Appellate Review in this Context. It should be emphasized that the trial court accepted for purposes of the motion to dismiss the averments set forth in the complaint filed by the administrator, and the Supreme Court also relied upon those assertions as framing the context for the legal issues. The Court noted that when a question of law concerning the trial courts application of the law to essentially undisputed facts is presented, a de novo standard of review is applied. Thus, the Court accorded no particular deference to the legal conclusions drawn by the trial court from the circumstances sketched by the parties as background for the motion to dismiss.

Overview of the Exclusive Remedy Doctrine. Under Va. Code § 65.2-101, an injury falls within the scope of the Workers' Compensation Act only if it results from an accident and arises out of and in the course of the injured persons employment. If the injury meets those tests, the rights provided by the Act are the sole remedies for the injury, to the exclusion of any other rights and remedies at common law or otherwise, on account of such injury, loss of service or death, under Va. Code § 65.2-307.

As the Court noted in a recent decision which also had elements of sexual predation to it, *Butler v. Southern States Cooperative, Inc.*, 270 Va. 459, 465, 620 S.E.2d 768, 772 (2005), to the extent that an employees injury does not meet the statutory tests for coverage under the Act, the employees common-law remedies are preserved unimpaired. In *Butler* the Court concluded:

In the present case, Butler's allegations, taken as true for purposes of our review, clearly establish that Allen's assault on Butler was personal to Butler and not directed against her as an employee or because of her employment. Allen's actions were the result of his asserted personal attraction to Butler. Allen's actions were in no way in furtherance

of Southern States' business and, therefore, Butler's injury cannot fairly be traced to her employment as a contributing proximate cause. Our prior decisions regarding personal assaults dictate the conclusion that the assault on Butler did not arise "out of" her employment in the context of the Workers' Compensation Act.

In the recent *Hilton* case, it was undisputed that the victim's fatal injury arose in the course of her employment. Therefore, the sole question on appeal was whether the circuit court erred in finding from the undisputed facts that her injury also was one arising out of her employment.

At the outset, the Supreme Court stressed a point it had also made in *Butler* -- that in considering the arising out of prong, the positional risk test, whereby simply sustaining an injury at work is sufficient to establish compensability, is *not* applied. Rather, the *actual risk* test is applied. Under the "actual risk" standard, an injury giving rise to a cause of action comes within the Act *only if there is a causal connection between the employee's injury and the conditions under which the employer requires the work to be done.*

While *Hilton* and *Butler* both involved inappropriate acts relating to amorous or sexual motivations, the Supreme Court of Virginia has reviewed a large number of cases over the years involving assaultive behavior directed against a victim who was an employee performing job duties at the time of the tortious behavior directed against him or her. Examples that have been cited in modern decisions are these:

"Goosing" another individual. Webster's Third New International Dictionary informs readers that to "goose" means "to poke or dig (a person) in some sensitive spot; esp: to poke (a person) between buttocks with an upward thrust of a finger or hand from the rear." See *Richmond Newspapers v. Hazelwood*, 249 Va. 369, 373, 457 S.E.2d 56, 58 (1995).

Rape of the victim by an assailant the victim knew personally off the job, in which theft of the employer's money appeared to be an afterthought. *Reamer v. National Service Industries*, 237 Va. 466, 471, 377 S.E.2d 627, 630 (1989)

Shooting of the driver of a moving truck, unrelated to any robbery, was personal to him and outside the employment. *Metcalf v. A. M. Express Moving Systems, Inc.*, 230 Va. 464, 470, 339 S.E.2d 177, 181 (1986).

Shooting of a newspaper carrier while seated in her car at 2:00 a.m., waiting for her employer to arrive with her supply of newspapers. *Plummer v. Landmark Communications*, 235 Va. 78, 366 S.E.2d 73 (1988) (the employee alleged that the employer knew of dangerous conditions in the parking lot and knew that another carrier had had difficulties there. She showed that the employer had notice of a dangerous condition and failed to protect her from it. These allegations showed that the probability of assault was augmented by the character of the job and the environment in which the employee worked, and therefore, that the injury arose out of the employment).

Assault of an employee of a merchant dealing in precious metals by a bank robber, in circumstances where the employer's requirement that the employee make daily bank deposits was a condition that "exposed her to a special risk of assault" and, hence, that the assault constituted an accident arising out of the employment. *R & T Investments v. Johns*, 228 Va. 249, 252, 321 S.E.2d 287, 289 (1984).

Sexual "fondling" and further harassment. *City of Richmond v. Braxton*, 230 Va. 161, 165, 335 S.E.2d 259, 262 (1985) (the victim was employed by the city as a ticket seller in the box office of a municipally owned theater. While the claimant was making a telephone call, her supervisor grabbed her and began fondling her breasts. The episode was interrupted when a customer appeared at the box office window. After the customer left, the supervisor attempted to grab the claimant again, but she broke away and ran out of the box office. The supervisor displayed sexually oriented literature in his office and regularly discussed sexual topics with another female employee in the box office and showed her pictures from Playboy magazine).

Murder of a coal delivery truck driver by an escaped mental patient who wanted the truck to escape the area. See *Hopson v. Hungerford Coal Co.*, 187 Va. 299, 305306, 46 S.E.2d 392, 395 (Va. 1948) (noting that the outcome might be different if the victim was defending the employer's property at the time he was killed).

Shooting of the victim because of a poker game and "working on Sundays." *A. N. Campbell & Co. v. Messenger*, 171 Va. 374, 377378, 199 S.E. 511, 513 (Va. 1938) ("if the shooting resulted from religious prejudice of the assailant aroused by the employment of claimant in labor on the Sabbath day, then his injury arose out of his employment and was compensable," but the poker motivation was equally plausible on the facts).

Attack with a hatchet on a traveling insurance premium collector by two hitchhiking youths. *Continental Life Ins. Co. v. Gough*, 161 Va. 755, 759760, 172 S.E. 264, 266 (Va. 1934) (suggesting that if robbery to obtain the employer's premiums the victim had collected were the motive, the Act would apply).

Reviewing the range of prior decisions in these contexts the Court concluded that this body of prior case law involving assaults upon employees all adheres to a common principle: *If the assault is personal to the employee and not directed against him as an employee or because of his employment, the resulting injury does not arise out of the employment.* That principle was expressly articulated after a review of numerous authorities in *Richmond Newspapers*, and it was deemed to control the recent *Hilton* case.

The virtually inexplicable motivations and intentions of the individual tortfeasor in *Hilton* did not trouble the Supreme Court, which found that it was "immaterial whether the assailants subjective motivation is playful, amorous, vindictive, or hostile. An injury resulting from an assault arises out of the injured person's employment when it is directed at the victim *as an employee*."

The Court also stressed that such an injury "also arises out of the employment when the *conditions under which the employer requires the work to be done* are a contributing cause of the injury. (Emphasis by the Court). Additionally, the assailants unauthorized use of a tool that happened to be available at the workplace was immaterial in making the determination.

A particular issue raised in *Hilton* sprung from the fact that the tortfeasor accomplished the assault and injury upon the victim through the use of medical equipment owned and made available to the workers by their common employer -- a powerful electric defibrillator. The Supreme Court found, however, that "[u]nauthorized use of the employer's equipment is not probative on the question whether the employer's workplace requirements were a contributing cause of the injury."

Respondeat Superior Also No Out. It may be remembered that in the prior sexual assault case, *Butler*, the Court had rejected the employer's claim that the victim's allegations of respondeat superior liability in her pleading necessarily caused her claim to be barred under the Act. The Court there noted that "to plead respondeat superior liability, a plaintiff must allege that the injury caused by the act of an employee, such as [individual tortfeasor in that case], occurred within the scope of the employment relationship. This is directly analogous to an injury "in the course of" an individual's employment for purposes of the exclusivity analysis under the Act. However, this is only one prong of that analysis." The exclusivity provision of Va. Code § 65.2-307 applies only to an injury both "arising out of" and "in the course of" an individual's employment under Va. Code § 65.2-300. As the Court dryly observed in *Butler*: "These requirements for compensability of a claim and, in turn, for the exclusivity of the remedy under the Act, are not synonymous," citing *R & T Investments, Ltd. v. Johns*, 228 Va. 249, 252, 321 S.E.2d 287, 289 (1984).

Conclusion. The Supreme Court concluded in the recent *Hilton* decision that the evidence, assumed as true for purposes of deciding the pending issues, clearly established that the individual tortfeasor's assault had no relationship with the victim's status as an employee. The Court states: "Whether intended as flirtatious, merely playful, or as harassment, it was purely personal. Further, the employers workplace requirements had no causal connection with the risk of injury by assault." Since the Court also held that the individual tortfeasor's decision to use the employer's equipment in assaulting a fellow employee was entirely his own and unconnected with the conditions of the employment, it ultimately found that the injury resulting from the assault did not "arise out of the employment." Thus the "exclusive remedy" provisions of the Virginia Workers' Compensation Act were not applicable, and a private wrongful death action could be maintained.

C Virginia Cross-References. For further analysis of the topics of Virginia law addressed herein, please consult the following sources:

With respect to Respondeat Superior and Negligent Retention claims, *see* John Costello, *Virginia Remedies*, (3rd Edition 2005) §§ § 17A.04: Respondeat Superior and § 17A.06: Negligent Hiring or Retention.

For a discussion of appeal of Workers' Compensation Commission decisions, *see* Charles E. Friend and Kent Sinclair, *Virginia Pleading and Practice* § 38.07: Procedure for Filing Appeal from the Workers' Compensation Commission.

For an overview of standards applied in the Determination of Compensable Injuries under the Worker's Compensation Act, *see* Charles E. Friend, *Personal Injury Law in Virginia* (2nd ed. 2002), § 23.7: Determination of Compensable Injury and § 23.26: Common Law Remedies.

For specific discussion of the Causal Connection With Employment Test in Virginia Tort and Workers' Compensation law, *see* Charles E. Friend, *Personal Injury Law in Virginia* (2nd ed. 2002), § 23.8: Causal Connection With Employment and § 23.26: Common Law Remedies.

For an overall review of case law principles construing and applying the Virginia Workers' Compensation Act, and the issues in this article, *see generally* Michies *Jurisprudence of Virginia and West Virginia* (2007), *Workers' Compensation*, § 1: Scope, § 2: Nature, Purpose and Constitutionality of Acts, § 25: Injuries and Diseases Compensable Under the Act: Particular Instances, § 53: Effect of the Act on Other Remedies: Generally.

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Garcia on Rush v. Norfolk Electric Company, Inc., 70 Mass. App. Ct. 373 (2007)

2008 Emerging Issues 1975

Garcia on Rush v. Norfolk Electric Company, Inc., 70 Mass. App. Ct. 373 (2007)

By Grace V. B. Garcia

March 3, 2008

SUMMARY: In *Rush v. Norfolk Electric Company, Inc., 70 Mass. App. Ct. 373 (2007)*, the Appeals Court of Massachusetts affirmed the trial courts decision to partially grant defendants, Modern Continental Construction Company, Inc., post-trial summary judgment motion to obtain indemnification from the third-party defendant, Harding & Smith, Inc. Although there has been a lot written on the subject of indemnification within construction contracts, this case is important in that it reminds contracting parties to ensure proper drafting of the construction agreements so that all of their clauses, including clauses regarding indemnification, can be read harmoniously, or else face the consequence of losing the benefits of a possibly favorable clause due to the conflicting clause rule. This commentary, written by Grace V.B. Garcia, discusses the implications of this important decision.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: In *Rush v. Norfolk Electric Company, Inc., 70 Mass. App. Ct. 373 (2007)*, the Appeals Court of Massachusetts affirmed the trial courts decision to partially grant defendants, Modern Continental Construction Company, Inc., post-trial summary judgment motion to obtain indemnification from the third-party defendant, Harding & Smith, Inc. Although there has been a lot written on the subject of indemnification within construction contracts, this case is important in that it reminds contracting parties to ensure proper drafting of the construction agreements so that all of their clauses, including clauses regarding indemnification, can be read harmoniously, or else face the consequence of losing the benefits of a possibly favorable clause due to the conflicting clause rule.

Background for the Courts Decision. Plaintiff, Michael Rush, was injured while working on a waste treatment project, on which Modern Continental was the general contractor. He brought a suit for negligence against Modern Continental and its subcontractor, Norfolk Electric Company, Inc. (Norfolk Electric), and his wife, Colleen Rush asserted claims for loss of consortium. For the project, Modern Continental also subcontracted the plumbing to Harding & Smith. Harding & Smith then sub-subcontracted the insulation and piping work to New England Insulation Co. (NEI), the plaintiffs employer.

Although Norfolk Electrics general liability insurer assumed the defense of Modern Continental based on an indemnification agreement, Modern Continental also asserted a third-party complaint against Harding & Smith for

indemnification based on its subcontract agreement. Harding & Smith, in turn, asserted a fourth-party complaint against NEI for indemnification based on its sub-subcontract.

As part of the subcontract Modern Continental had with Harding & Smith, it stated as follows:

Subcontractor does further agree to be bound to the General Contractor by the aforementioned General Contract Documents and all other instruments herein referred to and further to assume toward the General Contractor all the obligations and responsibilities pertaining to the work that the General Contractor by the aforesaid General Contract Documents has assumed to the owner including the furnishing of warranties and guarantees as are required in the General Contract Documents *for the work of this subcontractor*. (emphasis in original)

As part of the original contract for the project between the owner and Modern Continental, there was indemnification language which required Modern Continental to indemnify the owner with respect to claims for personal injuries or property damage incurred in connection with the work performed by Modern Continental on the project if such personal injuries occurred, even in part, as a result of the negligence of Modern Continental or any person or entity for which it was responsible. *Rush, 70 Mass. App. Ct. at 377*. As a result of the incorporation clause, Modern Continental argued that its subcontractor, Harding & Smith, was obligated to indemnify Modern Continental to the same degree Modern Continental was obligated to indemnify the owner.

Giving rise to this case, however, is the fact that there was also another indemnification provision that was contained in the subcontract between Modern Continental and Harding & Smith. The provision in the subcontract stated as follows:

To the extent permitted by law, the Subcontractor shall (1) fully indemnify and save the General Contractor wholly harmless from any and all claims, liabilities, liens, demands and causes of action for or on account of any injury to person, . . . arising out of or in consequence of the performance of the Subcontractors work hereunder, *but only to the extent caused in whole or in part by the acts or omissions of the Subcontractor, its subcontractors, anyone directly or indirectly employed by it, or anyone for whose acts it may be liable*. (emphasis in original)

After a jury found Modern Continental, Norfolk Electric and the plaintiff Michael Rush all partially negligent, the trial court allowed, only in part, Modern Continentals post-trial motion for summary judgment seeking indemnification from Harding & Smith. Rather, than allow Modern Continental full indemnification from Harding & Smith based on the general contract language, the court only granted Modern Continental a right to partial indemnification based on the subcontract language.

Indemnification. Indemnification provisions are common in construction contracts. Generally, the contract documents provide that the general contractor agrees to indemnify the owner for the project and then, in its subcontracts, the general contractor obtains indemnification agreements from its subcontractors. Mass. Gen. Laws. ch. 149, § 29C controls indemnification clauses in construction projects for Massachusetts. The statute voids indemnity in construction contracts for personal injuries or damages to property not caused by a subcontractor. However, pursuant to the statute, it is legal for a general contractor and subcontractor to agree that the subcontractor will indemnify for a loss even if the subcontractors negligence is only partially responsible. Mass. Gen. Laws. ch. 149, § 29C. As such, many indemnification clauses will begin with the clause To the fullest extent permitted by law, as such is a savings provision that enables a court to excise offensive portions of an indemnity provision and enforce the remainder of the provision. *Callahan v. A.J. Welch, 36 Mass. App. Ct. 608, 611-613 (1994)*.

There are several types of indemnification provisions used in construction contracts. For example, some provisions contain the language arising out of or in consequence of the performance of the subcontractors work. Such language, which is enforceable, limits the subcontractors indemnity obligation to situations where there is a causal connection between the subcontractors work and the injury. *M. DeMatteo Construction Co. v. A.C. Dellovade, Inc., 39 Mass. App.*

Ct. 1, 3-4 (1995). Other indemnity provisions in a subcontract agreement require indemnity but only to the extent caused in whole or in part by the indemnitor. Such language is deemed to be a proportional indemnity provision. *North American Site Developers, Inc. v. MRP Site Development, Inc.*, 63 Mass. App. Ct. 529, 534-35 (2005). Therefore, in a proportional indemnity provision, the language limits the indemnity obligation that the indemnitor, often the subcontractor, is responsible for.

Why Not Full Indemnification? In *Rush*, the general contract provided for indemnification by the indemnitor for the entire loss, as long as the loss was connected to the work performed by the indemnitor, regardless of whether the indemnitee was partly responsible for the loss. Consequently, if the indemnification obligation required of Harding & Smith in *Rush* was solely based on the broad indemnification language contained in the general contract, then Modern Continental would have been entitled to full indemnification from Harding & Smith. *Rush*, 70 Mass. App. Ct. at 377.

The problem in *Rush* arose, however, due to the fact that the indemnification clause in the subcontract limited the subcontractors obligation to indemnify to the extent the damages were caused by the subcontractor. Thus, although Modern Continental would have been entitled to complete indemnification under the provisions of the general contract, in contrast, it limited its right for indemnification by the additional and separate language contained in its subcontract with Harding & Smith.

As the Appeals Court held that the two indemnification clauses could not be read harmoniously, it followed the conflicting clauses rule which it laid out in *Lembo v. Waters*, 1 Mass. App. Ct. 227, 233 (1973). There, the court held that [i]f the apparent inconsistency is between a clause that is general and broadly inclusive in character and one that is more limited and specific in its coverage, the latter should generally be held to operate as a modification and pro tanto nullification of the former. *Id.*, quoting Corbin on Contracts § 24.23, at 176. Applying this rule, the Appeals Court in *Rush* agreed with the trial courts finding that the more limited indemnification clause in the subcontract was applicable, nullifying the indemnification clause contained in the general contract.

In reaching this conclusion, the Appeals Court noted that as the subcontract was actually between Modern Continental and Harding & Smith, the indemnification provision contained in that subcontract had been bargained for. Conversely, the general contract contained terms that were more applicable to the owner and Modern Continental, as well as contained several provisions that had nothing to do with Harding & Smiths plumbing duties, and only became operative against the subcontract due to the incorporation clause.

What Can Practitioners Due to Avoid the Outcome of *Rush*? In order to protect your client, whether the general contractor or subcontractor, it is important that practitioners make sure that they have read all the terms of the contract or contracts. This is especially important when a contract includes an incorporation clause, incorporating the terms of another contract or document. If there are two provisions that cover the same topic, such as indemnification, it is imperative that the parties be sure that they are artfully drafted in such a way that they can be read harmoniously. If the two provisions are not harmonious, the practitioner may want to take out one clause, thus, relying solely on the other clause. Otherwise, if litigation arises, a favorable clause may be lost due to the application of the conflicting clause rule, as shown by the *Rush* decision.

Cross References. MA Pleading and Practice § 8.171: Complaint on Contract in Writing: General Form.

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Grace V. B. Garcia is a Partner in the Boston office of Morrison Mahoney LLP. Ms. Garcias practice is concentrated in the areas of commercial litigation, construction law, product liability and premises liability. In 2005, 2006, and 2007, she was recognized by Boston Magazine and Law & Politics as a Super Lawyer Rising Star. Ms. Garcia is admitted to the bars of the Commonwealth of Massachusetts and the State of New York. She is actively involved in several bar associations and serves on the Massachusetts Bar Association's Litigation Section Council.

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Martin on Lioce v. Cohen

2008 Emerging Issues 1973

Martin on Lioce v. Cohen

By Leah A. Martin

February 29, 2008

SUMMARY: Nevada authority on attorney misconduct during closing argument and the resulting motion for new trial analysis have been moving targets in recent years. The newest (and final?) of these targets was entered by the Nevada Supreme Court in January 2008. *Lioce v. Cohen*, 124 Nev. Adv. Op. No. 1 (January 17, 2008), provides new and substantially modified authority in this matter, detailing the significance of whether objections were made and if so whether they were sustained, whether admonishments were given, and whether the improper conduct of counsel continued.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Introduction. Nevada authority on attorney misconduct during closing argument, and the resulting motion for new trial analysis, have been moving targets in recent years. The newest (and hopefully final) of these targets was entered by the Nevada Supreme Court in January 2008. *Lioce v. Cohen* [124 Nev. Adv. Op. No. 1 (January 17, 2008)] provides new and substantially modified authority in this matter, detailing the significance of whether objections were made and, if so, whether they were sustained, whether admonishments were given, and whether the improper conduct of counsel continued. This Expert Commentary (1) highlights the factors to be considered in deciding a motion for new trial in cases of attorney misconduct, and (2) outlines conduct that could result in the granting of a new trial (and possible attorney discipline and sanctions).

Nevadas Historical Treatment of New Trials Based on Attorney Misconduct. The issue of attorney misconduct at trial was first addressed by the Nevada Supreme Court relatively recently--in 1995. In *Barrett v. Baird* [111 Nev. 1496, 908 P.2d 689 (1995)], Nevada adopted the Ninth Circuit Court of Appeals rule on the subject, holding that [t]o warrant [a new trial] on grounds of attorney misconduct, the flavor of misconduct must sufficiently permeate an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict [*Barrett*, 111 Nev. 1496, 1515, 908 P.2d at 702 (quoting *Kehr v. Smith Barney, Harris Upham & Co., Inc.*, 736 F.2d 1283, 1286 (9th Cir. 1984))]. The *Barrett* court did not specify whether an objection to the attorney misconduct was required to preserve the issue for a motion for new trial or the extent of misconduct required to justify a new trial [see *Lioce v. Cohen*, 124 Nev. Adv. Op. No. 1 (January 17, 2008)].

Five years later, the Nevada Supreme Court took on this issue again in *DeJesus v. Flick* [116 Nev. 812, 7 P.3d 459 (2000)]. The *DeJesus* majority noted that as a general rule, failure to object to attorney misconduct precludes review,

but concluded that an exception exists in cases of plain error resulting from the inflammatory quality and sheer quantity of misconduct [*DeJesus*, 116 Nev. at 815816, 7 P.3d at 462].

Just a few years later, in *Ringle v. Bruton* [120 Nev. 82, 86 P.3d 1032 (2004)], the Nevada Supreme Court clarified when unobjected-to attorney misconduct would be considered the basis for a new trial. The *Ringle* court held that egregious unobjected-to misconduct would be considered in those rare circumstances where the comments are of such sinister influence as to constitute irreparable and fundamental error [*Ringle*, 120 Nev. at 9596, 86 P.3d at 10401041].

Lioce Brings Us Up to Date. That brings us to the final target: *Lioce v. Cohen* [124 Nev. Adv. Op. No. 1 (January 17, 2008)].ⁿ¹ In *Lioce*, the Nevada Supreme Court breaks down the analysis of whether a new trial should be allowed due to attorney misconduct into several categories, which are detailed below.

When Misconduct Is Objected to and Admonishments Are Given. In *Lioce*, the Nevada Supreme Court first addresses circumstances where the attorney misconduct is objected to and the objection is sustained. The court noted that in such circumstances, sustaining the objection is not enough--the court should admonish the jury and counsel. If admonishment is properly given, the burden is on the party seeking a new trial to demonstrate that the misconduct is so extreme that the objection and admonishment could not remove the misconducts effect [*Lioce v. Cohen*, 124 Nev. Adv. Op. No. 1 (January 17, 2008)]. If the moving party meets that burden, a new trial should be granted [*Lioce v. Cohen*, 124 Nev. Adv. Op. No. 1 (January 17, 2008)].

When Misconduct Is Objected to But Objection Is Overruled. The Nevada Supreme Court then addresses circumstances where the attorney misconduct is objected to but the court overrules the objection and does not admonish the jury. When this occurs, the moving party must first demonstrate that the district court erred by overruling the partys objection [*Lioce v. Cohen*, 124 Nev. Adv. Op. No. 1 (January 17, 2008)]. If the moving party meets that burden, the trial court must then consider whether an admonition to the jury would likely have affected the verdict in favor of the moving party, evaluating the evidence and the parties and the attorneys demeanor to determine whether a partys substantial rights were affected by the courts failure to sustain the objection and admonish the jury [*Lioce v. Cohen*, 124 Nev. Adv. Op. No. 1 (January 17, 2008)].

When Misconduct Is Objected to but Misconduct Continues. The Nevada Supreme Court next considers circumstances where the attorney misconduct is repeated or persistent, and is objected to by the opposing party. The *Lioce* court noted that by being forced to continuously object to such conduct, the nonoffending attorney is placed in the difficult position of having to make repeated objections before the trier of fact, which might cast a negative impression on the attorney and the party the attorney represents, emphasizing the improper point [*Lioce v. Cohen*, 124 Nev. Adv. Op. No. 1 (January 17, 2008)]. As a result, when considering a motion for new trial based on repeated or persistent misconduct, the court must consider that by engaging in continued misconduct, the offending attorney has accepted the risk that the jury will be influenced by his misconduct and give great weight to the fact that single instances of improper conduct that could have been cured by objection and admonishment might not be curable when that improper conduct is repeated or persistent [*Lioce v. Cohen*, 124 Nev. Adv. Op. No. 1 (January 17, 2008)].

When No Objection Is Made Concerning Misconduct. The *Lioce* court finally considers circumstances where a motion for new trial is brought, but no objection was made concerning the underlying attorney misconduct. The Nevada Supreme Court maintains the position that failure to object to attorney misconduct is generally deemed a waiver, but that in cases of plain error the misconduct may be considered in the new trial analysis [*Lioce v. Cohen*, 124 Nev. Adv. Op. No. 1 (January 17, 2008)]. The burden is high, and requires a determination that no other reasonable explanation for the verdict exists [*Lioce v. Cohen*, 124 Nev. Adv. Op. No. 1 (January 17, 2008)]. In other words, but for the misconduct, the verdict would have been different [*Lioce v. Cohen*, 124 Nev. Adv. Op. 1 (January 17, 2008)].

What Does This Mean for the Trial Lawyer? The most important thing to take away from *Lioce* is the importance of preserving all objections--particularly those relating to attorney misconduct--at trial. Best practice dictates that counsel should repeat the objection after each instance of attorney misconduct to ensure a complete and

clear record. In addition to simply stating the objections, counsel must also ensure that the closing arguments are reported and transcribed as part of the record [see *Beccard v. Nev. Natl Bank*, 99 Nev. 63, 657 P.2d 1154 (1983)]. A motion for new trial should be brought after the jury enters its verdict; until that occurs, the required prejudice cannot be demonstrated.

To avoid engaging in attorney misconduct, counsel must be aware of the state of the law in this delicate area of practice. In *Lioce*, the three categories of improper closing argument noted were [*Lioce v. Cohen*, 124 Nev. Adv. Op. No. 1 (January 17, 2008)]:

- (1) Jury nullification;
- (2) Statements of personal opinion; and
- (3) Golden rule arguments.

The Nevada Supreme Court discussed additional areas of forbidden argument in *DeJesus v. Flick* [116 Nev. 812, 7 P.3d 459 (2000)] and *Canterino v. Mirage Casino-Hotel* [117 Nev. 19, 16 P.3d 415 (2001)]. Specifically, those cases provide that counsels arguments cannot contain:

- (1) Perceived emotionalism;
- (2) Inflammatory argument;
- (3) Personal commentary concerning a party or witness; or
- (4) Send a message arguments (unless in relation to a punitive damages case).

Although this list is not comprehensive of all potential misconduct, it provides substantial guidance as to areas that are clearly outside the scope of permissible argument.

Lioce provides a great deal of clarity as to what is required in various circumstances to justify the granting of a new trial based on attorney misconduct. Hopefully, the Nevada Supreme Court will, in the future, further focus the authority as set forth in *Lioce* rather than making it just another in a string of moving targets.

For additional general information on the purpose and permissible scope of closing argument in Nevada and objections to closing argument, see NEVADA CIVIL PRACTICE MANUAL, Ch. 22, *Trials*, § 22.24 (Matthew Bender).

For additional general information on attorney conduct and misconduct, see NEVADA CIVIL PRACTICE MANUAL, Ch. 22, *Trials*, § 22.25 (Matthew Bender).

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n1 This opinion vacates 122 Nev. Adv. Op. No. 115 (December 28, 2006), which bears the same name.

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Since 2003, Ms. Martin has served as an associate editor for the State Bar of Nevada CLE Publications Committee on the *Nevada Civil Practice Manual*, published by Matthew Bender. Beginning in 2006, Ms. Martin has assisted in teaching Nevada Civil Practice at the William S. Boyd School of Law. Ms. Martin practices in the area of civil litigation. She has substantial experience in the areas of products liability, wrongful death, complex commercial litigation, class actions, dissenting shareholders rights, and appellate advocacy. Bailey Kennedy represents, among others, healthcare facilities, publicly traded corporations, gaming companies, financial institutions, travel and tourism leaders, public entities, real estate developers, sports and entertainment concerns, and entrepreneurs.



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Pleading Scierter: Vairo on the Remand of Makor Issues v. Tellabs

2008 Emerging Issues 1964

Pleading Scierter: Vairo on the Remand of Makor Issues v. Tellabs

By Georgene Vairo

February 28, 2008

SUMMARY: Georgene Vairo on *Makor Issues & Rights, Ltd. v. Tellabs, Inc.* The Seventh Circuit on remand applied the Supreme Courts new Tellabs standard for pleading scierter under the PSLRA in *Makor Issues & Rights, Ltd. v. Tellabs, Inc.* This commentary, written by Georgene Vairo, Professor and author and editor of several books including several chapters in *Moores Federal Practice*, discusses how the Seventh Circuit interpreted Tellabs and addresses how lower courts may apply the standard in the future.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, *F.3d*, 2008 U.S. App. LEXIS 975 (7th Cir. Jan. 17, 2008), involves the application of the Supreme Courts new, stricter standard for judging allegations of scierter in securities fraud actions under the Private Securities Litigation Reform Act (PSLRA). [See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. , 127 S. Ct. 2499, 168 L. Ed. 2d 179, 2007 U.S. LEXIS 8270 (June 21, 2007), discussed in *Moores Federal Practice Update*, August 1, 2007, p. 177]. Here, the Seventh Circuit, on remand, adhered to its earlier decision and ruled that the complaint was sufficient even under the strict formulation.

Procedural Background. The Seventh Circuit originally reversed the dismissal of the suit by the district court. The Supreme Court then reversed the Seventh Circuit, setting out a new, more stringent, test for determining whether allegations of securities fraud create a strong inference of scierter" as required by the PSLRA. The Supreme Court then remanded to the Seventh Circuit with directions to consider whether the plaintiffs' allegations of scierter were sufficient to survive a motion to dismiss under the standard defined by the Supreme Court.

Standard for Alleging Scierter. The PSLRA requires courts to determine whether the complaint contains the required strong inference." A complaint that on its face creates only a weak or bare inference of scierter, suggesting that the plaintiff would prevail only if there were no defense case at all, must be dismissed. The Seventh Circuit continued: Apparently Congress does not believe that weak complaints should put a defendant to the expense of discovery in a securities fraud case, which is likely to be complexas this case is."

Unquestionably, to prove liability in a securities fraud action, the plaintiff must show that the defendant either knew a material statement was false, or was reckless in disregarding a substantial risk that it was false. The PSLRA provides that the complaint must state with particularity facts giving rise to a strong inference that the defendant acted with the

required state of mind" [15 U.S.C. § 78u-4(b)(2)]. Under the Supreme Court's interpretation of this language, a court must dismiss a complaint unless a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." Moreover, the plaintiff must plead facts rendering an inference of scienter at least as likely as any plausible opposing inference."

Conclusion. The Seventh Circuit correctly articulated the three aspects of the Supreme Courts new test: 1) cogency; 2) comparability; and 3) plausibility. It also noted the departure of the Courts new test from established pleading rules: [t]o judges raised on notice pleading, the idea of drawing a strong inference' from factual allegations is mysterious." Further, it noted that even when a plaintiff is required by Rule 9(b) to plead facts with particularity, the district court must treat the pleaded facts as true and draw all reasonable inferences in favor of the plaintiff. Thus, the *Tellabs* court on remand had to deal with a brave new world beyond notice pleading and presumptions favoring plaintiffs.

Plaintiffs Allegations. The Seventh Circuit reviewed the story told by the plaintiff in the complaint: The defendant's chief executive officer and others had made announcements about the defendant's products, a telephone switching system called TITAN 5500 and its successor product, TITAN 6500. They said that the 6500 system was available now" and that a company had signed a multi year, \$100 million contract to buy it, although in fact no sales closed until after the period covered by the complaint. They stated that sales of the 5500 would also continue to grow. Other announcements said that customers are buying more and more" of the defendant's equipment, that the defendant had set the stage for sustained growth," that growth was robust," that customers are embracing" the 6500, and that sales of the 5500 were still going strong."

The defendant later reduced its sales estimates slightly but said it was doing so because of lower than expected growth in a part of its business unrelated to the 5500 and 6500 systems, that interest in and demand for the 6500 continues to grow," and that it was experiencing no weakness in demand for the 5500. Despite these claims, the defendant had been flooding its customers with tens of millions of dollars worth of 5500 systems that the customers had not requested, in order to create an illusion of demand. The defendant had to lease extra storage space to accommodate the large number of returns.

A few weeks after making these statements, the defendant reduced its sales projections significantly, but reiterated that demand was very strong" and that [e]very thing we can build, we are building and shipping." Shortly afterward, however, the defendant announced a major drop in revenues, and its share price plummeted. Not a single 6500 system was shipped during the complaint period.

Inference of Scienter Was At Least as Compelling as Any Opposing Inference." The Seventh Circuit found it easier to consider the second, comparative part of the Supreme Court's formulation first: whether the inference of scienter was at least as compelling as the contrary inference. According to the court, the two competing inferences were that the company knew the statements were false and material, or that the falsity was the result of innocent or careless mistakes. The critical question was how likely it was that the allegedly false statements were the result of merely careless mistakes at the management level based on false information from below, rather than of an intent to deceive or a reckless indifference to whether the statements were misleading.

The inference that the false statements were merely careless was exceedingly unlikely. The 5500 and the 6500 were the defendant's most important products. Sounding like Representative Elijah E. Cummings (D. Md.) commenting on Roger Clemens testimony at the House Baseball Steroids Hearing on February 13, 2008, the Seventh Circuit stated that: That no member of the company's senior management who was involved in authorizing or making public statements about the demand for the 5500 and 6500 knew that they were false is very hard to credit, and no plausible story has yet been told by the defendants that might dispel our incredulity." The defendant argued that its executives had no motive to exaggerate the prospects for the 5500 and 6500 systems because within months they acknowledged their mistakes and disclosed the true situation, and because they did not profit from it financially. However, the executives might have thought that the situation would right itself and the benefits of concealment would exceed the costs. The inference of

scienter, the Seventh Circuit concluded, was not only as likely as its opposite, it was far more likely.

Inference of Scienter Was Cogent. "If there are only two possible inferences, and one is much more likely than the other, it must be cogent." Because the alternative hypotheses either a cascade of innocent mistakes, or acts of subordinate employees, either or both resulting in a series of false statements are far less likely than the hypothesis of scienter at the corporate level at which the statements were approved, the latter hypothesis must be considered cogent." It was conceivable, the Seventh Circuit said, that the defendant's chief executive, who was responsible for most of the statements, was unaware of the problems of his company's two major products, but it was exceedingly unlikely.

Inferring Collective Intent. Although it found that the complaint before it satisfied the Supreme Courts test, the Seventh Circuit noted other problems confronting plaintiffs in PSLRA cases: The problem with inferring a collective intent to deceive behind the act of a corporation is that the hierarchical and differentiated corporate structure makes it quite plausible that a fraud, though ordinarily a deliberate act, could be the result of a series of acts none of which was both done with scienter and imputable to the company by the doctrine of respondeat superior... To establish corporate liability for a violation of Rule 10b-5 requires look[ing] to the state of mind of the individual corporate official or officials who make or issue the statement (or order or approve it or its making or issuance, or who furnish information or language for inclusion therein, or the like) rather than generally to the collective knowledge of all the corporation's officers and employees acquired in the course of their employment.

Channel-Stuffing as Fraud? Similarly, the Seventh Circuit warns that the use of channel stuffing as the basis for inferring fraud also is more difficult in the wake of *Tellabs*: Channel stuffing becomes a form of fraud only when it is used . . . to book revenues on the basis of goods shipped but not really sold because the buyer can return them. However, the plaintiffs complaint sufficiently alleged channel-stuffing.

Confidential Sources. As a final matter, the Seventh Circuit discussed the complaint's reliance on confidential sources for its allegations. In a recent case, the Seventh Circuit had ruled that allegations as to scienter derived from confidential informants, because the strength of inferences to be drawn from them is so difficult to assess, must be strongly discounted" [see *Higginbotham v. Baxter Int'l Inc.*, 495 F.3d 753, 2007 U.S. App. LEXIS 17918 (7th Cir. July 27, 2007), discussed in *Moore's Federal Practice Update*, October 1, 2007, p. 263]. The present case was very different in the Seventh Circuit's view. In *Higginbotham*, there was no basis for a strong inference of scienter other than the confidential sources, described merely as three ex employees and two consultants. The confidential sources listed in the complaint in the present case, in contrast, were numerous and consisted of persons who from the description of their jobs were in a position to know the alleged facts at first hand e.g., that sales of the 5500 were dropping and units were being returned, that the 6500 was still in the beta stage and failing performance tests conducted by prospective customers, and that it was too bulky for customers' premises. The information from the confidential informants was set forth in convincing detail, with some of the information, moreover, corroborated by multiple sources. Under these circumstances, the absence of proper names did not invalidate the drawing of a strong inference from the informants' assertions.

Conclusion. The Seventh Circuit concluded that the plaintiffs had succeeded, with regard to the statements alleged to be false and material, in pleading scienter in conformity with the requirements of the Private Securities Litigation Reform Act. The court therefore adhered to its prior decision to reverse the judgment of the district court dismissing the suit, and remanded for further proceedings.

I predicted in my Expert Commentary to the Supreme Courts *Tellabs* opinion that it would be likely to generate analytic confusion in the lower courts as they struggled with Justice Ginsburgs majority formulation. In their concurrences, Justices Scalia and Alito adopted even more stringent tests. Justice Scalias test is: whether the inference of scienter (if any) is *more plausible* than the inference of innocence. Justice Alitos similar test is: To satisfy the strong inference test, the plaintiff must show that the inference is more likely than not correct. However, as in any context, the

more strict sounding the test, the more latitude the district court will have in ruling for a defendant, and the greater the likelihood that an opinion dismissing a case will be affirmed in a close case. The Seventh Circuit clearly had the concurring opinions in mind when it applied the Supreme Courts test(s) to the story told in the complaint. The courts cogency analysis made clear that the court believed that the plaintiffs theory was more plausible than the defendants.

One of the interesting things to note in this regard is that it would appear to be a jury function to decide whether a theory is more or less plausible. Even though *Tellabs* presents an easier case for deviating from the Federal Rules of Civil Procedures pleading rules because Congress enacted the strong inference requirement, it is consistent with another recent Supreme Court pleading case that tightened up pleading in an antitrust context. [See *Bell Atlantic Corp. v. Twombly*, 550 U.S. , 127 S. Ct. 1955, 167 L. Ed. 2d 929, 2007 U.S. LEXIS 5901 (2007)]. As a general matter, both cases are consistent with the approach taken by the Supreme Court in its 1986 trilogy of summary judgment cases. *Bell Atlantic*, in turn, also is reminiscent of *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986), in terms of its analysis and emphasis. Therefore, the pleading standards enunciated in these two cases may have ramifications to pleading practice beyond the realm of antitrust and PSLRA cases.

During the Spring and Summer of 1986, the Supreme Court decided three summary judgment cases: *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The trilogy was decided at a time when the federal courts took other stringent steps to correct perceived abuses of the judicial system. In 1983, amendments to *Federal Rules of Civil Procedure* 11, 16 and 26 became effective. These amended rules attempted to clarify the kind of litigation practice that would no longer be tolerated and required the imposition of sanctions when a court found abuses of the new standards. Most federal judges embraced these amended rules. Accordingly, the Rules ushered in a new era of federal practice in which anything goes no longer is the rule.

The *Bell Atlantic* majority opinions emphasis on avoiding needless discovery, improving efficiency, and cutting wasteful costs is consistent with the developments in the 1980s. Just as the trilogy of summary judgment cases suggested a quite radical departure from past summary judgment practice under *Federal Rule of Civil Procedure* 56, it will be interesting to see if *Tellabs* and *Bell Atlantic* provide a basis for a similar departure in pleading practice. Clearly, the new emphasis of the Supreme Court led the Seventh Circuit on remand to apply a more stringent test than it perhaps needed to. In any event, as a practical matter, litigants ought to couch their arguments regarding the strength of their scienter inferences in comparative terms. Clearly, if they can show that the inference more likely than not shows scienter, the complaint will survive.

References. 2 *Moore's Federal Practice* (3d Ed.) § 9.03[6][a].

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McDonnell on Kajima Constr. Servs. v. St. Paul Fire & Marine Ins. Co.

2008 Emerging Issues 1943

McDonnell on Kajima Constr. Servs. v. St. Paul Fire & Marine Ins. Co.

By Joseph B. McDonnell

February 25, 2008

SUMMARY: Does the rule permitting an insured to tender its defense to one of multiple insurers require the exhaustion of all policies (both primary and excess) by the targeted insurer before a deselected insurers primary policy may be required to contribute? The Supreme Court in *Kajima Constr. Servs. v. St. Paul Fire & Marine Ins. Co.*, 227 Ill. 2d 102 (Ill. 2007), held that, to the extent that defense and indemnity costs exceed the primary limits of the selected insurer, the other insurer must answer for the loss pursuant to its primary policy before coverage under the excess policy of the targeted insurer can be sought. This commentary, written by Joseph McDonnell, discusses the implications of this important decision.

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ARTICLE: The targeted tender rule permits an insured which has multiple insurance coverages to direct its tender of defense to one of those insurers, and obligates the company to which the defense is tendered to undertake the defense and indemnity of the insured to the limits of its policy. In this case of first impression, the Illinois Supreme Court explores the question of whether the company to which the defense is tendered must exhaust both its primary and excess coverages before coverage afforded by other companies is implicated.

Background. Kajima, a general contractor, entered into a subcontract with Midwestern Steel Fabricators, Inc. for a construction project. Under the contract terms, Midwestern was obligated to maintain Comprehensive General Liability (CGL) coverage naming Kajima as an additional insured. Midwestern provided Kajima with a certificate of insurance from St. Paul which named Kajima as an additional insured and which provided Kajima with \$2,000,000 in general liability coverage and \$5,000,000 in umbrella coverage. Kajima also had its own primary CGL insurance policy with Tokio with limits of \$1,000,000 per occurrence.

A portion of Midwesterns subcontract was in turn subcontracted to Up-Rite Steel Company, whose employee was injured on the job. The employee filed suit against both Kajima and Midwestern. Kajima made a targeted tender to Midwestern and its insurer, St. Paul, stating that it was exercising its right to elect St. Paul to provide Kajima with the exclusive defense and indemnification in the employees suit. Ultimately, St. Paul accepted Kajimas targeted tender under a reservation of rights.

Prior to trial, Tokio demanded that St. Paul settle the Jones lawsuit for \$3,000,000 from its primary and umbrella

insurance policies. St. Paul refused this demand. The case settlement was ultimately agreed to, with St. Paul agreeing to pay its primary limits of \$2,000,000 and Tokio contributing its primary limits of \$1,000,000. Kajima and Tokio then filed a declaratory judgment suit against St. Paul seeking reimbursement of the \$1,000,000 that Tokio had contributed to the settlement.

Trial Court Proceedings. Both parties filed motions for summary judgment. Tokio argued that St. Paul, with its primary coverage of \$2,000,000 and excess coverage of \$5,000,000, was solely responsible for the defense and indemnification of Kajima without any contribution from Tokio. St. Paul took the position that, although the targeted tender rule permitted Kajima to tender its defense and indemnification to St. Paul as one of several insurers, Illinois law also provides that all primary policies must be exhausted prior to reaching an excess policy; and that Kajima had no right to require St. Paul to exhaust its excess coverage, over and above its primary limits, before subjecting other insurance to indemnification. The trial court agreed, granting St. Paul's motion for summary judgment and denying plaintiff's motion. The First District Appellate Court affirmed and the Illinois Supreme Court granted leave to appeal.

Decision on Appeal. The Supreme Court affirmed, holding that, to the extent that defense and indemnity costs exceed the primary limits of the selected insurer, the other insurer must answer for the loss pursuant to its primary policy before coverage under the excess policy of the targeted insurer can be sought.

The Issue: Horizontal vs. Vertical Exhaustion. At issue was the horizontal exhaustion rule, which requires an insured which has multiple primary and excess policies to exhaust all of the primary policy limits before invoking excess coverage.

In its analysis, the Supreme Court said that earlier authority established that an insured must exhaust all primary coverage before the excess carrier can be compelled to participate. This became known as the horizontal exhaustion rule. *United States Gypsum Co. v. Admiral Ins. Co.*, 268 Ill. App. 3d 598 (1994); *AAA Disposal Systems, Inc. v. Aetna Casualty & Surety Co.*, 355 Ill. App. 3d 275 (2005); *Outboard Marine Corp. v. Liberty Mutual Ins. Co.*, 283 Ill. App. 3d 630 (1996).

The targeted tender doctrine developed with *Institute of London Underwriters v. Hartford Fire Ins. Co.*, 234 Ill. App. 3d 70 (1992). There, the Great Lakes Towing Company had a primary policy with Hartford and was an additional insured under a policy issued by Institute of London Underwriters. After Great Lakes was sued in a wrongful death action, it tendered defense of the suit to London Underwriters, also notifying Hartford of the suit but requesting that Hartford not participate in the action. London Underwriters settled the case and then filed a declaratory judgment action seeking a declaration that Hartford was obligated to pay 50% of the settlement.

The Appellate Court held that Hartford was not asked by its insured to participate and, therefore, its policy was never triggered. There was thus no reason to invoke the other insurance clause of London Underwriters policy.

The right of an insured to knowingly forgo an insurer's assistance by instructing the insurer not to involve itself in the litigation had been established in *Cincinnati Cos. v. West American Ins. Co.*, 183 Ill. 2d 317 (1998). The Court there recognized that such a request may be made for various reasons, including the insured's fear that, if it tenders the defense to its own insurance company, its premiums may be increased or its policy canceled in the future. When a request not to participate is made by the insured, that particular insurer is relieved of its obligation to the insured with regard to that particular claim.

Later authority also recognized the right of an insured to deactivate a previous tender to an insurance company and to tender its defense to another insurer when coverage by the latter insurer has been discovered by the insured. *Alcan United, Inc. v. West Bend Mutual Ins. Co.*, 303 Ill. App. 3d 72 (1999).

In *John Burns Constr. Co. v. Indiana Ins. Co.*, 189 Ill. 2d 570 (2000), the Supreme Court had held that Burns

Construction had the right to choose which insurer would be required to defend and indemnify it and that nothing in the Indiana Insurance policy limited Burns right to select which insurer would be required to defend. The existence of an other insurance provision does not in and of itself overcome the insureds right to tender the defense of an action to one insurer alone.

In the case in question, the Supreme Court held that the horizontal exhaustion rule is based on a recognition of the difference between primary and excess insurance. Citing Justice Freeman's separate concurring opinion in *Roberts v. Northland Ins. Co.*, 185 Ill. 2d 262, 275 (1998), the Court pointed out that when excess insurance exists as part of an overall insurance package, it provides a secondary level of coverage to protect the insured where a judgment or settlement exceeds the primary policy's limit of liability. In the ordinary case, the limits of the primary insurance must be exhausted before an excess carrier will be required to contribute to a settlement or judgment.

St. Paul's excess policy was entitled Umbrella Excess Liability Protection Coverage, which the Court characterized as a true excess policy. The Court declined to extend the targeted tender doctrine to require one insurer to vertically exhaust its primary *and* excess coverage limits before all primary insurance available to the insured had been exhausted. Extending the targeted tender rule in such would eliminate the distinction between primary and excess coverage. It would also make it possible for an insured to deselect all of its primary insurers and tender only to its carriers who had excess coverage as well as primary.

Consequently, the court said that the better rule is that the targeted tender can be applied to circumstances where concurrent primary coverage exists for additional insureds, but, in a situation where the costs of defense and indemnification exceed the primary limits of the targeted insurer, the deselected insurer must answer for the loss (to the extent of its limits) before the insured can seek coverage under an excess policy. This, said the court, preserves the distinction between primary and excess insurance policies.

Accordingly, Kajima was required to exhaust its primary policies before invoking St. Paul's excess coverage. Therefore, Tokio was not entitled to reimbursement of the \$1,000,000 that it had paid toward the Jones settlement, and the judgment of the appellate court, affirming the decision of the trial court, was affirmed.

Tips for Practitioners. It is common, particularly in the construction industry, for both owners and general contractors to insist upon insurance protection as a component of the contract, which will cover them as additional insureds in the event of suit by an employee or other third party. Such provisions have been uniformly upheld (*Davis v. Commonwealth Edison Co.*, 61 Ill. 2d 494 (Ill. 1975); *USX Corp. v. Liberty Mut. Ins. Co.*, 269 Ill. App. 3d 233 (Ill. App. Ct. 1994)) and are in fact recognized by statute. 740 ILCS 35/1 *et seq.* The additional insured must be certain to receive a certificate of insurance evidencing such coverage before permitting the contractor/subcontractor to commence work; failure to do so may constitute a waiver of the requirement. *Geier v. Hamer Enterprises, Inc.*, 226 Ill. App. 3d 372 (Ill. App. Ct. 1992). Moreover, it is prudent in most cases for the additional insured to tender the defense of the suit to the contractor/subcontractor and its insurer, to avoid any possible penalty in connection with its own coverage by way of increased premium or even cancellation.

Cross Reference. See generally Construction Law, Chapter 13: Risk Management and Indemnity.

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Best on Vasquez v. People, 173 P.3d 1099 (Colo. 2007)

2008 Emerging Issues 1938

Best on Vasquez v. People, 173 P.3d 1099 (Colo. 2007)

By Arthur Best

February 22, 2008

SUMMARY: A criminal defendant forfeits his right to confront a witness against him under the United States and Colorado constitutions if he procures that persons unavailability with an intent to prevent the person from providing evidence in the criminal justice system. *Vasquez v. People, 173 P.3d 1099 (Colo. 2007)* answers a significant question: can hearsay statements be admitted in a case if the defendant killed the hearsay declarant to prevent the declarant from testifying in a case different from the current case? It also resolves a related problem, whether a defendants conduct that causes a forfeiture of Confrontation Clause rights should be treated as also barring the defendant from raising standard hearsay objections to statements by the witness whom the defendant has rendered unavailable.

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ARTICLE: Overview

A criminal defendant forfeits his right to confront a witness against him under the United States and Colorado constitutions if he procures that persons unavailability with an intent to prevent the person from providing evidence in the criminal justice system. *Vasquez v. People, 173 P.3d 1099 (Colo. 2007)* answers a significant question: can hearsay statements be admitted in a case if the defendant killed the hearsay declarant to prevent the declarant from testifying in a case different from the current case? It also resolves a related problem, whether a defendants conduct that causes a forfeiture of Confrontation Clause rights should be treated as also barring the defendant from raising standard hearsay objections to statements by the witness whom the defendant has rendered unavailable.

Summary of the Case

The defendants wife was scheduled to testify against him on harassment charges. Two days before the date of that intended testimony, she was found dead in a motel room. When a police officer arrived at the scene, the defendant (who was present) said to the police officer, referring to his wife, She set me up. The defendant was tried and convicted of first degree murder for killing his wife.

Subsequently, he was charged with restraining order and bail bond violations. In that case, the trial court admitted out-of-court statements the defendant's wife had made reporting restraining order and bail bond violations, although the defendant made Confrontation Clause and hearsay objections to their admission. With regard to forfeiture, the defendant argued that he could not have formed the intent to prevent his wife from testifying in the case because the case was not pending at the time of the murder.

The trial court held that the statements were admissible because part of the defendant's motivation for killing his wife was to silence her with regard to the restraining order and bail bond case. The trial court also held that the residual exception to the hearsay exclusionary rule applied to the statements. The defendant was convicted and the conviction was affirmed by the Court of Appeals. In *People v. Vasquez*, 155 P.3d 565 (Colo. App. 2006), the Court of Appeals held that no matter what purpose the defendant might have had for killing his victim, the fact that he killed her prevented him from asserting a Confrontation Clause claim and also prevented him from raising hearsay objections to admission of her statements. The Colorado Supreme Court granted certiorari to consider the Confrontation Clause and hearsay issues.

Pertinent Legal Principles

Federal Confrontation Clause Rights. Admitting testimonial hearsay at trial, absent the unavailability of the declarant and a prior opportunity for cross-examination by the defendant, violates the defendant's Sixth Amendment right to confrontation. See *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Detailed analysis of current Confrontation Clause jurisprudence is found in *Criminal Evidentiary Foundations* § 10.01 and *Weinsteins Evidence Manual* § 14.03.

State Confrontation Clause Rights. In *People v. Fry*, 92 P.3d 970 (Colo. 2004), the Colorado Supreme Court adopted the *Crawford* test as the appropriate inquiry for the admission of testimonial hearsay under Colorado's confrontation clause.

Motive Requirement for Forfeiture of Confrontation Clause Rights. In *People v. Moreno*, 160 P.3d 242, 247 (Colo. 2007), the Colorado Supreme Court stated that to deprive a criminal defendant of his right to confront a witness, the defendant's wrongful conduct must have been "designed, at least in part, to subvert the criminal justice system by depriving that system of the evidence upon which it depends."

The Colorado Supreme Courts Decision

Specificity of Motive to Support Forfeiture. The Court noted that this case is one of first impression in Colorado and nationally, in terms of state evidence holdings. No state that uses the intent requirement for forfeiture has considered whether a defendant's intent to prevent a witness from testifying in one proceeding can support forfeiture in a different proceeding.

Federal Rules Analogy and General Policy. The Court considered federal courts treatment of *Rule 804(b)(6)* of the *Federal Rules of Evidence*. That Rule does not have a parallel in the Colorado Rules of Evidence but the Court considered it as persuasive with regard to understanding forfeiture doctrine. The Federal Rule requires that the defendant intended to render the declarant unavailable as a witness but does not refer to any particular case. Construing the application of forfeiture broadly, the Court suggested, will provide the greatest deterrent to tampering with witnesses.

Motive to Suppress Testimony in Any Case Supports Forfeiture for All Cases. On the basis of the federal analogy and general policy, the Court held that a defendant forfeits his right to confront a witness at any proceeding in

which the witness's statements are otherwise admissible when a trial court makes three findings:

- (1) the witness is unavailable;
- (2) the defendant was involved in procuring the unavailability of the witness; and
- (3) the defendant acted with the intent to deprive the criminal justice system of evidence.

The Court stated explicitly that the defendant does not have to be under indictment or pending trial and the declarant need not be a scheduled witness at the time of the defendant's interference. Additionally, preventing the witness's testimony does not have to be the defendant's sole motivation for the action that has the effect of preventing it.

Procedural Aspects. The Court held that in considering forfeiture, a trial court should conduct a hearing outside the presence of the jury. Under Colorado Rule of Evidence 104(a), the determination is not bound by the rules of evidence except those with respect to privileges, so hearsay evidence, including the unavailable witness's out-of-court statements, will be admissible. A preponderance of evidence standard applies to the trial court's findings, and they will not be disturbed on appeal unless they are clearly erroneous.

Application in This Case. The Court considered whether the trial courts decision on forfeiture satisfied the requirements announced in this decision. It found that there was an adequate factual basis for the trial courts conclusion that the defendants conduct in killing his wife was motivated in part by his interest in suppressing her testimony. Support for this conclusion was the defendants statement at the scene of the murder, She set me up.

General Hearsay Rule Survives Forfeiture. Once a defendant has forfeited Confrontation Clause objections to a declarants out-of-court statements, should the general hearsay exclusionary rule still have force? Under the Federal Rules of Evidence and in many states, forfeiture of Confrontation Clause rights is equivalent to forfeiture of hearsay objections as well. The Supreme Court rejected that position, stating that even if a defendant has forfeited Confrontation Clause rights, the evidence must meet provisions of the Colorado Rules of Evidence that are intended to assure the reliability of evidence.

Application in This Case. The hearsay statements in this case were statements made by the murder victim to police, stating that her husband had left messages on her phone, in violation of a restraining order. The trial court admitted these statements under the residual exception, Colorado Rule of Evidence 807, which authorizes admission of

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

The trial court made findings on the record pursuant to this Rule, concluding that the legitimate value of the evidence outweighed risks of prejudice and that admission would serve justice. The Supreme Court noted that the findings were incomplete but that this error was harmless. It also noted that corroborating evidence should not have been relied on to support the Rule 807 finding.

Comments

The Supreme Courts holding gives broad effect to the forfeiture doctrine, but does leave one class of cases in which a defendant who has made a declarant unavailable could be protected from admission of that declarant's statements: cases where the defendant's conduct had no motivation at all with regard to the declarant's possible role in the future as a witness. Cases of that kind might involve a killing during a fight or a robbery. An interpretation that applies forfeiture even in cases of that kind has been made by the California Supreme Court in *People v. Giles*, 40 Cal. 4th 833, 55 Cal. Rptr. 3d 133, 152 P.3d 433 (2007). The United States Supreme Court has granted certiorari in that California case, and is likely to decide whether a defendant forfeits the right to confrontation when the defendant engaged in an intentional criminal act that caused the declarant to be unavailable for any reason.

In connection with the residual hearsay exception, the *Vasquez* court adhered to a close reading of Colorado Rule of Evidence 807. It stated that corroboration of an out-of-court statement does not support a finding of admissibility under that Rule. While the Rule refers to statements that have circumstantial guarantees of trustworthiness that are equivalent to those that support the other enumerated hearsay exceptions, those guarantees are understood to be guarantees found in the nature and circumstances of the statement, not supplied by separate sources of corroboration.

Colorado Evidence Courtroom Manual, Chapter 807 and *Colorado Evidentiary Foundations* § 10.P analyze Colorado cases on the residual exception.

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Best on United States v. Moran, 503 F.3d 1135 (10th Cir. 2007)

2008 Emerging Issues 1939

Best on United States v. Moran, 503 F.3d 1135 (10th Cir. 2007)

By Arthur Best

February 22, 2008

SUMMARY: Character evidence is inadmissible to show that a person acted in conformity with his or her character on a specific occasion. However, evidence that could support a conclusion about character is properly admitted if it is also relevant in some way that does not involve the prohibited character evidence. Trial courts receive lots of deference when they conclude that a non-character rationale for admission of evidence about a defendants past conduct is legitimate. In this case, proof that a defendant had been convicted in 1994 of knowing possession of a firearm was treated as properly admitted to show that when he was in possession of a firearm eleven years later, that possession was also knowing.

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ARTICLE: Overview

Character evidence is inadmissible to show that a person acted in conformity with his or her character on a specific occasion. However, evidence that could support a conclusion about character is properly admitted if it is also relevant in some way that does not involve the prohibited character evidence. Trial courts receive lots of deference when they conclude that a non-character rationale for admission of evidence about a defendants past conduct is legitimate. In this case, proof that a defendant had been convicted in 1994 of knowing possession of a firearm was treated as properly admitted to show that when he was in possession of a firearm eleven years later, that possession was also knowing.

Summary of the Case

In 2005, the defendant was driving a car and was stopped by law enforcement personnel. An officer saw the butt of a rifle stock sticking out of an unzipped rifle case on the vehicles back seat. Next to the rifle were a bow and some arrows. An officer asked the defendant if the rifle was loaded, and the defendant replied that it was. The defendant was indicted for being a felon in possession of a firearm. At his trial for that offense, when the defendant denied that he

knowingly possessed the rifle, the court admitted evidence that the defendant had been convicted in 1994 for being a felon in possession of a firearm. The court admitted evidence of that past conviction as relevant to show that the defendant had knowledge of the firearms presence in the car at the time of his 2005 arrest.

Pertinent Legal Principles

General Relevance Standard. Under the Federal Rules of Evidence, the general test for relevance, in Rule 401, heavily favors admissibility. It states that evidence is relevant if it has any tendency to affect the probability of the existence of any fact of consequence at trial.

Special Rule for Character Evidence. *Federal Rule of Evidence 404(a)* requires that evidence be excluded if its only relevance is to support a conclusion that an individual has a certain character trait and acted in conformity with that character on a specific occasion. However, Rule 404(b) makes clear that evidence of other acts may be admissible for purposes other than proof of a defendant's bad character or general propensity to commit crime. It states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident

Huddleston Analysis. In *Huddleston v. United States*, 485 U.S. 681, 691692, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988), the Supreme Court held that evidence of a defendants prior conviction may be admitted if: (1) the evidence is offered for a proper purpose; (2) is relevant; (3) has probative value that is not substantially outweighed by its potential for unfair prejudice under Rule 403; and (4) the court gives a proper limiting instruction, if the defendant requests one.

Colorado Evidentiary Foundations § 6.D and *Colorado Evidence Courtroom Manual, Chapter 404* analyze cases on non-character use of evidence of a defendants past crimes or bad acts.

The Tenth Circuits Decision

Applying Huddleston: Purpose. The Court applied each of the *Huddleston* factors to uphold the trial courts decision to admit the evidence. With regard to proper purpose, the Court noted that the defendant denied that he knowingly possessed the firearm, so that showing his knowledge of the weapon would serve a proper purpose.

Applying Huddleston: Relevance. On the issue of relevance, the Court held that knowing possession of a firearm in 1994 was relevant to whether someone in the presence of a firearm in 2005 had knowledge of that firearm. The Court cited earlier cases that reached the same conclusion: *United States v. Mills*, 29 F.3d 545 (10th Cir. 1994), *United States v. Walker*, 470 F.3d 1271 (8th Cir. 2006), *United States v. Jernigan*, 341 F.3d 1273 (11th Cir. 2003), and *United States v. Cassell*, 352 U.S. App. D.C. 84, 292 F.3d 788 (D.C. Cir. 2002).

Applying Huddleston: Balancing Probative Value and Unfair Prejudice. Considering the balance between probative value and unfair prejudice, the third *Huddleston* factor, the Court referred to the usual deference according trial courts with regard to this kind of balancing, and credited the trial courts statement that the evidence was highly probative. The Court stated that because the defendant had denied he had knowledge of the rifle, the prior conviction had clear probative value in rebutting this defense.

Applying Huddleston: Jury Instruction. The fourth *Huddleston* factor was satisfied with a jury instruction that cautioned the jury to consider the evidence "only as it bears on the defendant's intent, knowledge, absence of mistake or accident, and for no other purpose."

Comments

This opinion represents two well-known patterns in the treatment of other crimes evidence: generous deference by

appellate courts to trial court decisions in the area, and generous pro-prosecution treatment of the Rule 404(b) list of possible non-character uses of information about a defendant's past bad acts.

The trial court held that possession of a firearm eleven years prior to the charged offense was highly probative, and the Tenth Circuit referred to the clear probative value of the evidence. However, the Tenth Circuit's opinion states that when the defendant was questioned about the rifle by a law enforcement officer, he stated that the rifle was loaded. Certainly that statement could support a jury conclusion that the defendant knew that the rifle was in the vehicle. The availability of that proof tending to support the conclusion of knowing possession could well have been treated as diminishing the probative value to the prosecution of the logical link between knowing possession in 1994 and knowing possession in 2005.

Practice Tip. Probative value of evidence should always be analyzed in the overall context of all evidence available that points in a certain direction. Where the prosecution has more than one way of showing a controverted fact, defense counsel should be aware that the availability of multiple items of evidence can decrease the probative value of any single item.

The Tenth Circuit's opinion acknowledged that admission of the prior conviction involved a propensity inference, but it characterized that propensity inference as specific enough to be different from a prohibited general inference of bad character. It distinguished a propensity to possess firearms from a propensity to commit criminal acts. Whether a jury can really make that distinction is, of course, a matter on which individuals and judges might disagree. But the Tenth Circuit's recognition that admission of this evidence involved a logical analysis that is similar to the prohibited kinds of propensity analysis may be instructive. In future cases, defense counsel might emphasize that parallel. If there are factors that might arguably reduce the probative value of other crimes evidence, and the trial court is inclined to acknowledge the relatively weak logic of the idea that since he knew about a weapon once so he may well have known about a weapon on another occasion, those factors might incline a trial court to exclude the other crimes evidence.

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Cathcart on DiCola v. White Brothers Performance Products, Inc.

2008 Emerging Issues 1941

Cathcart on DiCola v. White Brothers Performance Products, Inc.

By Patrick A. Cathcart

February 22, 2008

SUMMARY: Expert litigator Patrick A. Cathcart analyzes the Fourth District Court of Appeals ruling in *DiCola v. White Brothers Performance Products Inc. (2008) 158 Cal. App. 4th 666, 69 Cal. Rptr. 3d 888*, and its effect on the common practice of having attorneys for parties opposing motions for summary judgment provide declarations outlining the evidence that would controvert facts offered on the summary judgment motion.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: California Court of Appeal for the Fourth District Affirms Judgment By Limiting Permissible Testimony In Declarations. The Fourth District Court of Appeal, in affirming a grant of a motion for summary judgment, has also affirmed a ruling by the trial court striking a declaration in opposition to the motion as impermissible hearsay and double hearsay. The courts opinion in *DiCola v. White Brothers Performance Products Inc. (2008) 158 Cal. App. 4th 666, 69 Cal. Rptr. 3d 888*, will foreclose a common litigation practice of having attorneys for parties opposing motions for summary judgment provide declarations outlining the evidence that would controvert facts offered on the motion for summary judgment.

The Underlying Action. *DiCola* was a wrongful death and products liability action stemming from an accident that was alleged to have occurred when a motorcycle side stand failed to retract. The principal defendants were the alleged manufacturer and distributor of the motorcycle side stands. The motion for summary judgment argued, and the trial court found, that (1) there was no evidence that either White, a distributor, or Tolemar, a manufacturer, placed the allegedly defective side stand on the market; (2) plaintiffs' evidence did not create a triable issue of material fact as to whether White and Tolemar were the distributor and manufacturer, respectively, of an exemplar side stand that plaintiffs' experts asserted was essentially identical to the side stand involved in the case; and (3) defendants demonstrated they were not responsible for placing the subject side stand into the stream of commerce.

Declaration In Opposition to Summary Judgment. The opinion is a red flag to practitioners in preparing oppositions to motions for summary judgment. The appellate court reviewed and affirmed the trial courts ruling striking a declaration filed in a supplemental opposition to the motion. The declaration relied impermissibly on statements made by an attorney for a third plaintiff concerning the packaging and labeling of an exemplar side stand on which plaintiffs expert relied in connecting the exemplar side stand with the allegedly defective side stand. The declaration was provided by an associate with the plaintiffs law firm, and stated that the exemplar side stand relied on by plaintiffs two

experts was identical to the one involve in the accident, that it was manufactured by Tolemar and distributed by White. The declaration stated:

[S]everal months after plaintiffs filed their complaint against Custom Chrome, that company's attorney of record, Mortimer Hartwell, and a Custom Chrome representative inspected Thomas DiCola's motorcycle and subject side stand. According to [declarant], Hartwell represented to her at that time that the subject side stand was not one of theirs, but a part manufactured and distributed by White. A few days later, Hartwell repeated that information to her in a letter. [Declarant] averred: "Custom Chrome's attorney then informed me that they had an exemplar of a White Brothers side stand that was identical to the subject side stand. Per our discovery request, Mr. Hartwell provided our offices with a Burly Brands side stand. The side stand that was produced is exemplar 'B' This side stand came in its original packaging for comparison to the subject side stand. [] ... Exemplar 'B' was in an un-opened, vacuum-sealed package when it arrived in our office. It was identified by the label 'Burly Brands' across the top of the packaging. I opened the package and removed the side stand. Inside the package was an instruction sheet for proper mounting of the side stand. On this sheet, the side stand indicated it was a White Brothers product, part 12-1200X."

[Declarant] averred that as a result of this information, plaintiffs eventually added White as a defendant, which in responses to special interrogatories "identified their packaging of the 12-1200X side stand in an identical manner to the packaging of the side stand provided by Custom Chrome." [Declarant] averred that White identified Tolemar as the sole manufacturer of the 12-1200X, and stated, "I am informed and believe, and thereupon allege that Tolemar, Inc. is the sole manufacturer of the 12-1200X side stand, and that they only sell their product to White ... for distribution and sale."

Grounds for Ruling That Declaration Contained Hearsay. In striking the declarations statements on grounds of hearsay, the appellate court noted that the appellants did not contest the hearsay nature of attorney Hartwells statements to the declarant, but also that the declarants statements concerning the packaging and the information on the labels, which would have tied the exemplar to the manufacturer and distributor, was double hearsay. The appellate court noted that its standard of review on rulings concerning admissibility of evidence is for abuse of discretion, not the de novo review according a review of the grant of the motion for summary judgment [*Alexander v. Codemasters Group Limited* (2002) 104 Cal. App. 4th 129, 139-140, fn. 3, 127 Cal. Rptr. 2d 145; *Jackson v. County of Los Angeles* (1997) 60 Cal. App. 4th 171, 192, fn. 15, 70 Cal. Rptr. 2d 96]. The trial court would be overruled only if it exceeded the bounds of reason [*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 118, 95 Cal. Rptr. 2d 113]. The appellate court went further, relying on *Smith v. Smith* (1969) 1 Cal. App. 3d 952, 958, 82 Cal. Rptr. 282, and *In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 118; 95 Cal. Rptr. 2d 113, holding not only that it would have to determine "no judge could reasonably have made the order that he did, but also that the evidence provided would be "insufficient if it presents a state of facts which simply affords an opportunity for a difference of opinion."

Proper Foundation for Evidence Provided In an Attorneys Declaration. The declaration at issue declaration sought to use the package label and enclosed information sheet to prove that the content of the package--the exemplar side stand was a particular model manufactured by Tolemar and distributed by White. The appellate court ruled that the package labeling as well as the instruction sheet were extrajudicial assertions offered to prove the truth of the matter asserted, namely, that the box contained a certain brand side stand [*see In re Michael G.* (1993) 19 Cal. App. 4th 1674, 1677, 24 Cal. Rptr. 2d 260 (information on label relative to ingredients of spray can was hearsay)]. The declaration, in reciting this written information, was inadmissible double hearsay.

Plaintiff offered discovery responses in an attempt to establish supporting facts as to Whites distribution of the exemplar. However, the discovery responses did not reference the exemplar side stand and, according to the court of appeal, did not concede that the allegedly defective side stand was one of it products, or, while likely distributed by Tolemar, that it was in fact distributed by Tolemar.

In footnote 7, the appellate court in *DiCola* provides one blueprint for the practitioner:

For example, a writing is admissible as a business record if it was made in the regular course of business, at or near

the time of the relevant event, the "custodian or other qualified witness testifies to its identity and the mode of its preparation," and the "sources of information and method and time of preparation were such as to indicate its trustworthiness." (*Evid. Code*, § 1271, subds. (a)-(d).) Plaintiffs made no such showing in the trial court as to example B's packaging or instruction sheet.

Practitioners could avoid a potentially disastrous result in opposing motions for summary judgment if they use the 75 days afforded following notice of a motion for summary judgment, or, if necessary, avail themselves of *Code Civ. Proc.* § 437c(h) and, through further discovery, establish the foundation and factual basis for admitting the hearsay. In *DiCola*, testimony or discovery responses from White personnel identifying the exemplar side stand, and authenticating the labeling, and if necessary, testimony from appropriate Tolemar witnesses, would have established information concerning the method and time of preparation that would indicate the trustworthiness of the testimony as required by *Evid. Code* § 1271. In seeking further discovery under *Code Civ. Proc.* § 437c(h), the information provided in the declaration at issue in *DiCola*, coupled with the information in that case that was provided by plaintiffs two expert witnesses, should also satisfy the requirements of *Code Civ. Proc.* § 437c(h) for establishing the need and probability of further discovery.

For discussion of summary judgment generally, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment* and Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 38, *Summary Judgment*.

For discussion of the preparation of the notice of motion for summary judgment and accompanying papers, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment*, § 537.21[2].

For specific discussion of preparing affidavits and declarations in support of a motion for summary judgment, see California Forms of Pleading and Practice, Ch. 537, *Summary Judgment*, § 537.24[1].

For points and authorities relating to summary judgments, see California Points & Authorities, Ch. 221, *Summary Judgments*.

For analysis of *Evid. Code* § 1271, the business records exception to the hearsay rules, discussed in this commentary, see Scallen & Weissenberger, California Evidence Courtroom Manual, Div. 10, Hearsay Evidence, Ch. 2, Exceptions to the Hearsay Rule, Article 7, Section 1271 analysis.

For analysis of hearsay evidence issues generally, see Scallen & Weissenberger, California Evidence Courtroom Manual, Div. 10, Hearsay Evidence, Ch. 1, General Provisions.

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McLean Brewer on Fireside Bank v. Superior Court

2008 Emerging Issues 1931

McLean Brewer on Fireside Bank v. Superior Court

By Carol McLean Brewer

February 21, 2008

SUMMARY: In *Fireside Bank v. Superior Court* (2007) [40 Cal. 4th 1069, 56 Cal. Rptr. 3d 861, 155 P.3d 268], the California Supreme Court revisited the long-dormant issue of one-way intervention in class actions. It held that trial courts in class actions should decide whether the class should be certified and if so, order class notice and an opportunity to opt out, before ruling on the substantive merits of the action. The Court held that one-way intervention--in which a trial court rules on the substantive merits in a putative class action before certifying and notifying the class--is prohibited in California unless the defendant waives its right to object to such a ruling or there is a compelling justification for doing so.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Introduction. In *Fireside Bank v. Superior Court* (2007) [40 Cal. 4th 1069, 56 Cal. Rptr. 3d 861, 155 P.3d 268], the California Supreme Court revisited the long-dormant issue of one-way intervention in class actions. It held that trial courts in class actions should decide whether the class should be certified and if so, order class notice and an opportunity to opt out, before ruling on the substantive merits of the action. The Court held that one-way intervention--in which a trial court rules on the substantive merits in a putative class action before certifying and notifying the class--is *prohibited* in California unless (1) the defendant waives its right to object to such a ruling, or (2) there is a compelling justification for doing so.

Factual Background of *Fireside Bank*. Fireside Bank sued the class representative on individual grounds, after repossessing a van on which she had failed to make payments. She then filed a class action cross-complaint. The class representative (cross-plaintiff) then moved for judgment on the pleadings as to Fireside Bank's individual claim against her, asserting that Fireside Bank's post-repossession notice violated the Rees-Levering Act [Civ. Code § 2981 et seq.], and therefore its claim against her was barred. When Fireside Bank objected on one-way intervention grounds, the cross-plaintiff agreed to have the class issues resolved before any merits ruling. She filed and then argued her class certification motion. But over Fireside Bank's objections and to the cross-plaintiff's surprise, the trial court ruled on the substantive merits of Fireside Bank's claim at the same time it decided that a class could be certified [see *Fireside Bank*, 40 Cal. 4th at 1086, 1088].

The California Supreme Court held that the trial court abused its discretion by prematurely ruling on the motion for judgment on the pleadings simultaneously with its ruling on class certification, all of which was before class notice was

sent [*Fireside Bank*, 40 Cal. 4th at 1087]. But changed circumstances justified the cross-plaintiffs belated motion for class certification due to Fireside Banks belated discovery response establishing numerosity sufficient to support a class. Therefore, the Court declined to decertify the class, finding that to bar the cross-plaintiff from pursuing a class action in response to the trial courts error would be inequitable. The Court also found that vacating the trial court's premature merits ruling and ordering it to decide any future motion de novo would reduce the risk of one-way intervention for Fireside Bank without unduly punishing the plaintiffs [*Fireside Bank*, 40 Cal. 4th at 1088].

Absent Compelling Justification, Court Must Decide Class Certification First. The California Supreme Court last touched on this issue in 1981, in *Green v. Obledo* (1981) [29 Cal. 3d 126, 172 Cal. Rptr. 206, 624 P.2d 256] in the context of a defendants belated motion to decertify a class after it lost on summary judgment. In *Green*, the Court reversed the trial courts decertification order. *Green* found that a defendant should not be allowed to sandbag a plaintiff, withholding its best case against certification and then seeking decertification if it lost on the merits [*Green*, 29 Cal. 3d at 147]. *Green* said procedural class-action issues--including the composition of the class--must *ordinarily* be resolved before a decision on the merits [*Green*, 29 Cal. 3d at 147 (italics added)].

In revisiting this issue in *Fireside Bank*, the Court clarified that ordinarily in *Green* means almost always. The Court explained that in *Green*, [w]hile it is true that we declined to strip trial courts of all authority to certify or decertify a class after a decision on the merits, we confined the trial courts authority to do so to situations involving a clear showing of changed circumstances. We further recognized that it is desirable for the trial court to retain some measure of flexibility in handling a class action; consequently, in an individual case compelling justifications may exist that will support a trial courts decision to depart from the usual order. Absent a finding of compelling justification, however, for the trial court to refuse defendants request to resolve class issues before merits issues is an abuse of discretion [*Fireside Bank*, 40 Cal. 4th at 10831084 (citations omitted)].

Rules to Avoid Problems. In light of *Fireside Banks* holding, the practitioner should carefully follow the Courts directives [see *Fireside Bank*, 40 Cal. 4th at 1083]:

§ A defendant must actively preserve its protection against one-way intervention by objecting. If it fails to timely object, or if the defendant affirmatively seeks resolution of the merits before certification, it will be deemed to have waived its rights.

§ Plaintiffs should seek certification before moving for any resolution on the substantive merits. If they seek certification after seeking resolution of the merits, in the absence of a defense waiver, they must demonstrate changed circumstances or other good cause justifying the belated motion before the court may consider it.

§ In the absence of a defense waiver courts should not resolve the merits before class certification and notice, absent a compelling justification for doing so.

Penalty for Violating Rule Against One-Way Intervention Can be Decertification. The practitioner must be cautioned that the penalty for violating the rule against one-way intervention is steep. Absent a showing of changed circumstances, the trial court may not consider a motion for class certification; absent a *further* showing of compelling justification it may not grant it. If the trial court erroneously grants class certification, the class generally must be vacated [*Fireside Bank*, 40 Cal. 4th at 10871088].

Courts Should Postpone Deciding Any Substantive Merits Issue Until After Class Certification. *Fireside Bank* articulated that the rule against one-way intervention applies to *any* substantive merits issue. Previously, several cases from the 1970s seemed to limit one-way intervention to instances in which the court determined the merits of the *class claims*. *Home Sav. & Loan Assn. v. Superior Court* (1974) [42 Cal. App. 3d 1006, 117 Cal. Rptr. 485 (Home Savings I)], and *Home Sav. & Loan Assn. v Superior Court* (1976) [54 Cal. App. 3d 208, 126 Cal. Rptr. 511 (Home Savings II)] describe one-way intervention as a procedure under which potential members of the class can reserve their decision to become part of the class until the validity of the *cause asserted by the named plaintiffs on behalf of the class* has been

determined [*Home Savings I*, 42 Cal. App. 3d at 1011; *Home Savings II*, 54 Cal. App. 3d at 211 (italics added)]. In *Travelers Ins. Co. v. Superior Court* (1977) [65 Cal. App. 3d 751, 135 Cal. Rptr. 579], the court explained that the trial court in a class action should first try the issue of identity of the class and designate the appropriate form and manner of notice to such class before trying the issue of *the defendants liability* [*Travelers Ins. Co.*, 65 Cal. App. 3d at 756757 (italics added)]. Thus, pursuant to *Home Savings I*, *Home Savings II*, and *Travelers*, the practitioner could argue that one-way intervention could not happen unless the *defendants liability to the class* was decided before the identity of the class was fixed.

That argument is no longer persuasive. The trial court in *Fireside Bank* decided the merits of Fireside Banks individual claim against the class representative, not the merits of the class claim. But the Court in *Fireside Bank* said that did not matter, because the merits of the class claim--whether Fireside Banks post-repossession notices violated the Rees-Levering Act and thus whether they were unlawful for purposes of the UCL--involved substantive issues common to Fireside Banks individual claim, so that resolving the individual claim squarely resolved the central issue in the class claim [see *Fireside Bank*, 40 Cal. 4th at 10861087]. What matters is the extent to which a motion impacts the principal legal issue or issues in a case and thereby poses for the defendants the risk of one-way intervention depending on its outcome [*Fireside Bank*, 40 Cal. 4th at 1086].

Any Ruling That Offers Substantial Hints About Outcome On Merits Should be Postponed. The practitioner should be cautioned that many situations that trial courts routinely face have the potential to decide some issue that touches on the merits and could lead to violating the rule against one-way intervention. The class certification process itself can touch on the relative merits of the case [see *Linder v. Thrifty Oil* (2000) 23 Cal. 4th 429, 443, 97 Cal. Rptr. 2d 179, 2 P.3d 27]. So can the trial courts decision to allocate the cost of giving notice to the class [*Civil Service Employees Ins. Co. v. Superior Court* (1978) 22 Cal. 3d 362, 380, 149 Cal. Rptr. 360, 584 P.2d 497]. Trial courts may consider a wide range of factors relevant to allocating the cost of notice to the class, including the apparent merit or lack of merit in the class claims [*Civil Service Employees*, 22 Cal. 3d at 380, n.10, citing *Berland v. Mack* (S.D.N.Y. 1969) 48 F.R.D. 121, 131132]. Even discovery motions can impact merits issues.

The California Supreme Court recognized that many rulings may offer substantial hints as to the likely substantive outcome of a given case, but warned this is no reason not to require trial courts to postpone such rulings until after certification and class notice [*Fireside Bank*, 40 Cal. 4th at 1085]. The Court suggested a two-step balancing test:

§ The degree to which the given motion poses one-way intervention problems, balanced against

§ The compelling justification proffered by the moving party for nevertheless deciding the given motion in advance of resolving class issues.

The greater the concerns, the more compelling the countervailing justification must be [*Fireside Bank*, 40 Cal. 4th at 1085]. Thus, when faced with this problem, the practitioner should err on the side of caution absent truly compelling justification.

Practitioners Should Consider CLRAs Procedures, Which Allows Merits Issues and Class Certification to be Decided Concurrently. If the parties agree to resolve merits issues before class certification, the defendants waiver removes the obstacle to a subsequent class certification. Absent a defense waiver, if class counsel wants to obtain a merits ruling before going to the expense of notifying the class, counsel should consider proceeding pursuant to the Consumers Legal Remedies Act [Civ. Code § 1750 et seq. (CLRA)]. *Civil Code* § 1781 expressly authorizes trial courts to determine whether there is no defense to the action *concurrently* with deciding whether a class action is appropriate [see *Civ. Code* § 1781(c)(1), (3)]. In practice, courts have applied the same standards that apply to summary judgment motions in deciding motions for no-merit determinations [*Smith v. Wells Fargo Bank, N.A.* (2005) 135 Cal. App. 4th 1463, 14741475, 38 Cal. Rptr. 3d 653 (citations omitted)]. Additionally, courts have found that this virtually identical no-merit procedure does not deprive parties of their due process rights [*Consumer Advocates v. Echostar Satellite Corp.* (2003) 113 Cal. App. 4th 1351, 13591360, 8 Cal. Rptr. 3d 22; *Olsen v. Breeze, Inc.* (1996) 48 Cal. App. 4th 608, 624,

55 Cal. Rptr. 2d 818].

Importantly, the CLRAs class action procedures are not limited to class actions brought pursuant to the CLRA. In *Vasquez v. Superior Court* (1971) [4 Cal. 3d 800, 820, 94 Cal. Rptr. 796, 484 P.2d 964], the California Supreme Court established that if Civ. Code § 382 does not directly cover a class action issue, for procedural efficiency California courts should look to the CLRA. Only in the event of a hiatus should California courts consult Rule 23 [Vasquez, 4 Cal. 3d 800, 820-821]. Numerous decisions since *Vasquez* have held that the CLRAs procedures apply to all California class actions and should be used wherever possible [see, e.g., *Linder*, 23 Cal. 4th at 437; *Civil Service Employees*, 22 Cal. 3d at 376, and cases cited therein].

Conclusion. The lesson to be learned from *Fireside Bank* is that although trial courts have discretion to manage class actions, the California Supreme Court has constructed a strict framework which directs that in nearly all instances class certification issues must be decided before the trial court determines any merits issues.

ABOUT THE AUTHOR(S):

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Ms. Brewer graduated from the University of Florida School of Law. She practiced in Florida for more than 20 years, where she was president of the Palm Beach County Bar Association and an elected member of the Florida Bars Board of Governors. In 2000 she relocated to California and joined Kemnitzer, Anderson, Barron & Ogilvie as a partner on passing the bar. She is a member of the National Association of Consumer Lawyers and the National Consumer Law Center.

Information referenced herein is provided for educational purposes only. For legal advice applicable to the facts of your particular situation, you should obtain the services of a qualified attorney licensed to practice law in your state.



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Susan Brazas on Porter v. Decatur Mem. Hosp., 2008 Ill. LEXIS 10 (Ill. 2008)

2008 Emerging Issues 1922

Susan Brazas on Porter v. Decatur Mem. Hosp., 2008 Ill. LEXIS 10 (Ill. 2008)

By Susan M. Brazas

February 20, 2008

SUMMARY: Revisiting, Again: The Relation Back of Specific Allegations of Error in Medical Treatment. In another recent opinion addressing the relation back of amendments to pleadings, *Porter v. Decatur Mem. Hosp., 2008 Ill. LEXIS 10 (Ill. 2008)*, the Illinois Supreme Court has spoken to the interplay of notice to defendants and fact pleading standards. Eschewing an analysis of the recent and divergent views on the subject from the Illinois Appellate Courts, the Supreme Court gives weight--and print space--to authority from unexpected sources. This commentary, written by Susan Brazas, discusses the implications of this important decision.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Illinois Supreme Court Identifies the Sufficiently Close Relationship Test for Relation Back Of Amendments to Pleadings

The Pleadings in Porter. The Illinois Supreme Court has addressed the issue of the relation back of amendments to a medical malpractice complaint in its recent decision in *Porter v. Decatur Mem. Hosp., 2008 Ill. LEXIS 10 (Ill. 2008)*. The case arose after the Plaintiff's January 12, 2001 hospitalization after sustaining injuries in an automobile accident. His original complaint, filed on March 25, 2002, named the admitting physician as a Defendant, and named the hospital as a Respondent in Discovery. This complaint alleged negligence in the physician failing to continually immobilize the plaintiff's spine, and failure to appreciate signs and symptoms of further spinal injury.

The first amended complaint, filed on January 6, 2003, added the hospital as a Defendant, and alleged that hospital staff failed to perform thorough hourly neurological checks as the co-defendant physician had ordered, failed to document specific findings, and failed to notify the physician of diminishing neurological status.

The second amended complaint, filed on August 10, 2004 (over objection by Defendant hospital), added allegations that the hospital's apparent agent, a radiologist, misinterpreted a cervical CT scan and failed to diagnose plaintiff's cervical fractures, resulting in loss of extremity function. Attached to plaintiff's motion for leave to file this amended complaint was the January 2004 deposition testimony of a professor of surgery from Chicago Medical School who testified that the fractures on the cervical CT scan were very evident and unequivocally showed a cervical spine injury, and that this misinterpretation affected the patient's entire management.

Recent Appellate Decision. The recent First District opinion of *Frigo v. Silver Cross Hosp. & Med. Ctr.*, 2007 Ill. App. LEXIS 1014 (Ill. App. Ct. 2007) cited but not commented on by the *Porter* Court, held that an initial complaint's allegations of negligent management by the Defendant hospital were sufficient to put the hospital on notice of the later allegations of negligent credentialing. The *Frigo* Court found that these later, more detailed allegations related back to the original pleading and were thus not barred by the statute of limitations.

Porter and the Sufficiently Close Relationship Test. The *Porter* Court's conclusion was also that the later-filed amended allegations related back to the original, timely-filed complaint. The *Porter* Court identified the sufficiently close relationship test as determinative. Under this test, later amendments relate back if a comparison of the new and original allegations show that the events alleged were close in time and subject matter and led to the originally alleged injury. Interestingly, the *Porter* Court's authority for this standard was not the well-known relation back case of *Zeh v. Wheeler*, 111 Ill. 2d 266, 278, 489 N.E.2d 1342 (1986), but instead a federal district court case decided one year prior to the *Zeh* case: *In Re Olympia Brewing Co. Securities Litigation*, 612 F. Supp. 1370, 1371-72 (N.D. Ill. 1985).

Strategic Considerations as the Case Progresses. Attorneys handling any type of action, especially medical malpractice actions, are well advised to examine whether new allegations could be brought, either in a new case filing or via amended pleadings, as the case progresses. If the statute of limitations has run, however, careful consideration should be given as to whether sufficient allegations have been made in existing pleadings, under the sufficiently close relationship test described above. The *Porter* decision is consistent with the trend of a liberal standard for relation back of amendments. This trend was acknowledged by the Illinois Supreme Court in *Zeh v. Wheeler*, and has been especially liberal as to medical malpractice complaints. See *Castro v. Bellucci*, 338 Ill. App. 3d 386, 391 (1st Dist. 2003).

Importance of Notice. The *Porter* Court emphasized the overarching importance of notice. Often, details of the specific acts or omissions of negligence are not ascertainable until discovery is underway. However, an attorney's own expert can be a helpful source of input as to what general allegations adequately cover the possible range of specific acts or omissions that may be discovered. Counsel should draft allegations against hospitals or clinics that are broad enough to encompass a wide range of specific acts of negligence, to provide adequate notice and guard against statute of limitations problems.

Ramifications for Argument. The key phrase found within the relation back statute which the *Porter* Court was construing was whether the new allegations grew out of the same transaction or occurrence. The Court's analysis resembled its interpretation of arising out of patient care within the context of the health care statute of repose, as discussed in *Orlak v. Loyola Univ. Health Sys.*, 221 Ill. 2d 643 (Ill. 2006) and *Brucker v. Mercola*, 2007 Ill. LEXIS 1838 (Ill. 2007).

Yet, the sufficiently close relationship test adopted by *Porter* bears resemblance to the substantially the same as phrase that had been omitted from the relation back statute in its 1933 amendment which added the grew out of the same transaction or occurrence phrase.

The *Porter* opinion illustrates that the Illinois Supreme Court is, with increasing frequency, looking to case law and statutes outside the traditional realm. The common thread, when non-binding precedent is the key to the Court's decision, is that the factual circumstances of the cited authority are quite similar to the case under review. Thus, attorneys should not limit their research to only those sources within Illinois state case law, nor to the statute or rule in question. Instead, attorneys should search for persuasive authority in similar fact patterns and argue that these factual similarities justify that the authority be given greater weight than other authority.

Discovery Strategies. The Plaintiff's attorney in *Porter* wisely presented for deposition an expert who explained the allegations of the amendment adequately to show their consistency with the allegations of the original complaint. This may well have been the deciding factor in the Court's decision that the amendments related back to the original complaint. By attaching the transcript of a physician or expert's deposition to a motion for leave to amend, counsel will help provide the court with guidance for its determination of whether the amendment bears a sufficiently close

relationship to the original complaint. To reach this step, however, counsel should push the experts' and treating physicians' depositions forward so that a motion to amend (or opposition thereto) can be promptly supported with expert opinion.

Respondent in Discovery Strategies. Counsel may find it necessary to name Respondents in Discovery as a way to force expedited discovery. Under the statute, 735 ILCS 5/2-402, a limited six-month window is allowed to convert a Respondent to a Defendant, except where the Respondent has refused to comply with discovery. The trial court has no discretion to extend this six-month deadline. *Robinson v. Johnson*, 346 Ill. App. 3d 895, 907 (1st Dist. 2003). Therefore, an attorney may well consider naming the entity or person as a Respondent in Discovery, in order quickly to obtain facts needed to determine whether additional factual allegations or additional legal theories should be pleaded. Requests to Admit and other discovery tools can also be used to determine whether amendments are in order.

Cross References. 735 ILCS 5/2-402; 735 ILCS 5/2-616(b); Ill. Sup. Ct., R 216; Illinois Litigation Forms and Checklists C6.01: Drafting a Complaint.

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Garcia on Supeno v. Equity Office Prop. Manag., LLC

2008 Emerging Issues 1923

Garcia on Supeno v. Equity Office Prop. Manag., LLC, 70 Mass. App. Ct. 470 (2007)

By Grace V. B. Garcia

February 20, 2008

SUMMARY: In *Supeno v. Equity Office Prop. Manag., LLC*, 70 Mass. App. Ct. 470 (Oct. 11, 2007), the Appeals Court of Massachusetts affirmed the trial courts decision to grant the defendants summary judgment based on the defendants argument that the plaintiff was collaterally estopped from relitigating a claim that had been asserted at the Department of Industrial Accidents and decided. This Appeals Court decision reminds practitioners of the breadth and use of collateral estoppel. This commentary, written by Grace Garcia, discusses the important implications of this decision.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: In *Supeno v. Equity Office Prop. Manag., LLC*, 70 Mass. App. Ct. 470 (Oct. 11, 2007), the Appeals Court of Massachusetts affirmed the trial courts decision to grant the defendants summary judgment based on the defendants argument that the plaintiff was collaterally estopped from relitigating a claim that had been asserted at the Department of Industrial Accidents and decided. This Appeals Court decision reminds practitioners of the breadth and use of collateral estoppel.

Background for the Courts Decision. Plaintiff brought a claim to the Department of Industrial Accidents (DIA) against her employer for workers compensation benefits under Mass. Gen. Laws. ch. 152, § 1 (7A). She claimed that her condition of idiopathic environmental intolerance (IEI) was caused by her exposure to harmful toxins in the workplace. After a hearing, a DIA administrative law judge denied her claim, finding that there was no evidence that any exposure to toxins in the workplace caused, or made worse, her IEI, as the plaintiff had a significant medical history of such intolerances before working for the employer at issue. The DIA review board and a single justice of the Appeals Court of Massachusetts affirmed the administrative law judges decision.

While the case before the DIA was pending, the plaintiff brought an action in the trial court against the management company and owner of the building in which her employer was located. She alleged that she was harmed by exposure to toxic substances emitted during renovation work in the building. After the DIA issued its decision, the trial court granted summary judgment to the defendants finding the plaintiff was collaterally estopped from asserting the same issues that already had been ruled upon by the DIA.

Collateral Estoppel. Collateral estoppel, or issue preclusion, essentially prevents relitigation of an issue that has been determined in an earlier action. *Heacock v. Heacock*, 402 Mass. 21, 23 n.2 (1988). *Res judicata*, which also has

been used to describe collateral estoppel, is the generic term for various doctrines by which a judgment in one action has a binding effect in another. *Id.*

Specifically, collateral estoppel provides that when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. *Alba v. Raytheon Co.*, 441 Mass. 836, 841 (2004), quoting *Fireside Motors, Inc. v. Nissan Motor Corp. in U.S.A.*, 395 Mass. 366, 372 (1985). Collateral estoppel is an important doctrine as its purpose is to conserve judicial resources, to prevent the unnecessary costs associated with multiple litigation, and to ensure the finality of judgments. *Martin v. Ring*, 401 Mass. 59, 61 (1987).

To prove collateral estoppel, one must prove that (1) there was a final judgment on the merits in the prior adjudication; (2) the party against whom preclusion is asserted was a party (or in privity with a party) to the prior adjudication; . . . (3) the issue in the prior adjudication was identical to the issue in the current adjudication; . . . [and (4)] the issue decided in the prior adjudication must have been essential to the earlier judgment. *Tuper v. North Adams Ambulance Serv., Inc.*, 428 Mass. 132, 134-35 (1998). Thus, collateral estoppel prevents the re-litigation of issues that are actually litigated in the prior action. *Fidelity Mgmt. & Research Co. v. Ostrander*, 40 Mass. App. Ct. 195, 199 (1996). If the four-part standard is met, it is important to note that the involvement of the same parties to both actions is not always required. *Supeno*, 70 Mass. App. Ct. at 473. Moreover, in some cases even if there is a lack of total identity between the issues involved in two adjudications, the overlap may be so substantial that preclusion is plainly appropriate. *Commr., of the Dept. of Employ. & Training v. Dugan*, 428 Mass. 138, 143 (1998).

A party can defend against issue preclusion by arguing that it did not have an adequate opportunity to litigate the issues decided. *Foster v. Evans*, 384 Mass. 687, 696 (1981). A party who wishes to use collateral estoppel has the burden of proof in showing that the issues have already been litigated. *Patterson v. Hantzes*, 5 Mass. App. Ct. 806, 806-07 (1977). Issue preclusion, however, may not be available if there is ambiguity concerning the issue or the basis of the decision, or if there were issues deliberately left open by the prior adjudication. Moreover, a party cannot avoid the use of issue preclusion simply by offering evidence in the second proceeding that could have been admitted, but was not, in the first action. *DeCosta v. Viacom Intl., Inc.*, 981 F.2d 602, 611 (1st Cir. 1992).

The Different Issues Argued in *Supeno v. Equity Office Prop. Manag., LLC*. On appeal, the plaintiff in *Supeno* argued that collateral estoppel could not be used because the issues argued to the DIA and those in the tort action involved different legal standards of causation, and thus, the issues differed. Specifically, in a tort action, to prove causation the plaintiff must show that the defendants negligence was a substantial factor in bringing about the injury and harm. *Bernier v. Boston Edison Co.*, 380 Mass. 372, 385 (1980) (emphasis added). Whereas to prove causation under the workers compensation statute, the plaintiff must show that the workplace injury remains a major but not necessarily predominant cause of disability. Mass. Gen. Laws. ch. 152, § 1 (7A) (emphasis added).

In its decision denying benefits, the DIA held that any alleged exposure to toxins by the plaintiff were not a major cause of either [of plaintiffs] medical impairments or [plaintiffs] ongoing disability. *Subpeno*, 70 Mass. App. Ct. at 472. Thus, the DIA found no probative evidence that showed the alleged exposure worsened or caused the plaintiffs disability. *Id.* In affirming summary judgment, the Appeals Court found that the issue of causation, which was the central issue of the case, was fully litigated in the DIA action. Specifically, as the DIA found that there was no evidence indicating any causal relationship between the alleged exposure and injury, that the issue of causation, regardless of the legal standard of proof, had been litigated. Consequently, the Appeals Court did not find a need to address the different standards of causation between a tort and workers compensation action as the essential issue of causation had been previously litigated.

How Practitioners Can Use *Supeno v. Equity Office Prop. Manag., LLC*. Practitioners should remember that they can use collateral estoppel both as a plaintiff and as a defendant. For an offensive use of collateral estoppel, the

plaintiff can seek to prohibit a defendant from relitigating an issue the defendant previously litigated unsuccessfully in another action against the same or a different party. For defensive use of collateral estoppel, a defendant can seek to prevent a plaintiff from relitigating an issue the plaintiff has previously litigated unsuccessfully in another action against the same or different party. Thus, it is a tool that can be used by both sides.

Cross References. MA Pleading and Practice § 8.416.1: Affirmative Defense Collateral Estoppel; MA Pleading and Practice § 8.429: Affirmative Defense Res Judicata.

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Grace V. B. Garcia is a Partner in the Boston office of Morrison Mahoney LLP. Ms. Garcias practice is concentrated in the areas of commercial litigation, construction law, product liability and premises liability. In 2005, 2006, and 2007, she was recognized by Boston Magazine and Law & Politics as a Super Lawyer Rising Star. Ms. Garcia is admitted to the bars of the Commonwealth of Massachusetts and the State of New York. She is actively involved in several bar associations and serves on the Massachusetts Bar Association's Litigation Section Council. Previously, Ms. Garcia served as a member of the MBA's Business Law Section Council (2003 -- 2006), New Lawyer Section Council (2000 -- 2003), co-chair of the Boston Bar Association's New Lawyer's Section (2002 -- 2004), and the BBA's Task Force on Pro Bono and New Lawyers (2002 -- 2003). Ms. Garcia is a part of the Massachusetts Associated General Contractors Safety Committee. Additionally, after being on the Executive Committee for several years, Ms. Garcia is the co-director for the Boston Chapter of the Downtown Women's Club for the 2007-2008 year. Ms. Garcia is the author of the Massachusetts Litigation Blog. In addition, Ms. Garcia has authored several articles including: Fundamentals of Electronic Discovery, Boston Bar Journal (March/April 2003) and Achieving Equitable Balance: Justice Wilkins and Chapter 93A, Boston Bar Journal (Nov./Dec. 2000) (co-author). She has lectured for various continuing legal education programs on electronic discovery, document retention, and deposition techniques.



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McDonnell on Class Actions & Distribution of Residual Funds

2008 Emerging Issues 1924

McDonnell on Class Actions & Distribution of Residual Funds, Illinois Public Act 95-0479

By Joseph B. McDonnell

February 20, 2008

SUMMARY: What Shall We Do With These Leftovers? The Illinois legislature creates a recipe for distribution of residual funds in class action suits. An analysis of Illinois Public Act 95-0479 (735 ILCS 5/2-807). This commentary, written by Joe McDonnell, discusses the implications of this important legislation.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: The Problem. The treatment of leftover funds following the settlement of class actions has been the subject of increasing comment over the past several years. When a class action is settled (or, if trial results in a judgment in favor of the class) it is not uncommon that there will be residual funds after all distributions have been made to claimants and all costs and attorneys fees have been paid. If the parties have not dealt with the subject in their settlement agreement, it is left to the trial judge, aided by suggestions of counsel and interested organizations, to provide for the disposition of such funds.

Alternative Solutions. In some cases, the court has provided for a return to the defendant of all unclaimed funds. This approach has been criticized as unfairly reducing the benefit to the class and, in turn, allowing the defendant to recoup some (perhaps much) of the money wrongfully obtained from the class. Another alternative has been to pay the residual funds, on a *pro rata* basis, to the class members who have already been paid. This procedure has also been criticized as creating a windfall for those class members who had already received their proportionate shares. Then there is the possibility that the excess be given to the government or a governmental agency (which almost nobody wants to do).

Searching for a Rationale. In most courts throughout the country the procedure for disposing of unclaimed or leftover funds has been *ad hoc*; both the identities of possible beneficiaries and the method of choosing them vary from state to state and sometimes from court to court. Although some courts have relied upon their inherent equitable powers to fashion decrees disposing of the undistributed funds, more often the common-law doctrine of *cy pres* has been employed as the vehicle for distribution. The rule of *cy pres* (derived from the French term *cy pres comme possible*, i.e. as near as possible) is a child of trust law, and developed as a means of permitting distribution of a gift for charitable purposes in a fashion as close as possible to the fulfillment of the underlying charitable intent where, for one reason or other, the donors express direction could not be accomplished. Under this theory, courts have ordered that undistributed funds in class action settlements be diverted to organizations that bear some relationship to the subject matter of the

class action. For example, an action based on housing discrimination may result in funds being distributed to tenants organizations; an action based on predatory lending practices might result in funds going to consumer watch-dog entities, etc.

A number of courts, including federal and state courts in Illinois, n1 have pointed out that trial judges have broad discretion in shaping equitable decrees and that, since class actions are founded on equitable principles, trial judges should be allowed broad discretion in framing orders for the distribution of residual funds. According to this view, the *cy pres* doctrine allows for virtually any charitable, educational or legally-related organization to be the beneficiary of distribution of residuary funds in class actions. The organization need not necessarily be one that has some relationship to the subject matter of the suit or to the members of the class. *See, generally*, Forde, K., *What Can a Court Do with Leftover Class Action Funds? Almost Anything!* The Judges Journal, vol. 35, no. 3 (Summer 1996).

Three basic reasons are advanced in support of this rationale: (1) the deterrence goals of the law are met, as the unclaimed funds do not revert to the defendant; (2) there is no unjust enrichment, since the defendant is still required to pay the entire liability regardless of the number of class members who fail to come forward and claim the amount to which they are entitled; and (3) an indirect benefit accrues to all class members through the benefits provided to society in general. *See* Forde, K., *op cit*.

Illinois: The Statutory Approach. The new Illinois statute (2007 Bill Text IL S.B. 486, 735 ILCS 5/2-807) appears to embrace this *cy pres* philosophy. It requires the trial court, in approving a class action settlement resulting in the creation of a common fund, to provide for the distribution of residual funds to one or more eligible organizations. The term eligible organization is defined as a not-for-profit organization which: (1) has been in existence for and qualified as a tax-exempt 501(c)(3) organization for at least three years; (2) is in compliance with the Charitable Trust Act and Solicitation of Charity Act; and (3) has as a principle purpose the promoting or providing of services eligible for funding under the Illinois Equal Justice Act. 735 ILCS 5/2-807(a)(i-iv). The Act further provides, however, that the court may, if it finds good cause to do so, order distribution of up to 50% of the residual funds to one or more other not-for-profit charitable organizations that serve the public good. 735 ILCS 5/2-807(b).

With respect to a judgment, however, as opposed to an agreed settlement, the courts discretion is more circumscribed. Following a judgment in favor of the plaintiff, the judgment shall provide for the distribution of residual funds to one or more eligible organizations. 735 ILCS 5/2-807(c). Unlike Section (b) dealing with settlements, in Section (c) there is no provision for distribution to one or more *other* non-profit charitable organizations. (Emphasis added). Presumably, this is because the jury or the trier of fact can deal only with those parties properly before the court and its verdict may not be enlarged to benefit persons or organizations not parties to the case. This is consistent with existing law on class actions: any judgment is binding on all class members, as the class is defined by the court, except those who have been properly excluded. 735 ILCS 5/2-805. The courts power with respect to the entry of judgment in such case is restricted accordingly.

Application and Effective Date. The Act does not apply to class actions against the State of Illinois or any of its political subdivisions. The effective date of the legislation is July 1, 2008. It applies to all actions commenced on or after its effective date and to all actions pending on such date for which no court order has been entered preliminarily approving a proposed settlement for a class of plaintiffs.

Tips for Practitioners. The best way to avoid application of the statute is to make provision in the settlement agreement for the disposition of residual funds to one or more organizations agreed upon by the parties and their counsel. It is not uncommon that class counsel will have close connections with one or more public-interest or

law-related organizations who may be considered as class action beneficiaries. Such relationship will not prohibit distribution of part of the funds to such organizations, provided that there is no direct benefit or *quid pro quo* to counsel in exchange for the payment. Barring such agreed-upon provisions, the statute expresses a preference for eligible organizations as beneficiaries of at least 50% of the residual distribution. In order to benefit organizations that do not meet the requirements of Section (a) of the statute, counsel must demonstrate to the court that any such contemplated beneficiary is a not-for-profit charitable organization, and that, for reasons particularly described to the court (preferably in writing), it is one that serves the public good.

It should also be kept in mind that, even though the statute does not take effect until July 1, 2008, existing class action cases qualify for treatment under the statute if no order preliminarily approving a settlement has been entered by that date.

Cross References. Illinois Civil Procedure § 7.08: Special Joinder Provisions Class Actions.

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n1 . *Superior Beverage Co. v. Owens-Illinois, Inc.*, 89-C-251 (N.D. Ill. 1993) (over \$2,000,000 ordered distributed to various law schools, legal aid clinics, and public interest groups); *Isenstein v. Rosewell*, No. 85-CH-7019, Circuit Court of Cook County, IL (distribution of unclaimed funds to Cook County Judicial Advisory Council, Lawyers Trust Fund, Chicago area law schools, Womens Bar Association of Illinois, and American Judicature Society)

ABOUT THE AUTHOR(S):

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Mr. McDonnell's trial practice has included the defense of legal malpractice suits, product liability actions, industrial accident cases and commercial litigation. He is a member of the Illinois State Bar Association, the American Bar Association, the Metropolitan Bar Association of St. Louis, and past president of the St. Clair County (IL) Bar Association. He is also a member of the Bar Association for the Central and Southern Districts of Illinois, the Seventh Circuit Bar Association and the Appellate Lawyers Association of Illinois. He serves on the board of the Lawyers Trust Fund of Illinois.



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Joseph McDonnell on Vill. of Mundelein v. Wis. Cent. R.R.

2008 Emerging Issues 1915

Joseph McDonnell on Vill. of Mundelein v. Wis. Cent. R.R., 2008 Ill. LEXIS 9 (Ill. 2008), and Eagle

By Joseph B. McDonnell

February 13, 2008

SUMMARY: The significance of *Vill. of Mundelein v. Wis. Cent. R.R.*, 2008 Ill. LEXIS 9 (Ill. 2008) and *Eagle Marine Indus. v. Union Pac. R.R.*, 2008 Ill. LEXIS 2 (Ill. 2008), discussed in this comment, lies in the fact that no Illinois court, state or federal, has previously considered the preemption question with respect to the blocked-crossing statute which has been in force in Illinois for at least 130 years. Moreover, the cases may have significant impact on state laws and regulations in the transportation field and in other areas as well. This commentary, written by Joseph McDonnell, discusses the important implications of this decision.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: The significance of *Mundelein* and *Eagle Marine*, lies in the fact that no Illinois court, state or federal, has previously considered the preemption question with respect to the blocked-crossing statute which has been in force in Illinois for at least 130 years. (See, e.g., *Peoria, D. & E.R.Co. v/ Lyons*, 9 Ill.App. 350 (1882) and Sec. 52 of chapter 114, R. S. 1874). Moreover, the cases may have significant impact on state laws and regulations in the transportation field and in other areas as well.

The Commerce Clause. Art. I, Sec. 8 of the U. S. Constitution gives Congress the power to regulate commerce among the several states, i.e., interstate commerce. Since *Gibbons v. Ogden*, 9 Wheaton 1, 6 L.Ed. 23 (1824), it has been settled law that state or local action affecting commerce which conflicts with Congress regulation of the subject is invalid under the commerce clause. It is also recognized, however, that a state may legislate upon a subject in which its authority is concurrent with that of the federal government. *Cooley v. Bd. of Wardens*, 53 U.S. 299 (U.S. 1852). In such a situation, a question may arise as to whether state regulation concerning the subject is or is not preempted by federal law. This issue was presented in two cases recently decided by the Illinois Supreme Court. The subject of both is one with which almost all drivers have become exasperatingly familiar: blocking of railroad crossings by trains.

The Rule of Preemption. Generally, federal law preempts a state statute when a conflict between the two arises. *Maryland v. Louisiana*, 451 U.S. 725 (1981). However, preemption must be the clear and manifest purpose of Congress as expressed in the pertinent statute. *Thompson v. Northeast Illinois Regional Commuter R.R. Corp.*, 854 N.E.2d 744 (Ill.App. 1st Dist. 2006), citing *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993). In the area of railroad transportation, the U. S. Supreme Court has interpreted federal regulations under the commerce clause to preclude state laws covering both train length (*Southern Pacific v. Arizona*, 325 U.S. 761 (1945) and train speed (*CSX Transportation*,

Inc. v. Easterwood, 507 U.S. 658 (1993).

The Issues. At issue in the two cases was whether the *Mundelein* ordinance and the Illinois statute had been preempted by the Federal Railroad Safety Authorization Act of 1994 (49 U.S.C. § 20101 *et seq.* (2000) (FRSA) and by the Interstate Commerce Commission Termination Act of 1995 (49 U.S.C. § 10101 *et seq.* (2000) (ICCTA); and whether the ordinance and statute violated Article 1, § 8, cl. 3 of the United States Constitution.

The Argument. On its face, the statute at issue in *Eagle Marine* (625 ILCS 5/18c-7402(1)(b)), often referred to as the ten-minute statute (and the *Mundelein* ordinance which copied it) regulates neither train speed nor train length, and applies only where a non-moving train is blocking a grade crossing. In addition, it is part of a statute entitled Safety Requirements for Railroad Operations and the section immediately preceding the ten-minute statute deals with obstruction of emergency vehicles, lending at least some support to the argument made by the railroads that the statute (and its mirror image ordinance) was a proper subject of local safety concerns.

Although the village in each case argued that the primary purpose of the statute (and ordinance) was to prevent emergency vehicles from being impeded in responding to calls, the Illinois Supreme Court, citing U.S. Supreme Court precedent, stated that it is the *effect* of the law on railroad operations that is important, rather than its professed purpose; and that a state may not frustrate the operation of federal law by claiming some purpose other than that specifically addressed by the federal law. *Gade v. National Solid Wastes Management Assn*, 505 U.S. 88 (1992) (slip op. at 10).

The Holding. Preemption, said the Court, depends on whether the applicable federal regulations substantially subsume the subject matter of the villages ordinance. (slip op at 8). The Court found it significant that the ordinance applied only to rail carriers and prohibited them from allowing trains to obstruct public travel at highway grade crossings except in specific circumstances. Relying on a Pennsylvania case, *Krentz v. Consolidated R. Corp.*, 589 Pa. 576, 910 A.2d 20 (2006), the Court held that the subject matter of the ordinance was directed at regulating the movement of trains. Reviewing federal regulations dealing with train speed, air brake testing and grade crossing safety, the Court determined that the overall structure of the federal regulations substantially subsumes the subject matter of the movement of trains at grade crossings. (slip op at 12). Thus, the regulations manifest a clear intent to preempt the villages ordinance on that subject matter.

The Court then explored whether an express preemption clause contained in the Federal Railroad Safety Act (49 U.S.C.A. Sec. 20106) might allow the ordinance to stand, notwithstanding the preemption. The statute has particular relevance in today's climate regarding national security:

Laws, regulations and orders related to railroad safety and laws, regulations and orders related to railroad security shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. (49 U.S.C.A. Sec. 20106)

The opening sentence of Section 20106 makes it clear that uniformity in the field of railroad operations is Congress preference. The phrase related to, as used in that sentence, has been construed broadly and the Court had no difficulty in concluding that the *Mundelein* ordinance was embraced by the federal statute. In the wording employed in the statute, it was evident to the Court that the federal regulations covered the subject matter of state and local regulation (49 U.S.C.A. Sec. 20106) and thus manifested Congress clear intent to preempt both the ordinance and the state statute.

The Court also discussed the three conditions specified in Sec. 20106 under which a state or local law, regulation or order might coexist with federal law on the same subject. The three conditions (all of which must be satisfied) are: (1) where the law, regulation or order is necessary to eliminate or reduce a local traffic hazard; (2) where the challenged law, rule or order is not incompatible with federal law; and (3) where it does not unnecessarily burden interstate

commerce.

The Court found that the second and third conditions were not satisfied, thus finding it unnecessary to discuss the first condition. The ordinance was clearly incompatible with the federal regulatory scheme with respect to railroad operations and, in addition, ran afoul of the established authority of Congress to regulate interstate commerce under Art. I, Sec. 8 of the Constitution.

Implications of the Decisions. The Illinois statutes contain a plethora of provisions dealing with the authority of the Illinois Commerce Commission, the regulatory arm of the Illinois legislature, with regard to rail carriers. (See 625 ILCS 5/18c-7101 *et seq.*) Registration, rate-making, transportation of hazardous materials, maintenance of crossings, signs and signals, safeguards at crossings, clearing of brush and other obstructions to the view of drivers, are only a few of the subjects regulated by Illinois law. And, of course, other subjects may be covered by both state and federal law. Whether and to what extent such laws may be affected by the *Mundelein* and *Eagle Marine* decisions is problematical. It may well be that, with the advent of and increased focus on homeland security (expressly mentioned in 49 U.S.C.A. Sec. 20106), the courts will look at state statutes covering the same subject matter as federal law with an increased awareness of Congress expression of a preference for uniformity in any field in which federal and state or local laws may conflict.

Tips for Practitioners. Whenever a question of preemption by federal law arises, it is essential that the question be examined in the light of those factors traditionally considered by the courts. In representing a local or state agency seeking to uphold the ordinance or statute, one should focus on the established police power of the state to safeguard the health, morals, safety and welfare of the public, and on harmonizing the state/local rule with the federal law or regulation. Is there language indicating an apparent intent by Congress to preempt the field? If so, does that mean complete preemption? Is there a savings clause which respects state regulation on the subject? Is the state or local rule compatible with the federal regulatory scheme? Is the federal regulation limited in its reach, so that purely local concerns can be accommodated?

Where counsel's goal is to establish preemption, the focus will be on congressional intent as the ultimate touchstone guiding the analysis; if the statute contains an express preemption clause, then the statutory construction should center on its plain meaning as the best evidence of Congress's preemptive intent. Is the overall federal regulatory treatment of the subject complementary or plenary? Will enforcement of the state or local regulation hamper the implementation of the federal rule? Are the two compatible, or will the federal regulation be impaired or thwarted by operation of the local/state regulation? What is the effect on interstate commerce?

Cross References. *Lundeen v. Canadian Pacific Ry. Co.*, 447 F.3d 606 (8th Cir. 2006), *Peters v. Union Pacific R.R. Co.*, 80 F.3d 257 (8th Cir. 1996); and *Thompson v. Northeast Illinois Regional Commuter R.R. Corp.*, Ill.App., 854 N.E.2d 744 (1st Dist. 2006).

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Robert Kugler and James Brand on Christians v. Grant Thornton, LLP

2008 Emerging Issues 1916

Robert Kugler and James Brand on Christians v. Grant Thornton, LLP

By Robert Kugler and James Brand

February 13, 2008

SUMMARY: In July 2007, the Minnesota Court of Appeals held that deepening insolvency is not a recognized theory of damages in Minnesota [*Christians v. Grant Thornton, LLP*, 733 N.W.2d 803 (Minn. App. 2007)]. In September 2007, the Supreme Court of Minnesota denied a petition to review the case [see *Christians v. Thornton*, 2007 Minn. LEXIS 572 (Minn. Sept. 18, 2007)], leaving in place a decision that is an enormous relief to officers and directors of troubled companies, banks that have lent to troubled companies, and professionals such as lawyers, accountants, and investment brokers who have provided services to troubled companies.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Overview. In July 2007, the Minnesota Court of Appeals held that deepening insolvency is not a recognized theory of damages in Minnesota [*Christians v. Grant Thornton, LLP*, 733 N.W.2d 803 (Minn. App. 2007)]. In September 2007, the Supreme Court of Minnesota denied a petition to review the case [see *Christians v. Thornton*, 2007 Minn. LEXIS 572 (Minn. Sept. 18, 2007)], leaving in place a decision that is an enormous relief to officers and directors of troubled companies, banks that have lent to troubled companies, and professionals such as lawyers, accountants, and investment brokers who have provided services to troubled companies.

Factual Background to Underlying Controversy in *Christians*. The *Christians* case arose from the bankruptcy of Technimar Industries, Inc., a company that had hoped to manufacture an agglomerated stone product from a facility in northern Minnesota. To pay for the necessary equipment, Technimar's investment banker arranged for the City of Cohasset, Minnesota, where the facility was located, to issue industrial-revenue bonds. Through a series of arrangements, Technimar essentially underwrote a substantial portion of the bonds. However, its financials, which were audited by the defendant accounting firm Grant Thornton, did not indicate this obligation. Had the financials been correct, they would have reflected that Technimar was insolvent. After this time, Technimar took out additional loans before defaulting on the bonds and filing for bankruptcy. Trustee Julie Christians was appointed, who brought an action against Grant Thornton in state court alleging, primarily, auditor malpractice and breach of contract. For damages, the trustee claimed that Technimar was harmed by the deepening of its insolvency [*Christians v. Grant Thornton, LLP*, 733 N.W.2d 803, 806808 (Minn. App. 2007)].

Federal Recognition of Deepening Insolvency Theory. Over the past decade a number of federal courts have recognized a theory of damages called deepening insolvency, where a defendant's wrongful action caused an insolvent

corporation to incur further debt. As the court stated in *Christians*: The concept presumes that, in taking on additional unpayable debt, a corporation might be harmed by operational limitations, strained corporate relationships, diminution of corporate assets, and the legal and administrative costs of bankruptcy [*Christians*, 733 N.W.2d at 810]. The *Christians* court cited the deepening insolvency damages theory as recognized in bankruptcy courts in the Southern District of Ohio, District of Colorado, Middle District of Florida, and Southern District of New York [*Christians*, 733 N.W.2d at 810]. Although there is no consensus among these courts regarding how to measure deepening insolvency damages, courts often assume that the corporation was injured to the extent of the deepening, suggesting that defendants could be liable for that full amount.

Other federal courts have gone so far as to find a new cause of action in various states common law. For example, the Third Circuit has articulated Pennsylvanias tort of deepening insolvency as the fraudulent expansion of corporate debt and prolongation of corporate life [*Official Committee of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340, 347 (3d Cir. 2001)]. While the Third Circuit has limited this to fraudulent conduct [see *Seitz v. Detweiler, Hershey and Associates, P.C. (In re CITX Corp.)*, 448 F.3d 672, 681 (3d Cir. 2006)], other courts have suggested that negligence could trigger liability [*Smith v. Arthur Anderson LLP*, 421 F.3d 989, 995 (9th Cir. 2005)]. This cause of action has the potential to override the business judgment rule to add a new substantive duty--a duty to liquidate rather than risk further operations--that complicates efforts to rehabilitate a struggling corporation.

Minnesota State Courts Rejection of Theory. The *Christians* court firmly holds that Minnesota does not recognize deepening insolvency as a theory of damages. It reached this conclusion in two steps. First, the court rejected the additional-loans component of deepening insolvency damages because loans are balance-sheet neutral. [E]very addition to a corporations liabilities is offset by an equal addition to the corporations assets [*Christians*, 733 N.W.2d at 811]. That is, the corporation is not damaged simply because it carries more debt. Second, the court stated: Once the deepening-insolvency theory is stripped of the additional-loans component, we are unable to discern what recoverable harms the concept captures that the ordinary measures of damages in auditor-malpractice and breach-of-contract claims do not [*Christians*, 733 N.W.2d at 811]. In other words, to the extent that this theory of damages makes any sense, the law already recognizes damages for any wrongdoing under other theories of recovery.

Professionals who work with corporations near insolvency will be relieved by the *Christians* opinion for two reasons. First, refusing to recognize the additional-loans component of damages reduces the likelihood of strike suits. The additional-loans component of damages can be quite large and nearly all corporations in bankruptcy will have gone through a period of increasing debt-load. This makes outside professionals an attractive target. Second, although the court held only that deepening insolvency is not a recognized *theory of damages*, a deepening insolvency *cause of action* is likely dead in the water as well in Minnesota courts. The court was unreceptive of the development.

Federal Court Could Still Recognize Theory. Despite *Christians*, a federal court could still find that Minnesota would recognize deepening insolvency, either as a theory of damages or as a cause of action. Where a states supreme court has not articulated the law, federal courts take their best guess, giving intermediate court decisions such as *Christians* only persuasive weight. For example, a recent case from the bankruptcy court in the District of Delaware recognized a deepening insolvency cause of action in Delaware law despite a recent state court decision that reached the opposite conclusion [compare *Miller v. McCown De Leeuw & Co. (In re The Brown Schools)*, 368 B.R. 394 (Bankr. D. Del. 2007) with *Trenwick America Litigation Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168 (Del. Ch. 2006)].

Lawyers who work in the area of business insolvency and bankruptcy, or who advise other professionals who do, should follow this development. While *Christians* is significant, the deepening insolvency theory still poses a risk for those who participate in the rehabilitation of failing corporations.

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Joe McDonnell on Buenz v. Frontline Transp. Co., 2008 Ill. LEXIS 4 (Ill. 2008)

2008 Emerging Issues 1902

Joe McDonnell on Buenz v. Frontline Transp. Co., 2008 Ill. LEXIS 4 (Ill. 2008)

By Joseph B. McDonnell

February 12, 2008

SUMMARY: There are many commercial transactions in which a party may seek to be indemnified from liability or damages arising out of the performance of a contractual relationship. While it is possible to draft an agreement that may entitle a party to be indemnified even for its own negligence, the language must be clear and free from doubt. However, the law also recognizes freedom of contract. Since the law recognizes the right of competent parties to contract, and assuming no fraud, overreaching, or illegality, the courts will enforce an agreement whereby a contracting party undertakes to protect another against the consequences of the others negligence. *Buenz v. Frontline Transp. Co., 2008 Ill. LEXIS 4 (Ill. 2008)* presents an example of just such an agreement. This commentary, written by Joseph McDonnell, discusses the important implications of this decision.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: There are many commercial transactions in which a party may seek to be indemnified from liability or damages arising out of the performance of a contractual relationship. Clauses of this kind are commonly seen in construction contracts, consultant agreements, manufacture-distributor arrangements, transportation agreements, and the like. While it is possible to draft an agreement that may entitle a party to be indemnified even for its own negligence, the language must be clear and free from doubt. This is because considerations of public policy, as well as fundamental concepts of tort liability, require that a party whose wrongful conduct has caused injury should be held accountable for the consequences of that conduct.

However, the law also recognizes freedom of contract. In certain industries (including transportation of goods), circumstances may be such that risk-shifting may be a compelling consideration. A shipper has little or no control over goods placed with it for transportation by a carrier, once the goods are loaded for transport. That will not guarantee, of course, that the shipper will not be sued if a third party is damaged in connection with the transportation of the goods. Under those circumstances, the shipper may expect the carrier to assume responsibility for all claims which might be made against either or both of the contracting parties. The carrier may assume the responsibility as an acceptable calculated risk to get the business. Since the law recognizes the right of competent parties to contract, and assuming no fraud, overreaching, or illegality, the courts will enforce an agreement whereby a contracting party undertakes to protect another against the consequences of the others negligence. *Frontline* presents an example of just such an agreement.

The Contract Terms. COSCO, a shipper, contracted with Frontline, a carrier, for the transportation of goods by

Frontline. The contract between the companies provided in pertinent part that Frontline would be responsible for the performance of the agreement until the return of the equipment [to COSCO]; and that Frontline shall indemnify and hold [COSCO] harmless for any and all claims, demands, actions, suits, proceedings, costs, expenses, damages, and liability arising out of, [in] connection with, or resulting from the possession, use, operation or returning of the equipment during all periods when the equipment shall be out of the possession of [COSCO].

Since the accident involved in the litigation had occurred during Frontlines operation of the equipment used to transport COSCOs goods, and both defendants were sued for various acts or omissions of negligence, COSCO took the position that the agreement covered its own alleged negligence and that Frontline was obligated to defend and indemnify it. The issue considered by the Supreme Court, on appeal by Frontline following the appellate courts affirmance of summary judgment in favor of COSCO, was whether the language in the contract was sufficiently inclusive to warrant the construction adopted by both the trial court and the appellate court.

Governing Principles. The parties agreed that the governing law was as set out in *Westinghouse Electric Elevator Co. v. LaSalle Monroe Building Corp.*, 395 Ill. 429 (1946). That case, cited many times over the years, held that a contract may provide for indemnification for ones own negligence where clear and explicit language to that effect is used or where such intention is expressed in unequivocal terms. The Supreme Court noted at the outset that an indemnity agreement, like any other contract, must be interpreted in light of established rules of construction and that the cardinal rule of interpretation is to discern the intent of the parties, if possible, from the terms used in the agreement. Where the contract language is unambiguous, it should be given its plain and ordinary meaning. *Virginia Surety Co. v. Northern Insurance Co. of New York*, 224 Ill.2d 550, 556 (2007).

Frontline, contending that the language was not clear and explicit, as required by *Westinghouse Electric* and its progeny, drew on cases which held that the language any and all claims, etc., was not sufficient to include claims based upon the negligent or wrongful conduct of the party to be indemnified.

Reconciling the Case Law. The Court, however, pointed out that a close reading of those cases (and, in fact, *Westinghouse Electric* itself) showed that other language in the agreements limited the promise of indemnification to acts or omissions of the promisor or indemnitor; thus the courts would not extend the promise of indemnification to cover a party for its own negligence because the language of the agreements in those cases did not clearly and explicitly include that risk.

In the contract at issue, however, there was no such language which limited the scope of the undertaking by Frontline or which suggested that the promised indemnity did not include claims resulting from COSCOs own negligence. The express language of the interchange agreement clearly and explicitly provides indemnification for COSCOs own negligence pursuant to the rest of the contract terms. (slip op. at 12). While Frontline argued that the use of the words any and all were not sufficient to cover the negligence of an indemnitee, the Court turned that argument on its head, pointing out that where the words any and all are used in conjunction with other language which does not limit the scope of the promise, the intent of the parties is clear: the indemnification extends to any and all claims, without limitation, including those based upon negligence of the indemnitee.

A Common Thread. The Court, in reviewing the case law since *Westinghouse Electric*, found (with the exception of one case, to be discussed shortly) a consistent thread: where the contract contains language limiting the promise of indemnification to acts or omissions of the promisor/indemnitor, it will not be construed to require indemnification of the other party against that partys negligence. By the same token, where the language clearly and explicitly provides for indemnification for the indemnitees own negligence, the agreement will be enforced according to its terms.

Karsner: A Short Shelf-Life. The sole exception to this consistent mode of analysis, according to the Court, was the appellate courts decision in *Karsner v. Lechters Illinois, Inc.*, 331 Ill.App.3d 474 (2002), decided only five years earlier. The language in that agreement was quite similar to that in *Frontline*. The pertinent clause provided that the Carrier [plaintiffs employer, as indemnitor] shall indemnify and hold [indemnitee] harmless from and against any and

all claims arising from or out of the pick-up, transportation and delivery of the property of [indemnitee] by Carrier, and the use of any motor vehicle or other equipment by Carrier in connection therewith. Plaintiff was injured while unloading a trailer containing defendant's merchandise. In its discussion of *Karsner* in the *Frontline* opinion, the Supreme Court said that the contract language was unlimited in its scope and that the appellate court had erred in holding that the indemnitee in *Karsner* was not entitled to indemnification for its own alleged negligence. *Karsner* was accordingly overruled.

Tips for Practitioners. It seems fundamental, but the most important consideration in drafting and interpreting contract language concerning indemnification is the language used. Keeping in mind the general policy against a construction that would protect a party from the results of its own wrongdoing, the language chosen must remove any doubt that that is exactly the parties' intention. Clear and precise language specifying that any and all claims are covered by the promise of indemnification, whether based on the conduct, acts or omissions of either party to the contract, will present a strong case for indemnification of a party against its own negligence. Words which fall short of that mark will fail the clear and explicit test of *Westinghouse Electric*.

From the indemnitors' standpoint, the less-inclusive the language, the better; and, if all else fails, the indemnifying party must be certain that its own insurance covers liabilities assumed by contract. Otherwise, there is the definite possibility that coverage for the tendered defense of the indemnitee will be refused, resulting in costly and prolonged litigation covering two fronts and possibly three: the underlying suit, the tendered defense of the indemnitee, and a declaratory judgment action by or against the indemnitors' insurer.

Cross References. Illinois Tort Law § 23.06: Indemnity.

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Garcia on Basis Technology Corp. v. Amazon.com, Inc.

2008 Emerging Issues 1888

Grace V.B. Garcia on Basis Technology Corp. v. Amazon.com, Inc., 71 Mass. App. Ct. 29 (2008)

By Grace V.B. Garcia

February 11, 2008

SUMMARY: Be Careful when You Hit the Send Key: E-mail Contained All Material Terms of Settlement Agreement. Billions of e-mail messages are sent each day. As practitioners, we receive and write numerous e-mails every day to clients, colleagues, and adversarial counsel. These e-mails, whether consisting of a well planned out communication or an off-the-cuff response, can be vital to a case. Such an e-mail was vital to the resolution in *Basis Technology Corp. v. Amazon.com, Inc.*, 71 Mass. App. Ct. 29 (2008). In *Basis Technology*, the Appeals Court of Massachusetts affirmed the lower courts decision to enforce a settlement agreement that consisted of an e-mail exchange between counsel on the third day of a trial. This lesson of this decision is that parties and their lawyers must be extremely careful when they discuss settlements via e-mail or other means of communication and report a case settled to the court prior to having a formal written agreement. This commentary, written by Grace V.B. Garcia, discusses the implications of this important decision.

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ARTICLE: Be Careful when You Hit the Send Key: E-mail Contained All Material Terms of Settlement Agreement

Billions of e-mail messages are sent each day. As practitioners, we receive and write numerous e-mails every day to clients, colleagues, and adversarial counsel. These e-mails, whether consisting of a well planned out communication or an off-the-cuff response, can be vital to a case. Such an e-mail was vital to the resolution in *Basis Technology Corp. v. Amazon.com, Inc.*, 71 Mass. App. Ct. 29 (2008). In *Basis Technology*, the Appeals Court of Massachusetts affirmed the lower courts decision to enforce a settlement agreement that consisted of an e-mail exchange between counsel on the third day of a trial. This lesson of this decision is that parties and their lawyers must be extremely careful when they discuss settlements via e-mail or other means of communication and report a case settled to the court prior to having a formal written agreement.

What Happened Here. In 1999, the plaintiff, Basis Technology Corporation and defendant, Amazon.com, entered into a service contract. Under the terms of the contract, Basis Technology agreed to provide technical services to Amazon to create an electronic commerce system in Japan for the sale of books and other products. In 2003, the

plaintiff brought suit against Amazon for breach of fiduciary duty, quantum meruit and violation of Mass. Gen. Laws. ch. 93A based on failure to pay. After discovery, a bench trial began in March 2005. After the third day of the trial and some settlement discussions, counsel for Basis Technology sent an e-mail to Amazons counsel that stated the following:

Subject: Basis v. Amazon Settlement Terms

This e-mail confirms the essential business terms of the settlement between our respective clients . . . Basis and Amazon agree that they promptly will take all reasonable steps to memorialize in a written agreement, to be signed by individuals authorized by each party, the terms set forth below, as well as such other terms that are reasonably necessary to make these terms effective.

After Basis attorney listed six terms for the settlement, he concluded his e-mail by stating: [P]lease contact me first thing tomorrow morning if this e-mail does not accurately summarize the settlement terms reached earlier this evening. See you tomorrow morning when we report this matter settled to the Court. In response to this e-mail, early the next morning, Amazons counsel sent a one-word reply: correct.

The next day, in open court and on the record, both attorneys reported the case settled. Consequently, the trial court ended the trial and issued a dismissal *nisi* order, which contemplates the filing of a dismissal within thirty days. Despite the e-mail and the report of settlement, the parties were unable to agree on a written settlement agreement. Basis Technology then filed a motion to enforce the settlement agreement based on the e-mail, which motion the trial court allowed. Amazon argued on appeal that the agreement was not enforceable because not all of the material terms had been agreed upon and the terms were ambiguous.

Understanding when There Is a Settlement Agreement. Massachusetts has long enforced oral settlement agreements. In enforcing settlement agreements, the court reviews whether the parties had an intention to be legally bound. The court will examine the circumstances to determine whether the parties had an intention to be legally bound on the material terms and whether those terms were unambiguous. To the extent that there is any writing, the court will look at the document as a whole. A party cannot argue that the terms of a settlement are ambiguous unless the terms are reasonably susceptible to more than one meaning. Provisions are not ambiguous simply because the parties have developed different interpretations of them. *Basis Tech., Inc.*, 71 Mass. App. Ct. at 36. Even if a settlement agreement leaves a party open to choose between two defined settlement options, it is not ambiguous or indefinite. *Correia v. DeSimone*, 34 Mass. App. Ct. 601, 603 (1993).

In *Basis Technology*, the court found that through the e-mail exchange, the parties had agreed on the essential business terms of the settlement. The mere fact that they needed to memorialize the settlement terms later did not make the settlement incomplete; it did not require the parties to create the terms, but merely required them to record the terms. Thus, the *Basis Technology* court stood by a decision it made twenty years earlier when it stated that if the parties have agreed upon all material terms, it may be inferred that the purpose of a final document which the parties agree to execute is to serve as a polished memorandum of an already binding contract. *Goren v. Royal Invs., Inc.*, 25 Mass. App. Ct. 137, 140 (1987).

Exercise Extreme Caution When Reporting Settlements to the Court. A large factor in finding that Basis Technology and Amazon had entered into a binding settlement agreement is the fact that the parties reported the matter settled to the court. The Appeals Court followed many Massachusetts cases that have found it important to enforce settlements that are reported to the court by counsel. See e.g. *Correia*, 34 Mass. App. Ct. at 603-604 ([b]y reporting to the court that the case was settled, the defendants signalled that they had gone beyond deciding whether to give up the right to trial in exchange for the plaintiffs offer . . . the integrity of the judicial process . . . would be ill served if those intimately involved in that process. . . could not rely on declarations of settlement made to the court); *Dominick v.*

Dominick, 18 Mass. App. Ct. 85, 86-89 (1984) (once the parties informed the court that they had entered into a settlement agreement with the intention of reducing such an agreement to writing, the agreement was binding notwithstanding the absence of a formal signed agreement). The courts have enforced many agreements based on the doctrine of judicial estoppel, a doctrine that has not been officially recognized in Massachusetts but which has sufficient vitality. *Correia*, 34 Mass. App. Ct. at 604. Judicial estoppel binds a party to the party's judicial declarations and prevents the party from contradicting them in a subsequent proceeding involving the same issues and parties. Thus, a party who reports the case settled to the court cannot later say that he or she has changed his or her mind.

Enforcing settlement agreements that have been orally relayed to the court protects the integrity of the judicial process as well as the parties themselves. It allows courts to dismiss juries, clean up their dockets and prepare for the next case. It also allows parties to rely on the results of negotiations that they have had in coming to a settlement conclusion. Failure to enforce such agreements would def[y] logic and fundamental principles of fairness to allow a represented party who has sought justice in a forum to contradict and undermine an agreement it reached and acknowledged in that same forum, especially when the judge and other litigants appear to have relied on that acknowledgement. *Correia*, 34 Mass. App. Ct. at 604.

Lesson for Practitioners. Based on the *Basis Technology* decision, counsel must be sure of the terms and conditions of a settlement before they confirm agreements to settle on behalf of their client. It is important that both counsel and their clients understand the terms that they are agreeing to when the agreement is made. Clients must understand that they cannot later change their minds. Practitioners should have heart-to-heart conversations with their clients, making it clear that the terms upon which there is general agreement can be enforced, even if there is no formal written agreement, once the case is reported settled to the court.

Cross References

MA Pleading and Practice § 16.15: Settlement and Agreement as to Damages.

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Bisceglie on Waiver of Right to Arbitrate

2008 Emerging Issues 1893

Bisceglie on Waiver of Right to Arbitrate

By Kyle C. Bisceglie

February 11, 2008

SUMMARY: The NY Ct of Apps held that a law firm retained its contractual right to seek arbitration despite multiple forays in court in a partner dispute. The Court added important guidance on the extent parties may pursue actions in NY before they will lose arbitral rights. Kyle Bisceglie, a Partner at Olshan Grundman, analyzes *Stark v. Molod, et al.*, in the context of prior law for permissible bounds/limits of contemporaneous litigation and arbitration.

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ARTICLE: In *Stark v. Molod Spitz DeSantis & Stark, P.C.*, 9 N.Y.3d 59, 876 N.E.2d 903, 845 N.Y.S.2d 217 (2007), a unanimous Court of Appeals ruled that a law firm could invoke an arbitration clause in a dispute with a former partner despite participating in related, intermittent proceedings in court for nearly eleven months before moving in favor of arbitration. It reasoned that the law firm's actions had not manifested affirmative acceptance of the judicial forum inconsistent with its later request. How the Court reached this conclusion requires examination of the clause at issue, and procedural history between the parties.

The partnership agreement contained an arbitration clause that provided "controversies and claims which may arise out of the transaction contemplated by this Agreement or the construction, performance or breach of this Agreement shall be determined by binding arbitration." *Stark v. Molod Spitz DeSantis & Stark, P.C.*, 29 A.D.3d 481, 482, 816 N.Y.S.2d 34, 35 (1st Dep't 2006), *reversed and remanded*, 9 N.Y.3d 59.

After receiving notice of termination and being locked out of her office, plaintiff brought the equivalent of a special proceeding seeking mainly to permit her continued representation of certain clients with pending cases. The parties resolved this by stipulation, which stipulation included both the law firm's preservation of right to claim a share of attorneys' fees on the cases in dispute as well as a general "reservation-of-rights" clause providing "[t]his Stipulation should not otherwise be construed as a waiver of any rights or remedies that [plaintiff] or [the firm] may seek to obtain against one another." Plaintiff, subsequently, filed a plenary action that was summarily "dismissed" on a technicality, and, then, a five count second complaint. The law firm made at least two applications for division of fees and disbursements under the Judiciary Law to Supreme Courts with jurisdiction over respective personal injury cases. That same month, the law firm moved to dismiss plaintiff's second complaint in favor of arbitration. The plaintiff opposed the law firm's requests for division of fees and moved to, among other things, stay arbitration.

The judicial view on this case had gone back and forth with each level of review. The trial court dismissed various claims on other grounds but granted the law firm's request to proceed to arbitration. A split Appellate Division reinstated the dismissed claims, and denied the law firm's motion to compel arbitration and granted the plaintiff's motion to stay arbitration. The Appellate Division held that the law firm waived its right to arbitration by "actively participat[ing] in a special proceeding and two plenary actions that involved matters falling within the ambit of the arbitration clause, thereby manifesting an affirmative acceptance of the judicial forum."

The Court of Appeals saw things differently, and reversed the Appellate Division. The Court reminded us that "the crucial question" is the "degree of participation by the defendant in the action that will create a waiver of a right to stay the action." *Stark*, 9 N.Y.3d at 66, 876 N.E.2d at 908, 845 N.Y.S.2d 217 (quoting *De Sapio v. Kohlmeyer*, 35 N.Y.2d 402, 405, 321 N.E.2d 770, 772, 362 N.Y.S.2d 843, 846 (1974)). There is no waiver where the "defendant's actions are consistent with an assertion of the right to arbitrate." *Id.* Waiver not found where "urgent need to preserve the status quo requires some immediate action..." *Stark*, 9 N.Y.3d at 67, 876 N.E.2d at 908 (quoting *Sherrill v. Grayco Builders, Inc.*, 64 N.Y.2d 261, 273, 475 N.E.2d 772, 776, 486 N.Y.S.2d 159, 163 (1985); *Preiss/Breismeister Architects v. Westin Hotel Co.*, 56 N.Y.2d 787, 789, 437 N.E.2d 1154, 452 N.Y.S.2d 397 (1982)). Unreasonable delay and "participation in the lawsuit" to the extent they "[manifest] an affirmative acceptance of the judicial forum" supports waiver. *Stark*, 9 N.Y.3d at 66-67, 876 N.E.2d at 907.

The Court found that the litigation did not "as a matter of law 'manifest an affirmative acceptance of the judicial forum.'" *Id.* The *Stark* Court reasoned "urgent need justify[ed] resort to the courts" given the affect on plaintiff's clients and all of the "the firm's ventures in Supreme Court addressed or grew out of" these clients representations. *Id.* at 9 N.Y.3d at 67-68, 876 N.E.2d at 908-909. The Court, also, noted the mutual "reservation-of-rights" provision. In so doing, the *Stark* Court broadened the type of exigent circumstances and the number of collateral and provisional skirmishes New York state courts will countenance without waiver of the right to later seek arbitration.

Stark in light of Prior Decisions. *Stark* does not make "new law" in New York but adds significant factual color to prior Court of Appeals decisions including *De Sapio* (1974), *Preiss/Breismeister* (1982) and *Sherrill* (1985), among others.

It is axiomatic in New York that the right to arbitration can be modified, waived or abandoned. *Sherrill*, 64 N.Y.2d at 272, 475 N.E.2d at 775, 486 N.Y.S.2d at 162. It is less clear when this modification, waiver or abandonment occurs:

The crucial question, of course, is what degree of participation by the defendant in the action will create a waiver of the right to stay the action. In the absence of unreasonable delay, so long as the defendant's actions are consistent with an assertion of the intention to arbitrate, there is no waiver. However, where the defendant's participation in the lawsuit manifests an affirmative acceptance of the judicial forum, with whatever advantages it may offer in the particular case, his actions are then inconsistent with a later claim that only the arbitral forum is satisfactory.

De Sapio v. Kohlmeyer, 35 N.Y.2d at 405, 321 N.E.2d at 772, 362 N.Y.S.2d at 846.

Clearly, parties can participate in parallel, unrelated claims even when those claims constitute but "various skirmishes" within "one internecine, intracorporate war." *Denihan v. Denihan*, 34 N.Y.2d 307, 311, 313 N.E.2d 759, 761, 357 N.Y.S.2d 454, 456 (1974). The practitioner should note that *Denihan* and *Stark* make clear that the court will focus on whether the claims are separate and distinct rather than their factual genesis or origination in a "common agreement" or transaction. See *Sherrill*, 64 N.Y.2d at 273, 475 N.E.2d at 776, 486 N.Y.S.2d at 163; *Denihan*, 34 N.Y.2d at 310, 313 N.E.2d at 761, 357 N.Y.S.2d at 456. Here, practitioners must examine the scope of the arbitration clause to identify arbitrable and non-arbitrable claims, and assess the availability of non-contractual causes of action such as statutory and/or common-law rights that permit a party to initially avail itself of court.

Parties also can seek judicial intervention to preserve the status quo without prejudicing their rights in arbitration. *Sherrill*, 64 N.Y.2d at 273, 475 N.E.2d at 776, 486 N.Y.S.2d at 163; *Preiss/Breismeister Architects*, 56 N.Y.2d at 789.

NY CLS CPLR §7502 (c) specifically countenances "an order of attachment or for a preliminary injunction in connection with" a pending or future arbitration. However, the practitioner usually should plead the necessity of this provisional relief as it is conditioned "only upon the ground that the award to which the applicant may be entitled may be rendered *ineffectual without such provisional relief*." NY CLS CPLR § 7502(c)(emphasis added). *Stark* specifically expanded on the type of "exigencies" parties can litigate before arbitration beyond those described in *Preiss/Breismeister Architects*.

The amount of time from suit to assertion of right is less important than the extent a party actively litigates during that time. See *City Trade & Indus., Ltd., v. New Cent. Jute Mills Co.*, 25 N.Y.2d 49, 250 N.E.2d 52, 302 N.Y.S.2d 557 (1969) (no waiver where time to answer had been extended by stipulation for a period of 18 months); *Plateis v. Flax*, 54 A.D.2d 813, 388 N.Y.S.2d 245 (3d Dep't 1976) (no waiver where arbitration sought by defendant after defendant answered and approximately three months after action commenced to allow settlement negotiations). New York requires meaningful use of the judicial forum for prosecution of claims, defense or seeking of discovery. Serving a notice of deposition may not waive arbitration rights. *Jade Press, Inc. v. Packard*, 91 Misc. 2d 820, 398 N.Y.S.2d 785 (Civ. Ct. New York Cty. 1977). Entrance of a general appearance and bond posting to secure a future judgment does not constitute a waiver. See *In re Terminal Auxiliar Maritima*, 6 N.Y.2d 294, 160 N.E.2d 526, 189 N.Y.S.2d 655 (1959).

The court will look for the "totality" of acts presented for conclusive evidence of waiver. *Sherrill*, 64 N.Y.2d at 273, 475 N.E.2d at 776, 486 N.Y.S.2d at 163. *C. I. Planning v. Weeks*, 112 A.D.2d 854, 493 N.Y.S.2d 4 (1st Dep't 1985)(waiver where defendant participated in litigation for 18 months and asserted a counterclaim); *Sullivan v. Kisly*, 93 A.D.2d 783, 461 N.Y.S.2d 808 (1st Dep't 1983)(waiver where party litigated for 17 months by answering, and participating in discovery including depositions); *City of Niagara Falls v. Rudolph*, 91 A.D.2d 817, 458 N.Y.S.2d 97 (4th Dep't 1982)(waiver after seven months pretrial conferences, examinations before trial, and some fact and expert discovery); *Malan Constr. Corp. v. Allis-Chalmers Mfg. Co.*, 35 A.D.2d 788, 315 N.Y.S.2d 258 (1st Dep't 1970)(waiver through participation in litigation for 28 months including answers to multiple pleadings and discovery).

It has been argued as convention in New York that a defendant's interposition of a counterclaim effects waiver. In fact, New York cases involve more than such an act alone, including -- prosecution of the counterclaim and/or cross-claims, lengthy delay, failure to assert arbitration as an affirmative defense or resort to the discovery process. See, e.g., *DeSapio*, 35 N.Y.2d 402, 321 N.E.2d 770, 362 N.Y.S.2d 843 (assertion of cross-claim apportioning liability and deposition of plaintiff); *Sherrill*, 64 N.Y.2d 261, 475 N.E.2d 772, 486 N.Y.S.2d 159 (assertion of counterclaim, delay, and depositions); *Gross v. Tagger*, 46 A.D.2d 876, 362 N.Y.S.2d 17 (1st Dep't 1974)(counterclaim and unreasonable delay). See also *In re Zimmerman*, 236 N.Y. 15, 139 N.E. 764 (1923) (waiver under the Arbitration Law where counterclaim, notices of trial, placement on the trial calendar, issuance of commissions to take foreign depositions and delay of two years); *Nagy v. Arcas Brass & Iron Co.*, 242 N.Y. 97 (1926)(waiver under Arbitration Law where assertion of counterclaim without pleading arbitration "either as a defense or a counterclaim" and undue delay). See also *International Modular Housing Inc. v. Atlanta Shipping Corp.*, 61 A.D.2d 941, 403 N.Y.S.2d 38 (1st Dep't 1978)(assertion of counterclaim did not waive right to arbitration where complaint consisted of both arbitrable and non-arbitrable claims -- defendant's response to nonarbitrable claims not imputed to waive arbitrable claims).

Federal Approach Briefly Compared. Unlike New York's approach, the Second Circuit requires prejudice to the party opposed to arbitration. *Com-Tech Assoc. v. Computer Assoc.*, 938 F.2d 1574, 1576 (2d Cir. 1991). More specifically, a party that engages in "protracted litigation" waives his right to arbitrate when an order compelling arbitration would result in prejudice to the party opposing arbitration. *S & R Co. of Kingston v. Latona Trucking Inc.*, 159 F.3d 80, 83 (2d Cir. 1998); *Kramer v. Hammond*, 943 F.2d 176, 179 (2d Cir. 1991); *Sherrill*, 64 N.Y.2d at 272, 475 N.E.2d 775, 486 N.Y.S.2d at 162. "Factors to consider include (1) the time elapsed from the commencement of litigation to the request for arbitration; (2) the amount of litigation (including exchanges of pleadings, any substantive motions, and discovery); (3) proof of prejudice, including taking advantage of pre-trial discovery not available in arbitration, delay and expense." *In re S & R Co. of Kingston*, 159 F.3d at 83. "An inquiry into whether an arbitration right has been waived is factually specific and not susceptible to bright line rules." *Cotton v. Slone*, 4 F.3d 176, 179 (2d Cir. 1993).

"Generally, waiver is more likely to be found the longer the litigation goes on, the more a party avails itself of the opportunity to litigate, and the more that party's litigation results in prejudice to the opposing party." *Thyssen, Inc. v. Calypso Shipping Corp., S.A.*, 310 F.3d 102, 105 (2d Cir. 2002).

Although some commentators have urged otherwise, the case law is clear that the Second Circuit has tolerated more litigation than New York state courts before finding a waiver. This result is likely attributable to the requirement of prejudice, the FAA's "strong presumption in favor of arbitration," e.g., *Thyssen, Inc.*, 310 F.3d at 104 (citations omitted) and federal courts view that "waiver is not to be lightly inferred." *In re S & R Co. of Kingston*, 159 F.3d at 83. The Second Circuit resolves doubts in favor of arbitration. *Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 25 (2d Cir. 1995).

Sufficient prejudice to infer waiver has been found when a party seeking to compel arbitration engages in extensive discovery successfully obtaining substantial disclosures not available pre-hearing in arbitration, (*Liggett & Myers Inc. v. Bloomfield*, 380 F. Supp. 1044, 1047-48 (S.D.N.Y. 1974)), makes motions going to the merits of an adversary's claims, (*Com-Tech Assoc.*, 938 F.2d at 1576), delays invoking arbitration rights while the adversary incurs unnecessary delay or expense, (*Kramer*, 943 F.2d at 179) or does all three. *Cotton*, 4 F.3d at 179.

A standard capable of varying interpretation, compare *Com-Tech Assoc.*, 938 F.2d at 1576 (holding that the party's "protracted litigation" activities, such as full participation in discovery, making of motions relating to the merits, and delaying the motion to compel arbitration until four months before the scheduled trial date, resulted in waiver), with the often criticized *Rush v. Oppenheimer & Co.*, 779 F.2d 885, 887-888 (2d Cir. 1985) (holding that delay of eight months prior to moving to compel arbitration, participation in extensive discovery, motion to dismiss, and answering of complaint without raising the arbitration clause as an affirmative defense did not result in waiver because there was no showing of prejudice). Second Circuit precedent permits significant litigation on the same claim before granting a request for arbitration. See, e.g., *Jung v. Skadden, Arps, Slate, Meagher & Flom, LLP*, 434 F. Supp. 2d 211 (2d Cir. 2006) (arbitration after defendant filed a motion to dismiss); *Leadertex*, 67 F.3d 20 (arbitration where parties engaged in discovery that yielded minimal information); *Sweater Bee by Banff, Ltd. v. Manhattan Industries, Inc.*, 754 F.2d 457, 461-64 (2d Cir. 1985) (arbitration where case pending two years and Court ruled on Defendants' motion to dismiss); *Carcich v. Rederi A/B Nordie*, 389 F.2d 692, 694 (2d Cir. 1968) (no waiver after two years of litigation before stay sought); *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 412-13 (2d Cir. 1959), cert. dismissed, 364 U.S. 801, 5 L. Ed. 2d 37, 81 S. Ct. 27 (1960) (no waiver after nine months despite defendant agreeing to deposition and receiving discovery from plaintiff); *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978 (2d Cir. 1942) (no waiver where no mention of arbitration in affirmative defense after ten months of litigation and case on "trial ready" calendar)

Practitioners' Take-Away. Parties commonly risk the forfeiture of their arbitration rights and proceed in a judicial forum first because they do not understand the nature of plaintiff's claims sufficiently, desire pre-hearing discovery, wish to bring a motion to clarify issues, want to make adjudication as complex and costly as possible for their adversary, seek to preserve the ability to choose a (more advantageous) forum and, often, a combination of these considerations. Occasionally, a party does not know and/or understand the scope of its arbitration rights until later. Parties are wise to assess the scope of the arbitration clause to determine if certain non-mandatory claims can be litigated separately in order to achieve the goals enumerated above. If a dual strategy is appropriate or viable, practitioners must carefully assess how, when and where their claims and defenses are pled. Parties have more latitude to pursue some litigation on the same claim in federal court without stanching arbitration. In state court, *Stark* specifically expands the types of "exigent circumstances" permitting judicial relief.

Cross-references

Anna Sim, *To Waive or Not to Waive: New York and Federal Law on Waiver of the Right to Compel Arbitration*, 43 N.Y.L. Sch. L. Rev. 609 (1999); 13-75 *New York Civil Practice: CPLR P 7501.26* (right to arbitrate or to litigate may be waived); 13-75 *New York Civil Practice: CPLR P 7503.15* (bringing action generally waives right to arbitrate);

13-75 *New York Civil Practice: CPLR P 7503.16* (defendant's actions manifesting agreement to judicial forum may waive right to demand arbitration).

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Susan Brazas on Brucker v. Mercola, 2007 Ill. LEXIS 1838 (Ill. 2007)

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Susan Brazas on Brucker v. Mercola, 2007 Ill. LEXIS 1838 (Ill. 2007)

By Susan M. Brazas

February 6, 2008

SUMMARY: Nutritional Supplement Dispensing Error Falls Within Arising out of Patient Care; But Does an Unborn Fetus Have the Right to Sue? This commentary discusses another must-read Illinois Supreme Court decision which addresses the current controversy over what constitutes arising out of patient care to render an action subject to the health care statute of repose. The surprise ending of the opinion identifies the time of accrual of an unborn fetus' cause of action for in utero injury. This commentary, written by Susan Brazas, discusses the implications of this important decision.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Illinois Supreme Court Addresses Scope of Health Care Statute of Repose for Nutritional Supplement Dispensing Error and for Tolling Of Statute Of Limitations for Fetal Injury.

In the first of two same-day decisions, the Illinois Supreme Court has construed broadly the scope of the health care statute of repose, 735 ILCS 5/13-212, in *Brucker v. Mercola, 2007 Ill. LEXIS 1838 (Ill. 2007)*. The Court undertook an extensive analysis of the meaning of the phrase arising out of patient care, which is the description within 735 ILCS 5/13-212 of the types of cases to which this statute of repose applies.

The other opinion filed by the Illinois Supreme Court on the same day, *Orlak v. Loyola Univ. Health Sys., 221 Ill. 2d 643 (Ill. 2006)*, also turned on the interpretation of that same phrase, but as applied to a hospital's failure to notify a prior patient that she was at risk for Hepatitis C virus from the blood transfusion of several years prior.

Both cases gave a broad reading to the phrase arising out of patient care, but with different approaches. In *Orlak*, the Court declined to follow an out-of-state case holding with a similar fact pattern. In *Brucker*, the Court assessed and adopted case law interpreting that same phrase by the Seventh Circuit, and also in state court decisions interpreting the phrase arising out of and in the course of employment found within the Illinois Worker's Compensation Act.

In *Brucker*, a female patient ingested a high dose of selenium, which an osteopathic physician's office receptionist had mistaken for a nutritional supplement which the physician had recommended and sold to the patient. The patient

was pregnant at the time, and she amended her complaint to add an action for injury to her unborn fetus resulting from the error. The defense claimed that this amendment was beyond the time allowed by the health care statute of repose, 735 ILCS 5/13-212.

The *Brucker* Court concluded that the cause of action was one arising from patient care, because the injury had its origin in the plaintiff's status as a patient, and had a causal connection to the patient care which included the prescribing of the supplements. The *Brucker* Court explicitly denied that it was applying a but-for test, which would be too broad, and also denied that the test was whether the error claimed was one of medical malpractice, as that would be too narrow. Still, the First District Appellate Court decision in *Brucker* referred to 735 ILCS 5/13-212 as the medical malpractice repose provision.

One might expect that the result of *Brucker* would be the dismissal of the action as time-barred. However, the *Brucker* Court concluded with an extensive discussion of whether the fetus' cause of action accrued at the time of the mother's injurious ingestion of selenium, or instead at the time of the fetus' birth. The *Brucker* Court relied heavily on the decisions of Louisiana and New York case precedent on this issue to conclude that because a fetus is incapable of suing, its cause of action does not accrue until its birth. The result was that the amended count brought on behalf of the infant was viewed as timely filed under the health care statute of repose.

Strategic Implications. As with the *Orlak* decision, one lesson to be learned from this decision is that specific facts should be pleaded in anticipation of the categorization of a case as arising out of patient care. More than the simple causal connection test set forth in *Orlak* is proposed by the *Brucker* Court, in its reference to the Workers' Compensation Act test that the injury must have had its origin in some risk connected with employment--or, in *Brucker*--connected with patient care.

Practical Ramifications. This case again illustrates the importance of drawing on unconventional citations as persuasive authority for a novel issue. The *Brucker* Court examined case law from the Seventh Circuit, and from state courts in New York, Louisiana, and Texas, as well as case law on the Illinois Workers' Compensation Act. As in its recent opinion in *Townsend v. Sears*, 2007 Ill. LEXIS 1701 (Nov. 29, 2007), in *Brucker* the Court looked to law review articles for part of its analysis. Thus, attorneys are well advised to make liberal use of persuasive authority for a variety of sources in their briefing and arguments, especially on issues for which there is little or no case law directly on point.

Considerations for Pleading. Counsel should exercise caution to set up pleadings so that charging allegations include those which are broad enough to encompass later, more detailed allegations which become apparent only as discovery proceeds. The Court's opinion of one month later, in *Porter v. Decatur Mem. Hosp.*, 2008 Ill. LEXIS 10 (Ill. 2008), held that allegations of failure timely to diagnose and treat progressing spinal injury were broad enough so that amended allegations of failure to take prompt action as shown necessary by a CT scan. The *Brucker* Court, in contrast, held that later amendments to the complaint did not relate back and, thus, the action was time-barred under the statute of repose.

Counsel can make use of techniques of pleading in the alternative as a means to guard against the risk of being time-barred, so that both ordinary negligence and medical negligence, for example, can be pleaded if warranted. If the culpability of a person or entity cannot be ascertained with sufficient certainty by the time the initial pleading is ready to be filed, counsel can use the Respondent in Discovery provision, 735 ILCS 5/2-402. This tool will serve to put the potential defendants on notice of the cause of action, and will allow for discovery (especially depositions) to proceed much more quickly than if only Defendants are named.

Counsel are also urged to pay special attention to those factual allegations that can add to (or detract from) the characterization of conduct as arising out of patient care. Both *Brucker* and *Orlak* demonstrate that it is not enough to show that the alleged wrongful conduct involved the exercise of medical judgment as opposed to administrative decision-making. Thus, counsel should set forth, in their pleadings and briefs, the connection between the plaintiff's status as a patient and the alleged wrongful conduct.

Extension to Other Issues. It may be argued that the *Brucker* decision should be limited to its facts, i.e., a fetus' lack of capacity to sue as justification to toll the statute of repose. Still, counsel could offer creative arguments about why this principle should apply to other persons and entities--such as a corporation which is not in good standing--to toll a statute of limitations. Counsel should make use of what the Court's current receptiveness to alternative sources of authority in offering citations to various sources, including other statutes and other jurisdictions, in support of these arguments.

Cross References. Illinois Litigation Forms and Checklists C6.01: Drafting a Complaint; Illinois Litigation Forms and Checklists C6.03: Serving a Complaint on Defendant.

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James J. Walsh on Hill v. L.F. Transportation, Inc., 2008 Mich. App. LEXIS 139

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James J. Walsh on Hill v. L.F. Transportation, Inc., 2008 Mich. App. LEXIS 139

By James J. Walsh

February 6, 2008

SUMMARY: In *Hill v. L.F. Transportation, Inc., 2008 Mich. App. LEXIS 139*, the Michigan Court of Appeals found that the trial court had abused its discretion when it refused to allow a third party to intervene in a lawsuit. This decision indicates that Michigan courts will continue their long-standing practice of liberally interpreting the rules governing intervention. This commentary, written by James J. Walsh, discusses the implications of this important decision.

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ARTICLE: In *Hill v. L.F. Transportation, Inc., 2008 Mich. App. LEXIS 139*, the Michigan Court of Appeals found that the trial court had abused its discretion when it refused to allow a third party to intervene in a lawsuit. This decision indicates that Michigan courts will continue their long-standing practice of liberally interpreting the rules governing intervention.

The plaintiff in *Hill* was a personal representative of the estate of a decedent who had been killed in an automobile accident. An insurance company moved to intervene in the settlement of the plaintiffs claims after case evaluation for the purpose of collecting costs awarded to it in an earlier proceeding. The trial court denied intervention, stating that in its opinion the insurance company would not have prevailed had it been permitted to bring its claim. On appeal, the Michigan Court of Appeals held that the trial court had abused its discretion in denying the insurance companys motion on this basis. To reach this decision, the Court of Appeals construed the court rule granting an individual the ability to intervene in a case under certain circumstances and found that MCR 2.209 required only that the potential intervener have a claim, not that the potential intervener necessarily have a meritorious claim. The Court of Appeals thus found that the trial court had erred by considering its assessment of the merit of the insurance companys claim when deciding to deny intervention. With its ruling in *Hill*, the Court of Appeals reaffirmed the practice of Michigan courts of interpreting the rules governing intervention in favor of allowing interested third parties to intervene.

Intervention is an action by which a third party becomes party in a suit pending between others. *School Dist. of the City of Ferndale v. Royal Oak Twp. School Dist. No. 8*, 291 N.W. 199, 204; 293 Mich. 1 (1940)) (quoting *Zeitinger v. Hargadine-McKittrick Dry Goods Co.*, 250 S.W. 913, 916; 298 Mo. 461 (1923)). As no right to intervention existed under the common law, the right to intervene is a creature of the judiciary in the court rules, and earlier, of the legislature by statute. *See id. at 202*. Currently, MCR 2.209 governs intervention by right and permissive intervention. Subsection A sets forth three methods by which a third party can intervene as a matter of right. First, a third party has

the right to intervene if a statute or court rule confers such a right. Second, a third party has the right to intervene if all parties to the action stipulate to allow intervention. Finally, a third party has the right to intervene if he claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicants ability to protect that interest, unless the applicants interest is adequately represented by existing parties. Subsection B sets forth the circumstances under which the court may permit a third party to intervene. Under this subsection, a third party may be permitted to intervene if a statute or court rule confers on the individual a conditional right to intervene or if his claim or defense and the main action have a question of law or fact in common.

Regardless of whether he is seeking intervention under subsection A or B, a third party looking to intervene in a suit must submit to the court a motion stating the grounds for his intervention as well as a pleading stating the claim or defense for which he seeks intervention. MCR 2.209(C). He must also give notice to all parties already involved in the suit. *Id.*

When the legislature by statute granted third parties the right to intervene in lawsuits under certain circumstances, the Michigan Supreme Court ruled that the remedial statute must be construed liberally. *Ford Motor Co. v. Blair*, 244 N.W. 167, 169; 259 Mich. 574 (1932) (discussing former statute). Michigan courts have held that the court rules governing intervention should also be construed liberally to permit a third party to intervene by right if it can be demonstrated that the original parties to the suit may not be adequately representing the third partys interests. See *Precision Pipe & Supply, Inc. v. Meram Constr., Inc.*, 489 N.W.2d 166, 167; 195 Mich. App. 153 (1992); *Sumpter v. Kosinski*, 419 N.W.2d 463, 470; 165 Mich. App. 784 (1988) (discussing former rule).

Not only do the courts liberally construe the rules to allow intervention, courts also reject efforts to create new, different or greater barriers to the ability to intervene under the rules. For example, Michigan courts have construed MCR 2.209(A)(3) to hold that it does not require the third party to demonstrate that the original parties are in fact inadequately representing his interests. Although such a demonstration would certainly suffice, the rule does not require it. Rather, the rule only requires the third party to demonstrate that the concern or possibility of inadequate representation exists. See *Vestevich v. West Bloomfield Twp.*, 630 N.W.2d 646, 649; 245 Mich. App. 759 (2001); see also *Davidson v. City of Pontiac*, 167 N.W.2d 856, 859; 16 Mich. App. 110 (1969) (under former court rule). Courts have characterized the resulting burden as minimal. *Karrip v. Twp. of Cannon*, 321 N.W.2d 690, 692; 115 Mich. App. 726 (1982)).

Although Michigan courts do recognize that intervention may be denied when it would result in either undue delay or causing a multifariousness of parties and causes of action, see *Precision Pipe & Supply, Inc.*, 489 N.W.2d at 168; *School Dist of the City of Ferndale*, 291 N.W. at 203, the courts do not strictly follow this. As the Michigan Court of Appeals observed in *Precision Pipe*, intervention might never be granted if this were strictly construed. *Precision Pipe*, 489 N.W.2d at 168.

Thus, *Hill* represents the latest rejection by a Michigan court of an attempt to make it more difficult for third parties to intervene in a lawsuit. The decision in *Hill* is also in line with dicta from a prior decision of the court, decided under a former version of the court rules. See *Davidson*, 167 N.W.2d 856, 16 Mich. App. 110. As in *Hill*, the court in *Davidson* noted that [t]he ultimate success or failure of a third partys defense (or claim) is of course, irrelevant to the question of intervention. *Id.* at 116.

Considerations. Although MCR 2.209 is liberally construed to allow intervention, practitioners should be aware of potential limitations on a third partys ability to intervene. The first consideration appears in the rule itself. The rule requires that a third partys motion to intervene (either by right or through permissive intervention) must be timely. It is within a courts discretion to deny a motion to intervene based on a finding of laches or unreasonable delay. *Karrip*, 321 N.W.2d at 692. Although timeliness is a requirement for intervention under both subsections A and B, a court may more

closely scrutinize the timeliness of a motion seeking permissive intervention than a motion seeking intervention by right. Subsection B explicitly allows a court to consider whether the proposed intervention will cause undue delay or prejudice to the original parties, and the court may deny intervention on that basis.

An example of the application of the timeliness requirement concerns the courts handling of a motion to intervene brought postjudgment. A third party bringing such a motion must make a strong showing that intervention is appropriate, and courts show a considerable reluctance to grant such motions. *Dean v. Dept of Corr.*, 527 N.W.2d 529, 532; 208 Mich. App. 144 (1994); see also *Czajkowski v. Lount*, 52 N.W.2d 642, 646; 333 Mich. 156 (1952) (decided under former statute). The concern in such a situation is fairness a third party bringing a postjudgment motion to intervene is looking to take advantage of a judgment already known to be favorable to his position. See *Dean*, 527 N.W.2d at 532. Thus, in his motion the third party must explain to the court why he did not move to intervene prior to judgment. See *id.*

Not every interested third party may intervene in a suit. Practitioners should note that a third party looking to intervene in an action must also meet traditional constitutional standing requirements before a court will grant a motion to intervene. *Karrip*, 321 N.W.2d at 692. As these requirements are constitutionally mandated, no court rule or statute can eliminate them. See *Rohde v. Ann Arbor Public Schools*, 737 N.W.2d 158, 166; 479 Mich. 336 (2007). Michigan state courts have recently adopted federal standing requirements. See *Lee v. Macomb County Board of Commrs*, 629 N.W.2d 900; 464 Mich. 726 (2001) (adopting the standing requirements as set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)).

Finally, practitioners must be aware of the consequences of a decision to intervene. Once a third party has successfully intervened, he becomes a party to the action, and is thus bound by the courts judgment in that action. *Blue Cross & Blue Shield of Mich. v. Eaton Rapids Cmty. Hosp.*, 561 N.W.2d 488; 221 Mich. App. 301 (1997).

For general information on intervention in Michigan, see Michigan Law and Practice *Civil Procedure* §§ 134, 135, 136.

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Merrill on Nevada Summary Judgment

2008 Emerging Issues 1872

Merrill on Nevada Summary Judgment

By David J. Merrill

February 6, 2008

SUMMARY: For 20 years after the U.S. Supreme Court adopted its summary judgment trilogy [*Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)], Nevada Supreme Court summary judgment jurisprudence vacillated between the federal standard adopted by the Court and the slightest doubt standard first accepted by the Nevada Supreme Court in 1954. These parallel lines of authority subjected the Court to criticism from both the bench and bar. In *Wood v. Safeway, Inc.* [121 Nev. Adv. Op. 73, 121 P.3d 1026 (2005)], the Nevada Supreme Court put the criticism to rest. The court finally abandoned the slightest doubt standard and formally embraced the trilogy. In 2007, the Court further cemented the federal standard into Nevada law by clarifying the summary judgment burdens of proof and production [see *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. Adv. Op. 55, 172 P.3d 131 (2007)].

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ARTICLE: Introduction. For almost 20 years after the United States Supreme Court adopted its summary judgment trilogy [*Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)], Nevada Supreme Court summary judgment jurisprudence vacillated between the federal standard adopted by the Court and the slightest doubt standard first accepted by the Nevada Supreme Court in 1954. These parallel lines of authority subjected the Court to criticism from both the bench and bar. However, in *Wood v. Safeway, Inc.* [121 Nev. Adv. Op. 73, 121 P.3d 1026 (2005)], the Nevada Supreme Court put the criticism to rest. In *Wood*, the court finally abandoned the slightest doubt standard and formally embraced the trilogy. In 2007, the Nevada Supreme Court further cemented the federal standard into Nevada law by clarifying the summary judgment burdens of proof and production [see *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. Adv. Op. 55, 172 P.3d 131 (2007)]. Thus, the Nevada practitioner can no longer blindly adhere to the past 20 years of Nevada jurisprudence when moving for or opposing a motion for summary judgment, but must refer to more recent Nevada Supreme Court cases or federal cases.

The Slightest Doubt Standard. In *Parman v. Petricciani*, [70 Nev. 427, 436, 272 P.2d 492, 496 (1954), abrogated by *Wood*, 121 Nev. Adv. Op. 73, 121 P.3d 1026], the Nevada Supreme Court quoted the following language from the Second Circuits opinion in *Doehler Metal Furniture Co. v. United States*, [149 F.2d 130, 135 (2d Cir. 1945) (emphasis

added)]:

We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to trial *where there is the slightest doubt as to the facts...*

Ever since, the slightest doubt standard has permeated Nevadas summary judgment jurisprudence [see *Wood*, 121 Nev. Adv. Op. 73 at 4, 121 P.3d at 1038; see also *Wood*, 121 Nev. Adv. Op. 73 at 16, 121 P.3d at 1038 n. 1 (Maupin, J., concurring in part and dissenting in part)].

However, in *Wood*, the court noted that other courts and commentators had criticized the slightest doubt standard as unduly limiting the use of summary judgment [see *Wood*, 121 Nev. Adv. Op. 73 at 4, 121 P.3d at 102930 & n.5]. The court also recognized that although the United States Supreme Court did not address the slightest doubt standard directly in *Celotex* and *Liberty Lobby*, the Courts opinions in those cases undermin[ed] the slightest doubt standard [Wood, 121 Nev. Adv. Op. 73 at 4, 121 P.3d at 1030]. For example, in *Celotex*, the Court concluded that summary judgment should not be regarded as a disfavored procedural shortcut [Wood, 121 Nev. Adv. Op. 73 at 4, 121 P.3d at 1030 (quoting *Celotex*, 477 U.S. at 327, 106 S.Ct. at 2555)]. Likewise, in *Liberty Lobby*, the Court noted that not all factual disputes preclude summary judgment, only genuine issues of material fact [Wood, 121 Nev. Adv. Op. 73 at 5, 121 P.3d at 1030 (quoting *Liberty Lobby*, 477 U.S. 24748, 106 S.Ct. at 2510)].

Despite its continued adherence to the slightest doubt standard in certain circumstances, the Nevada Supreme Court also issued several decisions that seemingly reject[ed] the slightest doubt standard [Wood, 121 Nev. Adv. Op. 73 at 5, 121 P.3d at 1030]. For example, *Wood* noted that previous decisions concluded that a nonmoving party may not defeat a motion for summary judgment by relying on the gossamer threads of whimsy, speculation and conjecture [Wood, 121 Nev. Adv. Op. 73 at 5, 121 P.3d at 1030]. In addition, the court had previously stated that [w]hen a motion for summary judgment is made and supported as required by NRCP 56, the nonmoving party may not rest upon general allegations and conclusions, but must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine factual issue [Wood, 121 Nev. Adv. Op. 73 at 5, 121 P.3d at 1030 (quoting *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 71314, 57 P.3d 82, 87 (2002))]. In fact, the court had previously cited *Celotex* and *Liberty Lobby* with approval [see, e.g., *Valley Bank of Nev. v. Marble*, 105 Nev. 366, 367, 775 P.2d 1278, 1279 (1989); *Oehler v. Humana, Inc.*, 105 Nev. 348, 350, 775 P.2d 1271, 1272 (1989); *NGA #2 Ltd. Liab. Co. v. Rains*, 113 Nev. 1151, 1156, 946 P.2d 163, 167 (1997); *Clauson v. Lloyd*, 103 Nev. 432, 435, 743 P.2d 631, 633 (1987)].

The Nevada Supreme Courts use of the slightest doubt standard in certain circumstances and citation to the federal standard in other instances made the court the rightful subject of criticism within the bench and bar for shaping results by variant applications of the two standards [see *Wood*, 121 Nev. Adv. Op. 73 at 17, 121 P.3d at 1038 (Maupin, J., concurring in part and dissenting in part)]. However, in *Wood*, the court put the criticism to rest as it took the opportunity to clarify that the slightest doubt standard in our summary judgment jurisprudence is an incorrect statement of the law and should no longer be used when analyzing motions for summary judgment [Wood, 121 Nev. Adv. Op. 73 at 2, 121 P.3d at 1028]. Instead, the court formally adopted the United States Supreme Court trilogy [see 121 Nev. Adv. Op. 73 at 6, 121 P.3d at 1031].

Nevadas Summary Judgment Standard. As stated in Nevada Rule of Civil Procedure 56:

[Summary] judgment ... shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

[N.R.C.P. 56(c)]. The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant [Wood, 121 Nev. Adv. Op. 73 at 6, 121 P.3d at 1031]. In addition, [a] factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party. [Wood, 121 Nev. Adv. Op. 73 at 6, 121 P.3d at 1031]. The court must construe the evidence in a light most

favorable to the nonmoving party [see *Wood*, 121 Nev. Adv. Op. 73 at 6, 121 P.3d at 1031]. However, to avoid summary judgment, the nonmoving party must produce admissible evidence demonstrating a genuine issue of material fact [see *Wood*, 121 Nev. Adv. Op. 73 at 6, 121 P.3d at 1031]. However, as recently clarified in *Cuzze v. University & Community College System of Nevada*, [t]he manner in which each party may satisfy its burden of production depends on which party will bear the burden of persuasion on the challenged claim at trial [*Cuzze v. University & Community College System of Nevada*, 123 Nev. Adv. Op. 55, 5, 172 P.3d 131, 134 (2007)].

Burden of Production and Persuasion. In *Cuzze*, the court noted that it follows the United States Supreme Courts opinion in *Celotex Corp. v. Catrett* when analyzing who bears the burden of proof and persuasion [*Cuzze*, 123 Nev. Adv. Op. 55 at 4, 172 P.3d at 134]. The moving party always bears the initial burden of production to show the absence of a genuine issue of material fact [*Cuzze*, 123 Nev. Adv. Op. 55 at 4, 172 P.3d at 134 (citing *Celotex*, 477 U.S. at 323, 106 S.Ct. 2548)]. Assuming the moving party satisfies its initial burden, then the nonmoving party must produce admissible evidence demonstrating a genuine issue of material fact [*Cuzze*, 123 Nev. Adv. Op. 55 at 4, 172 P.3d at 134 (citing *Celotex*, 477 U.S. at 331, 106 S.Ct. 2548)].

How this burden of production may be satisfied depends on who bears the burden of persuasion at trial [*Cuzze*, 123 Nev. Adv. Op. 55 at 4, 172 P.3d at 134 (citing *Celotex*, 477 U.S. at 322, 106 S.Ct. 2548)]. For example, if the moving party bears the burden of persuasion, that party must present evidence that would entitle it to a judgment as a matter of law in the absence of contrary evidence [*Cuzze*, 123 Nev. Adv. Op. 55 at 5, 172 P.3d at 134 (citing N.R.C.P. 56(a), (e))]. However, if the moving party does not bear the burden of persuasion, it can satisfy the burden of production in two ways. First, it can provide evidence that negates an essential element of the nonmoving partys claim [*Cuzze*, 123 Nev. Adv. Op. 55 at 5, 172 P.3d at 134 (citing *Celotex*, 477 U.S. at 331, 106 S.Ct. 2548 (Brennan, J., dissenting))]. Second, the party may satisfy its initial burden by pointing out ... that there is an absence of evidence to support the nonmoving partys case [*Cuzze*, 123 Nev. Adv. Op. 55 at 5, 172 P.3d at 134 (quoting *Celotex*, 477 U.S. at 325, 106 S.Ct. 2548)]. In such cases, the burden of production then shifts to the nonmoving party to demonstrate, through admissible evidence, that there is a genuine issue of material fact [*Cuzze*, 123 Nev. Adv. Op. 55 at 5, 172 P.3d at 134 (citing *Wood*, 121 Nev. at 732, 121 P.3d at 1031)].

The Bottom Line. Because the Nevada Supreme Court has adopted the summary judgment standard used by the federal courts and entirely abandoned the slightest doubt standard, Nevada practitioners must take a critical look at prior Nevada Supreme Court summary judgment cases. Actions in which the court reversed the granting of summary judgment may no longer support the same outcome in a similar case if the prior case--as many of them were--was based on the slightest doubt standard. Practitioners seeking to avoid summary judgment can no longer cling to the slightest doubt standard, which was the death knell for many well-supported motions. Likewise, parties can more confidently move for summary judgment knowing that it is no longer viewed by the court as a disfavored procedural shortcut but instead as an integral part of the [Nevada] Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action [*Wood*, 121 Nev. Adv. Op. 73 at 45, 121 P.3d at 1030 (quoting *Celotex*, 477 U.S. at 327, 106 S.Ct. 2548))].

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Law Rev. Commn Proposals to Add Two New Hearsay Exceptions to the CA Evid. Code

2008 Emerging Issues 1874

Prof. Paul Bergman on Law Revision Commission Proposals to Add Two New Hearsay Exceptions to the Cal

By Paul Bergman

February 6, 2008

SUMMARY: Paul Bergman, UCLA Law School Professor Emeritus, discusses the status of the California Law Revision Commissions pending proposals to add a new hearsay exception that would make present sense impressions admissible in California, and to expand Californias very limited version of the forfeiture by wrongdoing hearsay doctrine. The Commissions proposals, existing California law, and the treatment of similar issues under the Federal Rules of Evidence are discussed and analyzed.

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ARTICLE: As of February 2008, the California Law Revision Commission is in the process of deciding whether to recommend to the Legislature the addition of two new hearsay exceptions to the California Evidence Code (CEC). One of the new hearsay exceptions would make present sense impressions admissible in California. The second new hearsay exception would expand Californias very limited version of the forfeiture by wrongdoing doctrine. If enacted by the California Legislature, each addition would bring the CEC more in line with the Federal Rules of Evidence (FRE).

Present Sense Impressions

A California Law Revision Commission report of January 2008 recommends the addition of a new Evid. Code § 1243 to the CEC, adding a new hearsay exception for present sense impressions. This exception was rejected when the CEC was enacted in the mid-1960s, but is in effect in 44 states, has received limited opposition, and will almost certainly be enacted by the Legislature.

New Evid. Code § 1243 probably will be nearly identical to *Federal Rules of Evidence (FRE), Rule 803(1)*, which provides a hearsay exception for A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

The Commissions January 2008 report includes an example of the type of hearsay that the present sense impression exception will make admissible: a baseball announcers description of a game. Because an announcer describes the action as it unfolds, faulty memory is not a concern, nor is the announcer likely to have enough time to be deliberately deceptive. These factors mean that the description is very likely to be trustworthy, and a hearsay exception therefore warranted.

In many situations in which present sense impressions are offered into evidence, the testifying witness will be either the declarant or a person who was at the scene and near enough to the declarant to hear the statement. Either way, an additional justification for the exception is that a witness with first-hand knowledge of the event to which the statement pertains is likely to be available for cross examination. (Of course, this may not always be true, and in fact is not true in the Commissions baseball announcer example. If the testifying witness was listening to the game on the radio, the witness will have first-hand knowledge of the announcers statement but not of the play to which the statement pertains.)

The Commission dismissed an objection that an exception for present sense impressions is not warranted because this type of hearsay is often cumulative, simply repeating a witness in-court testimony. The hearsay may well be more reliable than testimony that takes place long after an event, and at any rate trial judges have discretion under *Evid. Code* § 352 (the CEC counterpart to *Federal Rules of Evidence, Rule 403*) to exclude present sense impressions if their probative value is substantially outweighed by time considerations.

The Commission also noted that the exception for present sense impressions ordinarily will not apply to pretrial identifications. When for example a declarant attends a lineup and says that No. 3 was the robber, the statement does not constitute a present sense impression because it relates back to an event that took place well before the statement was made, not during or immediately thereafter. And the CEC, like the FRE, has a separate rule governing pretrial identifications.

A common uncertainty is how to treat statements of opinion under the exception for present sense impressions. For example, what if our baseball announcer says, That was a wicked line drive; the shortstop made a great play to catch it? Under proposed *Evid. Code* § 1243, as under to *Federal Rules of Evidence, Rule 803(1)*, the conclusory nature of a statement is a factor that trial judges can consider when exercising discretion under *Evid. Code* § 352.

How much time can elapse before a statement no longer qualifies as having made during or immediately after the event to which it pertains? The issue is a common one; it arises every time lawyers argue about and judges have to apply the abstract language of legal rules to concrete events. The Commission proposes to somewhat limit judges discretion in this regard by including in its official comment an advisory that the permissible time lapse is strictly limited to the moment required to verbalize what has just been perceived.

Finally, the Commission proposes that the official comment to the new rule remind judges that the proponent of a present sense impression must offer *foundational corroborative evidence independent of the present sense impression itself* that (1) the event or condition took place and (2) the declarant perceived the event or condition. And because California does not follow the *Federal Rules of Evidence, Rule 104(a)* provision that federal judges can consider inadmissible evidence when making foundational rulings, a California proponent of a present sense impression will have to corroborate a present sense impression with admissible evidence that an event occurred and that the declarant perceived it.

Forfeiture by Wrongdoing

Background. In *Crawford v. Washington (2004) 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177*, the U.S. Supreme Court made a sea change in its interpretation of the right of confrontation guaranteed by the Sixth Amendment to the U.S. Constitution. The Court ruled that testimonial hearsay is inadmissible against a criminal defendant unless the defendant has an opportunity to cross examine the declarant either before or during trial.

The Court gave further guidance in *Davis v. Washington (2006) 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224*. The Court ruled that statements made to 911 operators (as well as police officers and other government authorities) in the course of an ongoing emergency are not testimonial. Once an emergency has passed and objective circumstances indicate that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution, statements are testimonial.

Prior to *Crawford*, the Confrontation Clause was rarely an obstacle for prosecutors who sought to offer hearsay into

evidence. Prosecutors could satisfy the Confrontation Clause by showing that hearsay had indicia of reliability. For example, in a common situation, a female victim of domestic violence may describe an attack to the police, identifying her attacker. By the time of trial, however, the woman often recants and refuses to cooperate in the prosecution. Under pre-*Crawford* law, prosecutors successfully prosecuted many attackers by calling a police officer to testify to the victims hearsay statements. Post-*Crawford*, the hearsay is inadmissible unless the hearsay statements were made in the course of an ongoing emergency.

The Court recognized the obstacle that *Crawford* and *Davis* present in cases in which victims may be too scared and intimidated to testify against their attackers. For example, with reference to domestic violence cases, the Court in *Davis* said that this particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial. The Court pointed to a possible way-out for prosecutors: the doctrine of forfeiture by wrongdoing [*Davis v. Washington* (2006) 547 U.S. 813, 165 L. Ed. 2d at 244; 126 Sup. Ct. at 2280].

As set forth in to *Federal Rules of Evidence*, Rule 804(b)(6), forfeiture by wrongdoing is a hearsay exception that arises when the party against whom a statement is offered has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness. As the Court stated in *Crawford* and repeated in *Davis*, forfeiture by wrongdoing extinguishes confrontation claims on essentially equitable grounds. One who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation [*Davis v. Washington* (2006) 547 U.S. 813, 165 L. Ed. 2d at 244; 126 Sup. Ct. at 2280].

Cases in which federal courts have found forfeiture by wrongdoing to have occurred include:

. *United States v. Thompson* (7th Cir. 2002) 286 F.3d 950 (wrongful act of co-conspirator constituting forfeiture are imputable to other co-conspirators if the wrongful act was within the course and scope of the conspiracy and reasonably foreseeable to co-conspirators who did not participate in the wrongful act); *see also United States v. Carson* (D.C. Cir. 2006) 455 F. 3d 336.

. *United States v. Montague* (10th Cir. 2005) 421 F.3d 1099 (defendant procured his wives unavailability through previous acts of domestic violence and threats made to her when she visited him in jail prior to trial)

California. Evid. Code § 1350 is far more narrow than its FRE counterpart, *Federal Rules of Evidence*, Rule 804(b)(6), and seemingly was drafted with the expectation that prosecutors would rarely be able to satisfy it. *Evid. Code* § 1350 applies only in criminal proceedings charging a serious felony (*Evid. Code* § 1350(d) identifies the felonies to which the rule relates). For the *Evid. Code* § 1350 hearsay exception to apply, the proponent of hearsay has to prove by clear and convincing evidence that all of the following conditions have been satisfied:

. The party against whom the hearsay is offered (almost certainly the defendant) knowingly caused the declarant to be unavailable (or aided or solicited another persons act that caused the declarant to be unavailable).

. The act that caused the declarant to be unavailable was a homicide or a kidnapping.

. The act that caused the declarant to be unavailable was committed for the purpose of preventing the partys arrest or prosecution.

. The offering party was in no way responsible for the declarants unavailability.

Even if the proponent of a hearsay statement overcomes these substantial hurdles, a statement is not admissible unless it has been memorialized in writing or electronically by a law enforcement official, and signed and notarized by the declarant. Moreover, the hearsay statement must have been made under circumstances that indicate its trustworthiness, and must be corroborated by evidence independent of evidence of the commission of the offense. A salmon that is blind, deaf, and lacks a sense of smell probably has a better chance of reaching its spawning ground than prosecutors have of proving forfeiture by wrongdoing under *Evid. Code* § 1350.

In *People v. Giles* (2007) 40 Cal. 4th 833, 55 Cal. Rptr. 3d 133, 152 P.3d 433, the California Supreme Court ruled that a homicide victims hearsay statement undermining her ex-boyfriends self-defense claim was admissible. The decision was based not on *Evid. Code* § 1350, but on the Courts interpretation of equitable principles underlying the Sixth Amendments confrontation clause. Under *Giles*, a defendant forfeits the right to confrontation if the prosecution can prove by a preponderance of the evidence that the defendant engaged in an intentional criminal act that caused the declarant to be unavailable. If these foundational elements are proved, forfeiture occurs *regardless of whether the defendant acted with the intent to prevent the declarant from testifying*. The U.S. Supreme Court granted certiorari *Giles* to consider the constitutional legitimacy of this holding.

Moreover, under *Giles*, *the intentional criminal act that caused the declarants unavailability could either be the same act charged in the underlying case or a different act*. In other words, a defendant charged with murder might be considered to have forfeited the right to rely on the Sixth Amendments right of confrontation if the prosecution proves to the judge by a preponderance of the evidence that the defendant committed the murder.

In *Giles*, the California Supreme Court noted that a finding of forfeiture only bars a defendant's objection under the confrontation clause of the federal Constitution and does not bar statutory objections under the Evidence Code. Thus, even if it is established that a defendant has forfeited his or her right of confrontation, the contested evidence is still governed by the rules of evidence; a trial court should still determine whether an unavailable witness's prior hearsay statement falls within a recognized hearsay exception and whether the probative value of the proffered evidence outweighs its prejudicial effect [*People v. Giles*, 40 Cal. 4th 833, 854].

The accuracy of this statement may depend on whether or not the party against whom a hearsay statement is offered engaged in wrongdoing for the purpose of making a declarant unavailable. Purposefully making a declarant unavailable to testify arguably constitutes evidence that the declarants hearsay statement was trustworthy. Hence, the same wrongful act may overcome both constitutional and hearsay objections to the introduction of evidence. When forfeiture occurs in the absence of intent to make a declarant unavailable (as in *Giles*), inferring from the wrongful act that the declarants hearsay statement was trustworthy is less warranted. In the latter situations, the party offering the declarants hearsay statement into evidence may need to satisfy a hearsay exception.

The California Law Revision Commission has struggled with the question of whether to repeal the narrow forfeiture by wrongdoing hearsay exception created by *Evid. Code* § 1350 and replace it with a broader exception based on *Giles*. The Commissions January 2008 report recommends that the Legislature retain *Evid. Code* § 1350 in its present form at least until the U.S. Supreme Court decides *Giles*; the Court has already granted certiorari and the case is expected to be decided in 2008.

The Commission considered at least four options for responding to *Giles*. These are as follows:

. *Option 1*: Repeal *Evid. Code* § 1350 and codify the holding in *Giles* by enacting a new rule providing that if the prosecution proves by a preponderance of the evidence that a defendants intentional criminal act caused a declarant to be unavailable, forfeiture has occurred. The act which constitutes forfeiture may be the charged crime.

. *Option 2*: Repeal *Evid. Code* § 1350 and replace it with a rule similar to *Federal Rules of Evidence*, Rule 804(b)(6). The primary difference from Option 1 is that Rule 804(b)(6) requires that to constitute a forfeiture, the act must have been done with the intent to procure the declarants unavailability.

. *Option 3*: Retain *Evid. Code* § 1350 but broaden it in a variety of possible ways. For example, the Legislature could remove the serious felony limitation, or expand the types of statements that are admissible.

. *Option 4*: Leave *Evid. Code* § 1350 in place; do nothing, at least until after the U.S. Supreme Court issues its decision in *Giles*.

The Commissions January 2008 report recommends Option 4 to the Legislature: wait and see. Its conclusion rests

partly on the uncertainty surrounding the scope of the forfeiture by wrongdoing doctrine, and partly on the fact that guidance from the Supremes is in the offing. The Commission also cited a concern that is unique to California: The so-called Victims Bill of Rights, enacted through the initiative process in the early 1980s, provides in part that in criminal cases, a rule that restricts the admissibility of relevant evidence can be adopted only by another initiative or by a two-thirds vote in the Legislature. The Commission prefers that the Legislature wait until *Giles* is decided before enacting a rule that may require an initiative or a super-majority vote to undo.

For further information on the present sense impression and forfeiture by wrongdoing hearsay exceptions, see

§ Friedland, Bergman & Taslitz, *Evidence Law and Practice* (3d ed. LexisNexis 2007), Ch. 14, § 5 and Ch. 15, §. 8.

§ Weinstein's Evidence Manual (Matthew Bender), Ch. 16, *Hearsay Exceptions--Availability of Declarant Immaterial*, § 16.02 and Ch. 17, *Hearsay Exceptions Requiring Unavailability--Rule 804*, § 17.06

§ Weissenberger & Duane, *Weissenbergers Federal Evidence*, 5th ed. (Matthew Bender 2007), Ch. 803, *Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial*, §§ 803.1--803.5, 804.22.

For discussion of *Evid. Code 1350* and the *Crawford* and *Davis* cases cited in this commentary, see Scallen & Weissenberger, *California Evidence Courtroom Manual*, §§ 1350, 1370.

For general coverage of the hearsay exceptions in California, see Imwinkelried, Wydick & Hogan, *California Evidentiary Foundations*, Ch. 9, *The Hearsay Rule and Its Exceptions*.

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Professor Kent Sinclair on Lloyd v. Kime, 654 S.E.2d 563 (Va. 2008).

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Professor Kent Sinclair on Lloyd v. Kime, 654 S.E.2d 563 (Va. 2008).

By Prof. Kent Sinclair

February 1, 2008

SUMMARY: In its recent decision in *Lloyd v. Kime*, 654 S.E.2d 563 (Va. 2008), the Supreme Court of Virginia issued an important decision dealing with the propriety of the trial court's use of discovery deposition testimony from the plaintiffs expert witness as a basis to sustain a motion in limine excluding the witness testimony and subsequently granting summary judgment for the defendant based on the plaintiffs lack of an expert witness. Further, it addressed the scope of practice issues involving intraoperative and post-operative care in an orthopedic and neurological context, ruling on whether the trial court erred in holding that the plaintiffs witness was not qualified to testify as to standard of care, breach of the standard of care, and proximate causation in a medical malpractice action because the expert failed to meet the requirements of Virginia Code § 8.01-581.20. This commentary, written by Professor Kent Sinclair, discusses the implications of this important decision.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Summary Judgment by Any Other Name Excluding Experts and Entering Judgment. Virginia Procedural Limits and Evidence Doctrine Interact in Medical Negligence Cases, and Elsewhere. Intraoperative and Post-Operative Negligence: Partial Qualification of Witnesses and the Separation of Issues for Expert Testimony

In its recent decision in *Lloyd v. Kime*, 654 S.E.2d 563 (Va. 2008), the Supreme Court of Virginia issued an important decision dealing with the propriety of the trial court's use of discovery deposition testimony from the plaintiffs expert witness as a basis to sustain a motion in limine excluding the witness testimony and subsequently granting summary judgment for the defendant based on the plaintiffs lack of an expert witness. Further, it addressed the scope of practice issues involving intraoperative and post-operative care in an orthopedic and neurological context, ruling on whether the trial court erred in holding that the plaintiffs witness was not qualified to testify as to standard of care, breach of the standard of care, and proximate causation in a medical malpractice action because the expert failed to meet the requirements of Virginia Code § 8.01-581.20.

Key Evidence and Procedure Points. In its recent *Lloyd* decision, the Supreme Court of Virginia reviewed an appeal in a medical malpractice case in which the trial court used deposition evidence to resolve a motion in limine and subsequent motion for summary judgment. There is important consideration given to the absence of objection as a form of agreement under the governing section of Title 8.01 of the Code of Virginia.

Moving from procedure to Evidence issues, the Court makes several efforts to clarify the standards for holding that an expert witness is or is not qualified under Virginia Code § 8.01-581.20 to testify on standard of care and breach thereof respecting diverse issues in a malpractice case. Distinguishing between the proffered expert's expertise and recent clinical activities as they relate to intraoperative negligence and post-operative care, the Court reverses part of the lower court's handling of the issues.

Moreover, the Court holds that an expert may be qualified to testify concerning *proximate causation* in respect of a problem for which the expert could not testify to the standards of care or deviation therefrom.

Factual and Procedural Background. Plaintiff sued the defendant orthopedic surgeon and his practice group for medical malpractice in the performance of a surgical procedure upon him known as an anterior cervical discectomy decompression and for his post-operative treatment in the hospital. Plaintiff alleged that the surgeon should not have cut plaintiff's spinal cord during the surgery so as to leave him partially paralyzed, and should have administered certain medicine to him within the first eight hours after the surgery to minimize and/or correct the spinal cord injury. He sought recovery for, among other things, continued unsteadiness, weakness in his right arm and leg, pain in his abdomen, difficulty swallowing and sexual dysfunction.

Plaintiff designated a single practicing out-of-state neurologist as an expert witness on the required standard of care, deviation therefrom, and proximate causation, who was proffered to testify at trial that the standard of care for surgeons performing spinal surgeries required the defendant surgeon to not cut the spinal cord with the surgical instruments so as to cause permanent paralysis and to initiate conventional heavy steroid dosage immediately post-operatively.

At the time of plaintiff's surgery, though plaintiff's expert was a practicing neurologist and had performed spinal surgeries, including anterior cervical discectomies, in the past, he had not performed any surgeries, worked in a hospital, or had hospital privileges since 1997. The defendant surgeon filed a motion in limine seeking to exclude the testimony of plaintiff's expert because he did not meet the requirements of Virginia Code § 8.01-581.20.

After reading portions of the depositions of plaintiff's expert, the defendant surgeon, and the defense expert witness, the trial court held that plaintiff's expert was not qualified to testify as to the standard of care for either the surgical procedure or plaintiff's post-operative care under Virginia Code § 8.01-581.20(A), and was also not qualified to testify as to breach of the standard of care or proximate causation. The court denied the plaintiff patient's request to file a supplemental expert designation to offer another surgeon to testify on the standard of care, because the time for designation of experts pursuant to the pretrial scheduling order had expired.

Soon after his motion in limine was granted, the defendant surgeon successfully moved for summary judgment on the grounds that plaintiff had no designated expert witness to testify on standard of care, breach, or proximate causation, and therefore could not demonstrate a *prima facie* case of medical malpractice. Plaintiff appeals.

Use of Depositions on Summary Judgment. Va. Sup. Ct. R. 3:20 and Va. Code § 8.01-420 provide that no motion for summary judgment or to strike the evidence shall be sustained when based in whole or in part upon any discovery depositions under Va. Sup. Ct. R. 4:5, unless all parties to the action agree that such deposition may be so used. Va. Sup. Ct. R. 3:20 states:

No motion for summary judgment or to strike the evidence shall be sustained when based in whole or in part upon any discovery depositions under Va. Sup. Ct. R. 4:5, unless all parties to the action shall agree that such deposition may be so used.

See also Va. Code § 8.01-420, which is the mandate that Va. Sup. Ct. R. 3:20 implements.

A decade ago, the Court in *Gay v. Norfolk & W. Ry. Co.*, 253 Va. 212, 214, 483 S.E.2d 216, 218 (1997), held that Va. Sup. Ct. R. 3:20 and Va. Code § 8.01-420 impose a very specific condition; namely, the parties must *agree* to the use of depositions before they may serve as a basis in whole, or in part, for the entry of summary judgment. This condition requires some showing of acquiescence in the use of a deposition.

While the qualification of expert witnesses is a matter in which the trial judges of Virginia have wide discretion, the Court has also held that the question whether a trial court's actions conflict with the procedural requirements set forth in a rule of Court or a statute is a question of law that is reviewed de novo. See *Collins v. Shepherd*, 274 Va. 390, 397, 649 S.E.2d 672, 675 (2007). As a result, the hands-off standards normally applied to trial court discretionary rulings do not effectively shield these dispositions from appellate scrutiny.

In its recent *Lloyd* decision, the Court considered the plaintiff's argument that the trial court erred in using his experts' discovery deposition to disqualify the expert and to then grant summary judgment based on the disqualification. On one hand the Court was quite clear in noting the applicability of the statutory and rule-based ban on use of deposition transcripts to support a summary judgment application even though the defendant doctor in *Lloyd* did *not* offer deposition testimony in support of his motion for summary judgment. The Court noted that the defendant, in fact, had utilized the deposition transcript in a manner that was functionally a motion for summary judgment, an application of the statute and the Rule that had previously been demonstrated in *Gay*, 253 Va. at 214 n.*, 483 S.E.2d at 218 n.* where the court held that -- that regardless of the label, a defendant's motion to dismiss for lack of subject matter jurisdiction was functionally a motion for summary judgment and subject to Va. Sup. Ct. R. 3:20 and Va. Code § 8.01-420.

Moreover, the Court in *Lloyd* drew attention to a case that leaders of the litigating bar have given considerable attention in the last three years, but which many practitioners are unaware of, its decision in *Parker v. Elco Elevator Corp.*, 250 Va. 278, 281 n.2, 462 S.E.2d 98, 100 n.2 (1995). In that decision, without significant fanfare and in a procedural context which may have obscured the significance of the decision for many practitioners -- the Court expressly held that Va. Sup. Ct. R. 3:20 and Va. Code § 8.01-420 apply when a defendant files a motion in limine seeking the exclusion of the plaintiff's expert testimony, and the court's ruling excluding the testimony is followed by the defendant's motion for summary judgment predicated upon the exclusion. In such a case, the Court in *Lloyd* comments, "the motion in limine is functionally a motion for summary judgment."

Thus the Court applied Va. Sup. Ct. R. 3:20 and Va. Code § 8.01-420 in considering the trial court's ruling in the *Lloyd* case that it would exclude the testimony of the expert tendered by the plaintiff in that case. Under those standards, deposition testimony could not be used to support the motion in limine *unless the party opposing the motion acquiesced*.

In *Lloyd* the defendant argued that plaintiff's counsel acquiesced in the use of the deposition *by quoting it* in his Argument in Opposition to the Motion to Exclude and his Motion to Reconsider. However, Va. Sup. Ct. R. 3:20 and Va. Code § 8.01-420 are directed to use of deposition transcripts to *support* a motion for summary judgment. Thus, Va. Sup. Ct. R. 3:20 states that [n]o motion for summary judgment shall be sustained when *based* in whole or in part on discovery depositions unless the parties agree that depositions can be used.

The Court in *Lloyd* states:

Under Va. Sup. Ct. R. 3:20 and Va. Code § 8.01-420 discovery depositions cannot be used to *support* a motion for summary judgment unless the parties agree. The Rule and statute do not apply to the use of depositions to *oppose* a motion for summary judgment.

For the first time, the Court then went on to state the converse, long assumed to be true but lacking in case law support prior to *Lloyd*: Use of the deposition by the party opposing the motion in limine "would be a permissible use."

Waiver of Objection. Having spelled out the importance of the barrier on use of deposition testimony, contrasted with the option to use the deposition transcript to *oppose* summary adjudication, the Court then turned to the other strand of Virginia law on these points: the doctrine of waiver of the statutory ban.

The Court in *Lloyd* began the waiver analysis by noting that, based upon its review the record of this case, it found that the plaintiff did not object to the use of the depositions by the defendant doctor in support of the motion. Citing *Parker*, 250 Va. at 281 n.2, 462 S.E.2d at 100 n.2, the Court held: "Failure to object to the use of the deposition is sufficient to establish acquiescence."

Appellate Practice Sidelight: on Proving You Objected. In addressing the waiver issue the plaintiff maintained in appellate papers that he had objected at a hearing in the trial court about the use of depositions by the moving defendant. On appeal, counsel quoted in the rebuttal briefing the pertinent language suggesting that an objection to the use of depositions may have been expressly lodged by the plaintiff before the final ruling of the trial court. The Supreme Court, however, includes a footnote to its opinion in *Lloyd* noting that a transcript of that hearing was not filed in the circuit court clerk's office and, consequently, is not a part of the record. The Court said simply that in this situation, the "transcript is unavailable for our consideration," citing *Woodfin v. Commonwealth*, 236 Va. 89, 97-98, 372 S.E.2d 377, 382 (1988) ("[W]e are limited to the appellate record in this case in consideration of issues presented here. We are not permitted to supplement the record by referring to [other evidence] not made a part of this record."); *Dere v. Montgomery Ward & Co.*, 224 Va. 277, 281 n.2, 295 S.E.2d 794, 796 (1982) (holding the Court was bound by the record and the circuit court's certified written statement of fact, and "not upon counsel's recollection of what occurred" during proceedings in the circuit court); *Rountree v. Rountree*, 200 Va. 57, 62-63, 104 S.E.2d 42, 47 (1958) (holding the Court would not consider facts in affidavits attached to the appellate briefs that were not part of the record from the circuit court); *Old Dominion Iron & Steel Corp. v. VEPCO*, 215 Va. 658, 212 S.E.2d 715 (1975); and *Godfrey v. Commonwealth*, 227 Va. 460, 317 S.E.2d 781 (1984). The Court did not provide any information as to whether failure to include the transcript was a result of counsel's oversight or a problem with the court reporter, for example.

On this basis, the Supreme Court found that procedurally trial court did not err in using deposition evidence in the resolution of the motion in limine and subsequent motion for summary judgment.

Qualification of a Medical Expert under Virginia Code § 8.01-581.20. Having resolved the question whether the trial court had the power to make a pre-trial disposition on the issue of expert qualification using deposition materials in support of the in limine motion, the Supreme Court in *Lloyd* turned to the merits of the question whether the trial judge ruled correctly.

The Court has recently stated in *Perdieu v. Blackstone Family Practice Ctr.*, 264 Va. 408, 418, 568 S.E.2d 703, 709 (2002), that while [t]he question whether a witness is qualified to testify as an expert is largely within the sound discretion of the trial court, in the context of a medical malpractice action, this determination must be made with reference to Virginia Code § 8.01-581.20. (quoting *Noll v. Rahal*, 219 Va. 795, 800, 250 S.E.2d 741, 744 (1979)).

As noted above, even though it is routinely recited that a trial court's exercise of its discretion in determining whether to admit or exclude evidence will not be overturned on appeal absent evidence that the trial court abused that discretion, see e.g., *Wright v. Kaye*, 267 Va. 510, 517, 593 S.E.2d 307, 310 (2004) (quoting *May v. Caruso*, 264 Va. 358, 362, 568 S.E.2d 690, 692 (2002)), the fact that in medical cases this judgment entails a construction of the statute governing testimony in malpractice cases makes the matter fair game for "de novo" review on appeal.

The qualification of a witness as an expert on the standard of care in a medical malpractice action is governed by Virginia Code § 8.01-581.20, which states in relevant part:

Any physician who is licensed to practice in Virginia shall be presumed to know the statewide standard of care in the specialty or field of medicine in which he is qualified and certified. This presumption shall also apply to any physician who is licensed in some other state of the United States and meets the educational and examination requirements for licensure in Virginia. An expert witness who is familiar with the statewide standard of care shall not have his testimony excluded on the ground that he does not practice in this Commonwealth. A witness shall be qualified to testify as an expert on the standard of care if he demonstrates expert knowledge of the standards of the defendants specialty and of what conduct conforms or fails to conform to those standards and if he has had active clinical practice in either the defendants specialty or a related field of medicine within one year of the date of the alleged act or omission forming the basis of the action.

In *Lloyd*, the Court divides its analysis under this statute, recognizing that there are two methods by which a physician is presumed to know the statewide standard of care in his particular specialty or field of medicine:

(1) If the physician is licensed in Virginia, he is presumed to know the standard of care of the specialty or field of medicine in which he is qualified and certified. *Wright*, 267 Va. at 518, 593 S.E.2d at 311.

(2) If the physician is licensed out-of-state, but meets the educational and examination requirements of the statute, he is presumed to know the standard of care of the specialty or field of medicine in which he is qualified and certified. *Id.*

The Court went on to note that if *neither* of these situations applies, a witness nonetheless may be qualified to testify as to the standard of care if the witness demonstrates sufficient knowledge, skill, or experience to make him competent to testify as an expert on the subject matter at issue. *Lloyd*, quoting and applying *Christian v. Surgical Specialists of Richmond, Ltd.*, 268 Va. 60, 65, 596 S.E.2d 522, 524 (2004); *Sami v. Varn*, 260 Va. 280, 284, 535 S.E.2d 172, 174 (2000); *Hinkley v. Koehler*, 269 Va. 82, 88, 606 S.E.2d 803, 806 (2005).

It is basic Virginia law under these authorities that in all cases to qualify as an expert witness on the standard of care, the witness must have expert knowledge on the standard of care in the defendants specialty and an active clinical practice in either the defendants specialty or a related field of medicine within one year of the date of the alleged act or omission forming the basis of the action as Virginia Code § 8.01-581.20 requires.

In *Lloyd* the Supreme Court notes that in order to qualify a witness as an expert on the standard of care, the proponent of the expert must show, among other things, that the specialty or field of medicine in which [the expert] is qualified and certified is the same as the defendants specialty or a related field of medicine. For example, in *Griffett v. Ryan*, 247 Va. 465, 472-73, 443 S.E.2d 149, 153-54 (1994), the Court held that the expert, an internist, was qualified to testify because he demonstrated that the standard of care in his field did not vary from the standard of care in the defendants field, gastroenterology (a subspecialty of internal medicine).

In its recent case, evidence produced by the moving defendant indicated that plaintiff's tendered expert witness did not have an active clinical practice in neurosurgery. However, for purposes of the motion in limine, the parties agreed that he was a neurologist. While not licensed in Virginia, the Virginia Department of Health Professions provided a letter asserting that this physician's "credentials meet the educational and examination requirements for licensure in Virginia. The Supreme Court concluded that on that record, under Virginia Code § 8.01-581.20, the witness was therefore presumed to know the standard of care in Virginia for neurologists.

In *Lloyd*, the defendant was an orthopedist performing a surgery that is also performed by neurosurgeons. As the Court had made clear in *Griffett*, 247 Va. at 472-73, 443 S.E.2d at 153-54, the plaintiff patient as the party tendering the proposed expert -- had the initial burden to demonstrate that the witness' area of qualification and certification had certain overlapping medical practices and similar standards of care with the defendant's. In the recent case, this translated into a requirement that the plaintiff show that the specialty of the proposed witness, neurology, is a related field of medicine to the defendants specialty of orthopedics. The Supreme Court treated this as a clear prerequisite to

any finding accepting the witness as an expert qualified to testify as to the intraoperative standard of care.

In one of the Supreme Court's leading precedents on the topic of accrediting a witness to testify as an expert, *Sami v. Varn*, 260 Va. 280, 285, 535 S.E.2d 172, 175 (2000), the Court laid out the purposes which underlie the statute:

The purpose of the requirement in Virginia Code § 8.01-581.20 that an expert have an active practice in the defendant's specialty or a related field of medicine is to prevent testimony by an individual who has not recently engaged in the actual performance of the procedures at issue in a case. Therefore, we conclude that, in applying the related field of medicine test for the purposes of Virginia Code § 8.01-581.20, it is sufficient if in the expert witness clinical practice the expert performs the procedure at issue and the standard of care for performing the procedure is the same.

In *Wright v. Kaye*, 267 Va. at 523, 593 S.E.2d at 314, and other case law, the Court has also stated clearly that "the term actual performance of the procedures at issue must be read in the context of the actions by which the defendant is alleged to have deviated from the standard of care.

In *Lloyd*, the plaintiff alleged that the defendant orthopedist deviated from the standard of care in two different ways: The first deviation was intraoperative (defendant allegedly performed the anterior cervical discectomy negligently); the second deviation was postoperative (defendant alleged that in the first 17 hours after the surgery the defendant failed to recognize that the patient had a new neurological injury, to properly diagnose it, and to properly treat the new injury).

Intraoperative Negligence. In a situationally specific argument, the plaintiff in *Lloyd* contended that the proffered expert should be allowed to testify as an expert witness on the standard of care applicable to intraoperative negligence because the parties did not dispute the standard of care for that claim, and plaintiff theorized that the requirements of Virginia Code § 8.01-581.20 are not applicable if the standard of care is not in dispute. However, the Supreme Court noted that it has previously held in *Perdieu*, 264 Va. at 419, 568 S.E.2d at 709 and other decisions, that the requirements of Virginia Code § 8.01-581.20 are mandatory.

Thus, since it was also undisputed that the witness had not performed any surgeries, worked in a hospital, or had hospital privileges since 1997; he had no active clinical practice in performing spinal surgery, and no evidence was presented to suggest that his practice as a neurologist included performing spinal surgery. The Supreme Court therefore held that the trial court was correct in finding that the witness was not qualified to testify as an expert witness on the standard of care as to the allegation of intraoperative negligence.

The situation was different under the Supreme Court's analysis, however, with respect to the allegation of postoperative negligence. On that topic the plaintiff presented to the trial judge evidence of "an overlap between a neurologist's practice and a neurosurgeon's or orthopedist's practice." The theory of postoperative negligence was that the defendant should have recognized that his patient had symptoms of having suffered a new neurological injury during surgery, and should have performed the appropriate diagnostic tests, discovered the injury, and promptly treated the injury with a heavy dose of the steroid Solu-Medrol or a similar medication.

Affidavit Proof on Standards of Post-Operative Care. In *Lloyd* the plaintiff had presented evidence that the standard of care for neurologists and neurosurgeons or orthopedists in such a post-operative care circumstance is the same. The plaintiff's expert stated in an affidavit that the neurological symptoms the patient displayed post-surgery

must be evaluated like any new patient. This is done by taking a thorough history, performing a complete physical examination for neurological function, evaluating and ordering proper tests and studies, reaching a diagnosis and prognosis, and formulating and implementing a treatment plan. . . . The medical procedures utilized in the evaluation, diagnosis, and treatment of an acute spinal cord injury . . . are the same utilized in the hospital setting as opposed to the office setting, or anywhere else for that matter. There is no significant medical distinction in how these procedures are done in a hospital setting as opposed to an office setting or anywhere else.

The Supreme Court found that the defendant had offered no evidence to contradict this assertion, or to otherwise suggest that there is a medical distinction between evaluation of a neurological injury post-surgery and any other time. In light of that record, the Supreme Court holds in *Lloyd* that trial court "could not disregard the uncontradicted testimony that the standard of care for evaluation of a neurological injury was common to neurosurgeons, orthopedists, and neurologists," citing *Sami*, 260 Va. at 284, 535 S.E.2d at 174. Therefore, the Court held that the trial judge abused his discretion by failing to qualify the plaintiff's proposed witness as an expert on the standard of care with regard to the allegation of postoperative negligence.

Further, the Court noted that while the proposed witness had not performed surgery within one year of the date of the alleged negligence, there was nothing in the record on the motion to suggest that this witness' "active practice" in the year before Lloyds surgery was not in a related field of medicine with regard to postoperative diagnosis and care.

Therefore, the moving defendant had failed to rebut the statutorily-based presumption noted above, to the effect that this witness was qualified to testify as to the standard of care on the allegation of postoperative negligence. Thus the trial court was held to have abused its discretion in holding that the witness was not so qualified.

Breach of the Standard of Care And Proximate Causation. Even though the Supreme Court held that the proposed witness lacked the current practice requirement to testify about the operative standard of care, the Court also reviewed in the recent *Lloyd* decision the plaintiff's claim that the witness was nonetheless qualified under Virginia Code § 8.01-581.20 to testify as to breach of the standard of care or proximate causation for either allegation of negligence. Citing *Hinkley*, 269 Va. at 92 n.5, 606 S.E.2d at 809 n.5, the Court noted an important limitation on the qualifications required under the Code, restricting their impact to aspects of the standard of care:

Virginia Code § 8.01-581.20 addresses only the qualifications of experts to testify on the standard of care and whether the standard of care is breached.

Thus the Court concluded: "The requirements do not address whether an expert witness is qualified to testify on proximate causation." Thus the trial court was found to have abused its discretion by excluding this witness as not qualified to testify on proximate causation as to either allegation of negligence (intraoperatively or postoperatively).

Summary. The recent decision of the Virginia Supreme Court in *Lloyd* draws important distinctions, both as a matter of procedure and on expert qualification. Its clarification of the waiver possibilities for use of depositions on in limine and summary judgment applications is important in itself. Moreover, because the trial court did not consider the uncontradicted affidavit "testimony" from the proposed witness himself -- that the standard of care for postoperative evaluation of a neurological injury was common to neurosurgeons, neurologists, and orthopedists the Court holds that the trial court abused its discretion by not finding the proposed witness qualified to testify on this issue. Exemplifying the level of differentiation required in these expert-qualification judgments at the trial level, the Court finds that the proposed witness was qualified to testify on standard of care, breach of standard of care, and proximate causation as to Lloyds allegation of *postoperative* negligence. Further, even though the witness was not qualified under the express terms of Virginia Code § 8.01-581.20 to testify as to standard of care or breach of standard of care as to the plaintiff's allegation of intraoperative negligence, given that there was no contest about what the applicable standard of care was for the procedure, it was altogether possible that the witness could be qualified to testify as to proximate causation for the injuries received in the operation.

C Virginia Cross-References. For further analysis of the topics of Virginia law addressed herein, please consult the following sources:

With respect to Summary Judgment and the Use of Depositions in Motions, see Charles E. Friend and Kent Sinclair, Virginia Pleading and Practice § 13.04 (Basis of Summary Judgment); § 13.05 (How Summary Judgment Sought and Opposed).

For a General Introduction to Summary Judgment in Virginia, *see* also Kent Sinclair & Leigh Middleditch, Virginia Civil Procedure § 11.7 (Summary Judgment).

Concerning Expert Witness Qualification, *see* Charles E. Friend, The Law of Evidence in Virginia § 17-15 (Qualification of Expert Witnesses).

For draft rules on Expert Testimony and Commentary Discussing the governing principles for qualification of experts, *see* Boyd-Graves Conference (Kent Sinclair, Editor), The Guide to Evidence in Virginia (2008 ed.) Sections 702 (Expert testimony) and 703 (Basis for Expert Proof).

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Professor Kent Sinclair on Dogwood Valley Citizens Ass'n v. Shifflett

2008 Emerging Issues 1856

Professor Kent Sinclair on Dogwood Valley Citizens Ass'n v. Shifflett, 2008 Va. LEXIS 2 (Va. 2008)

By Prof. Kent Sinclair

February 1, 2008

SUMMARY: A new decision in a long-running saga of a beleaguered homeowners' association and its unavailing efforts to enforce assessment obligations on recalcitrant lot owners in the subdivision has reached a defining moment, in the second broadside leveled by the Supreme Court against the effectiveness of the instruments under which the association claimed the right of enforcement. This commentary, written by professor Kent Sinclair, discusses the important implications of the Court's decision in *Dogwood Valley Citizens Ass'n v. Shifflett*, 2008 Va. LEXIS 2 (Va. 2008).

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Homeowners' Associations in Virginia are there Any "Teeth" in the Association's Governing Instruments? Key Statutes for "Special Assessments" in Myriad Virginia Subdivisions

A new decision in a long-running saga of a beleaguered homeowners' association and its unavailing efforts to enforce assessment obligations on recalcitrant lot owners in the subdivision has reached a defining moment, in the second broadside leveled by the Supreme Court against the effectiveness of the instruments under which the association claimed the right of enforcement.

IMPORTANCE: In the past decade the Virginia Property Owners Association Act, Va. Code §§ 55-508 through Va. Code §55-516.2, has become one of the most often amended and frequently enforced statutes in the Code of Virginia. Created in 1989 but reaching back by its express terms to at least 1959, this Act was originally modeled on the "horizontal property act" provisions that governed condominium developments. Since then, it has been amended numerous times to increase the enforcement options and to beef up the reporting requirements for associations to which it applies. This statute applies to large numbers of Virginia property owners' associations, and thus the issues involved which include the basic powers of an association to impose assessment charges against lot owners and the concomitant power to seek enforcement remedies in court when a lot owner refuses to pay have broad applications for lawyers and their clients throughout the Commonwealth. Important provisions of the Act include:

Coverage: Va. Code §55-508

Definitions of Terms: Va. Code §55-509

Adoption and Enforcement of Rules: Va. Code §55-513

Authority to Levy Special Assessments: Va. Code §55-514

Requirement to Comply with Declarations: Va. Code §55-515

Amendment of a Declaration: Va. Code §55-515.1 and Va. Code §55-515.2

Liens to Enforce Assessments: Va. Code §55-516

The Act also contains detailed provisions concerning so-called "disclosure packets" of information for prospective buyers interested in purchasing a lot subject to the rights and responsibilities administered by the Property Owners' Association. See, e.g., Va. Code §55-511 (contract disclosure statement requirement and timing provisions); Va. Code §55-512 (detailed components for disclosure package); Va. Code §55-514 (reserve requirements, including a periodic reserve "study"); Va. Code §55-516.1 (annual reports).

The new decision in *Dogwood Valley Citizens Ass'n v. Shifflett*, 2008 Va. LEXIS 2 (Va. 2008) sheds bright light on the necessary conditions for this system of maintenance and assessments to work properly in Virginia.

SUMMARY: The Supreme Court holds in *Dogwood Valley* (a proceeding which followed from a homeowners' association's levy of special assessments and subsequent warrants in debt against lot owners in a development) that the circuit court did not err in determining that the particular homeowners' association involved in this subdivision, which was a non-stock Virginia corporation, did not qualify as a property owners association under the Property Owners Association Act, Va. Code §55-508 through Va. Code §55-516.2.

Key Point. Because the filing of the association's articles of incorporation and bylaws in the land records did not constitute a declaration imposing upon it operational or maintenance responsibilities for the common areas or roads of the development, the judgment of the circuit court is affirmed. The key requirement for a declaration is "imposing" duties on an association which are not voluntary or avoidable, although as the Supreme Court's opinion goes forward, it appears to also require a separate instrument denominated as a "declaration" to assure that an organization qualifies as a homeowners' association under the Virginia statutes.

Legal Background. In *Anderson v. Lake Arrowhead Civic Association, Inc.*, 253 Va. 264, 483 S.E.2d 209 (1997), the developers of a subdivision in Stafford County made each lot subject to a recorded plat with identical restrictive covenants that were recorded by deeds of dedication among the land records. As emphasized by the Supreme Court of Virginia, the most important features of these instruments were these:

A key covenant granted to the developers the power to assign "all of the rights and powers, title, easements and estates reserved" to him, provided that the assignee would have the same "obligations and duties with respect to the land area concerned."

Other provisions in the covenants required each purchaser of a lot to pay the developer or his assignee \$20 each year for the first lot owned and \$10 per year for each additional lot owned "to be used for general maintenance.

The covenant also stated that the "maintenance fee shall be a lien on the real estate."

However, these covenants did not expressly require that the developers or their assignees actually maintain the common areas of the subdivision.

Subsequently, a Civic Association was formed. The entity was a Virginia non-stock corporation. Its articles provided that the association's purpose was to "further and promote the community welfare of the property owners in

the Lake Arrowhead Subdivision . . . and to handle and supervise any funds received for community betterment." The articles were subsequently amended to require that "each owner of any lot by acceptance of a deed therefore, whether or not it shall be expressed in any such deed or other conveyance, . . . [shall] covenant and agree to pay [the association]: 1) annual assessments or fees and, 2) special assessments for capital expenditures." 253 Va. at 267-68, 483 S.E.2d at 211. The developers conveyed to the association various parcels of land consisting primarily of roads, lakes, beaches, and park areas within the subdivision. The language in these deeds did not impose any duty upon the association to maintain the common areas. 253 Va. at 268, 483 S.E.2d at 211.

In *Anderson*, the Supreme Court applied Va. Code §55-508 and Va. Code §55-509, holding that it is clear that in order to qualify under the Property Owners' Association Act an association "must possess both the power to collect a fixed assessment or to make variable assessments and a corresponding duty to maintain the common area. In addition, these conditions must be expressly stated in a recorded instrument in the land records of the jurisdiction where some portion of the development is located." 253 Va. at 271-72, 483 S.E.2d at 213. On the facts in *Anderson*, the Court found that the language of the deed that conveyed the common areas from the developers to the association failed to expressly require the association to maintain the common areas.

Factual Background the prior appeal involving the present subdivision community association. Several years after the *Anderson* decision, the Court dealt with the Dogwood Valley Citizens Association for the first time. In *Dogwood Valley Citizens Ass'n, Inc. v. Winkelman*, 267 Va. 7, 590 S.E.2d 358 (2004), the Court noted that this community association is a non-stock corporation. According to its articles of incorporation, it was created to provide for the maintenance of the roads and common facilities of the Dogwood Valley subdivision. These articles and the association's bylaws purportedly authorized it to impose fees and special assessments on the property owners in the subdivision pursuant to the applicable restrictive covenants.

The deed that transferred the roads and common areas from the developers to the homeowners' association contained the following paragraphs:

"WHEREAS, in the aforesaid Deeds of Dedication and Protective Covenants, the Grantor has reserved the right to use, keep and maintain all of the roads and common facilities in the aforesaid subdivision; and

"WHEREAS, the aforesaid Deeds of Dedication and Protective Covenants provide that the rights, duties and responsibilities as are created therein may be delegated by the Grantor to a committee of lot owners approved by the Grantor; and

. . . .

"WHEREAS, the property owners of Dogwood Valley have united and formed a corporation referred to herein as[***4] the Grantee, whose purpose is to see that the roads, public facilities and other common areas of Dogwood Valley Subdivision are properly maintained; and

"WHEREAS, it is the desire of the Grantor herein, B. K. Haynes Corporation, now to convey to the Grantee, Dogwood Valley Citizens Association, Inc., all of the rights, duties and responsibilities which were created or may have been created by the aforesaid Deeds of Dedication and Protective Covenants; and

"WHEREAS, it is the desire and intent of the Grantee to receive from the Grantor and accept herein by the recordation of this deed all of the rights, duties and obligations which the Grantor has pursuant to the aforesaid Deeds of Dedication and statement of Protective Covenants.

"The Grantor hereby further QUITCLAIMS, ASSIGNS, RELEASES and REMITS unto the Grantee, Dogwood Valley Citizens Association, Inc. any and all rights which it may have, both legal and equitable in all of the roads within the aforesaid subdivision, together with any other common areas or public areas not specifically set forth in this deed."

In *Winkelman* the Supreme Court applied the "plain language" of Va. Code §55-509, which provides:

"Declaration" means any instrument, however denominated, recorded among the land records of the county or city in which the development or any part thereof is located, that either (i) imposes on the association maintenance or operational responsibilities for the common area or (ii) creates the authority in the association to impose on lots, or on the owners or occupants of such lots, or on any other entity any mandatory payment of money in connection with the provision of maintenance and/or services for the benefit of some or all of the lots, the owners or occupants of the lots, or the common area. "Declaration" includes any amendment or supplement to the instruments described in this definition. "Declaration" shall not include a declaration of a condominium, real estate cooperative, time-share project or campground.

Interpreting its prior *Anderson* decision, the Court in *Winkelman* held that the Dogwood Valley Citizen's Association was not a property owners' association within the meaning of the Property Owners' Association Act: It failed to identify any document, recorded among the land records of the jurisdiction where some property of the development is located, that expressly requires it to maintain the common areas or the roads. The Court said: "This duty must be expressly stated in the recorded documents and may not be inferred or implied."

The Court in *Winkelman* rejected expressly the suggestion that the following instruments were sufficient to clothe an association with the powers provided under the Act:

A paragraph of the Dogwood Valley subdivision's deed of dedication references an annual lot assessment not to exceed \$15 for "the use, upkeep and maintenance of the roads . . . and . . . other common facilities."

?

That declaration also provides that "the right and responsibilities as created by this paragraph may be delegated by the grantors to a Committee of lot owners within said subdivision"

?

Other paragraphs in the declaration and the statements of protective covenants refer to maintenance fees.

?

One covenant specifically states: "The following shall be an additional covenant 'Each lot owner shall be responsible for damages to subdivision roads and other common facilities by his agents. It is the intent of this covenant to limit the liability of the road maintenance fund for the cost of repair of roads and other common facilities, when the damage to the roads and common facilities was caused by the act or acts of an individual lot owner or his agent.' "

The Supreme Court of Virginia, however, held that these provisions were insufficient. It found that the association was simply unable to identify any language in any recorded instrument that expressly required it to maintain the roads or common areas. The Court found its failure to do so "fatal to its assertion that [it] is a property owners' association within the meaning of the Property Owners' Association Act."

The Present Litigation. After the decision in *Winkelman*, the president of this same Dogwood Valley community association filed in the land records an affidavit and a copy of its articles of incorporation and bylaws. The bylaws stated:

It shall be the duty of the Board of Directors to. . . cause the roads and common facilities to be maintained according to the extent that the funds permit.

The association then levied special assessments against its members under Va. Code § 55-514. When some of the landowners refused to pay these assessments, the association filed warrants in debt to enforce the assessments. The

general district court denied the association's claims, and the circuit court held that filing the articles and bylaws did not qualify the association as a property owners association under the Property Owners' Association Act and, therefore, it did not have the right to levy special assessments, charge interest, charge penalties, collect attorneys or docketing fees, or any other charge other than the regular assessments set forth in the deeds of dedication. The association appealed and the Supreme Court spelled out the meaning and extent of the requirement that qualification as a property owners association under the Act requires that a declaration recorded in the land records where the development is located impose on an association both the power to assess fees for road and common facilities maintenance and the duty to perform such maintenance.

The Court noted that in Va. Code § 55-509 the Act defines a property owners association as an incorporated or unincorporated entity upon which responsibilities are imposed and to which authority is granted in the declaration. Declaration is defined Va. Code § 55-509 as:

any instrument, however denominated, recorded among the land records of the county or city in which the development or any part thereof is located, that either (i) imposes on the association maintenance or operational responsibilities for the common area or (ii) creates the authority in the association to impose on lots. . . any mandatory payment of money in connection with the provision of maintenance and/or services for the benefit of . . . the common area.

In essence the Dogwood Citizens group argued that the core defect that controlled the Court's prior decisions was the failure of a property owners association to have a document on file in the land records that imposed on it the responsibility of maintaining the roads or common areas. This defect was cured, it was argued, by filing the Articles of Incorporation and Bylaws in the land records because those documents provided the requisite duty to maintain the roads and common areas of the development. However, the suggestion that these corporate instruments met the definition of declaration under the Act was rejected by the Supreme Court, which concluded that "a literal application of the phrase 'any instrument' in the definition of 'declaration' [in Va. Code §55-509] is inconsistent with the concept of 'declaration' used in other provisions of the [Act]."

The Court noted that the Property Owners' Association Act applies under the terms of Va. Code §55-508 (A) to developments subject to a declaration. A [d]evelopment is defined by the Act as

real property . . . subject to a declaration which contains both lots . . . and common areas with respect to which any person, by virtue of ownership of a lot . . . is obligated to pay assessments provided for in a declaration.

See Va. Code § 55-509. The Supreme Court concluded that these two definitions along with the definition of declaration itself as quoted above reflect the intent of the General Assembly to apply the statutory scheme to "real property subject to certain benefits and burdens that are part of the bundle of property rights conveyed with the transfer of ownership of the property." In passing the Court made reference to the benefits and burdens generally described as restrictive covenants that run with the land, as described in certain of its prior case law. *See Sonoma Development, Inc. v. Miller*, 258 Va. 163, 167 n.2, 515 S.E.2d 577, 579 n.2 (1999); *Burton v. Chesapeake Box and Lumber Corp.*, 190 Va. 755, 764, 57 S.E.2d 904, 908 (1950); *Willard v. Worsham*, 76 Va. 392, 396 (1882).

Under the Property Owners' Association Act, however, the Code provisions designate the required instrument imposing these restrictions as a declaration. The Court noted that articles of incorporation and bylaws "are not instruments that apply to real property and are not instruments that subject real property to certain burdens and benefits that pass as part of the property rights in the conveyance of the property."

Thus, the Court held that the corporate articles and bylaws could not be a declaration for purposes of the definition of development, even if filed among the land records pursuant to a sworn affidavit by an officer thereof.

Several other provisions of the Property Owners' Association Act clearly treat declarations as instruments separate and distinct from articles of incorporation and bylaws. For example, the Court noted that Va. Code § 55-512(A)(12) requires that the "disclosure packet" given to a buyer of a lot in the subdivision to describe the health and operations of the community organization must include [a] copy of the current declaration, the associations articles of incorporation and bylaws, and any rules and regulations or architectural guidelines adopted by the association. Similarly, Va. Code § 55-515.1 discusses the process for obtaining the consent of a mortgagee [i]n the event that *any provision in the declaration* requires the written consent of a mortgagee in order to *amend the bylaws or the declaration*.

The Supreme Court concluded that the operative language of these various Code provisions supported the conclusion that the General Assembly did not consider articles of incorporation and bylaws to be synonymous with declarations. It noted in passing that in the Dogwood Valley corporate bylaws themselves, there is a reference to declarations as documents separate from the bylaws.

From a policy standpoint the Court was unwilling to water down the bright-line significance of a distinct declaration instrument. To seize upon the broad language of Va. Code §55-509 by allowing corporate charters and by-laws to suffice "would allow a property owners association to acquire the right to issue special assessments under the [Act] merely by filing in the appropriate land records a document, regardless of its nature, stating that the association has the authority to assess property owners for maintenance of common areas and the responsibility to maintain those areas."

The Court noted that one fatal flaw in such an interpretation is the fact that a change in prescribed duties and responsibilities of an association and its members could occur without any notice to or concurrence by the property owners in such a system, by amendment of the corporate documents themselves. Clearly, the Property Owners' Association Act contemplates a declaration document that can be changed only if the lot owners have notice and agree to the change, *see* Va. Code §55-515.1, a condition consistent with the method of altering restrictive covenants applicable to real property. In this regard the Court cited *Hening v. Maynard*, 227 Va. 113, 117, 313 S.E.2d 379, 382 (1984).

Unilateral action is permitted under the Property Owners' Association Act but only in only carefully limited circumstances. The Court observed that Va. Code §55-515.2 allows unilateral changes to a declaration in very limited situations, "such as correction of a scrivener's error, a mathematical mistake, or an inconsistency." The Court simply concluded that no provision of the Act suggested that "the unilateral filing of a document without notice and concurrence of the lot owners can impose upon real property and subject owners of that property to conditions not included in a deed of dedication or by a properly adopted amendment to such deed."

The decision might have stopped there. However, the Supreme Court went on to emphasize the concept that the instrument must "impose" the duties upon an association. It stated that "voluntary assumption of this duty is insufficient," citing its prior decision in *Lake Arrowhead*, 253 Va. at 272, 483 S.E.2d at 213-14. The Court then explained that a duty imposed on an organization for purposes of qualifying as a property owners association under the Property Owners' Association Act is "one that cannot be altered or eliminated simply by amending the associations bylaws."

Thus, while the Dogwood Valley Citizens Association bylaws recited that the board of directors has such a duty, the Court read that assumption of this duty as being **voluntary** and not required by the declarations in the deeds of dedication of the development.

Whether this language in the current opinion will interfere with efforts to create bona fide binding obligations after the initial deeds are filed will remain an issue for future litigation. In the current *Dogwood Valley* decision it was sufficient for the Court to note that the declarations applicable to this particular development did not impose on the association the duty to maintain the roads and common areas, a matter the Court had previously noted in the *Winkelman* decision, 267 Va. at 13-14, 590 S.E.2d at 361.

Thus the community association's articles of incorporation and bylaws, although filed in the land records, were not the functional equivalent of a freestanding "declaration" as defined by the Act in Va. Code §55-509. The result, of course, was that the association did not qualify as a property owners association for purposes of the Property Owners' Association Act, and lacked the power to enforce the assessments which began this litigation saga.

CVirginia Cross-References. For further analysis of the topics of Virginia law addressed herein, please consult the following sources:

Enforcement of Assessment Liens, see Enforcement of Judgments and Liens in Virginia Ch. 1 (Enforcement of Judgments and Liens) and Ch. 2 (Collection of Money Judgments from Personal Property) (Lexis Law Publishing, 2004).

On the title effects of restrictions in deeds, see Virginia Title Examiners Manual § 15-1 et seq. (Dedication); § 38-1 et seq. (Restrictions); and § 41-1 et seq. (Subdivisions) (Mathew Bender & Co. 1998).

For a variety of Real Estate Forms dealing with Property Owners' Association Act issues, including liens and disclosure obligations, for rental and sale transactions, see generally Virginia Forms for Real Estate Transactions (Matthew Bender & Company, 2007).

General issues respecting covenants affecting real property, and lien rights, are discussed in Michie's Jurisprudence, COVENANTS, and LIENS (Matthew Bender & Co. 2007).

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Susan Brazas on Orlak v. Loyola Univ. Health Sys., 221 Ill. 2d 643 (Ill. 2006)

2008 Emerging Issues 1857

Susan Brazas on Orlak v. Loyola Univ. Health Sys., 221 Ill. 2d 643 (Ill. 2006)

By Susan M. Brazas

February 1, 2008

SUMMARY: This commentary, written by Susan Brazas, discusses the impact and implications of *Orlak v. Loyola Univ. Health Sys., 221 Ill. 2d 643 (Ill. 2006)* which addresses the arises from patient care factor to determine whether the statute of repose barred the plaintiff's action. Unlike some of its recent opinions, the Illinois Supreme Court declines to adopt case law from other states and from federal courts on the issue.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Once a patient, always a patient. That seems to be the conclusion of the Illinois Supreme Court in *Orlak v. Loyola Univ. Health Sys., 221 Ill. 2d 643 (Ill. 2006)*. The *Orlak* Court held that where patient care was at the beginning of a course of events, even if remote in time, a cause of action which is causally connected to it will be subject to the four-year statute of repose for actions arising out of patient care.

The *Orlak* plaintiff had received a blood transfusion in 1989, while she was an in-patient at Loyola University Hospital. In 1990, the Hospital notified the plaintiff that she should be tested for HIV. The Plaintiff did, and the HIV test was negative. The blood donor later told the Hospital of having tested positive for Hepatitis C, and the Hospital notified Plaintiff of this, and advised her to be tested for that condition, in August 2000. Plaintiff filed suit against the Hospital in 2002, for failure timely to notify her of her risk for the Hepatitis C virus. Plaintiff's four theories of recovery were constructive fraud, medical negligence, medical battery, and ordinary negligence.

The Court found that Plaintiff's suit was untimely, and concluded that it was filed past the four-year statute of repose for health care lawsuits. The Court found that it was irrelevant whether the notification decision was administrative or involved the exercise of medical judgment, because the decision was one which arose from patient care. The Court noted that Plaintiff's cause of action arose 13 years prior to filing suit (which would be the time of the actual transfusion).

The Court elected to distinguish the facts from out-of-state cases which presented very similar factual scenarios. In those cases, the other courts had focused on whether the alleged wrong was a medical decision, but the *Orlak* Court focused on whether it arose from patient care. Looking more closely at the opinion, it seems to give greatest weight to the arose from aspect of this test, rather than the patient care aspect. In explaining its reasoning, the Court noted that no special fiduciary or confidential relationship existed any longer between the Plaintiff and the Hospital, and therefore at

the time that, according to Plaintiff, the Hospital should have notified the Plaintiff of the risk of HCV infection, the Hospital owed Plaintiff no special duty which would warrant extension of the statute of repose.

Strategic Implications. Depending upon the perspective, counsel will want to establish the status of alleged wrongful conduct as either arising from patient care or not arising from patient care. The *Orlak* dissent sharply disagreed with the majority's opinion, calling the majority's logic a but-for analysis despite assertions to the contrary. Thus, the course of events--from the patient's arrival at the hospital doors to the lawsuit's filing through the courthouse doors--should be described in terms of the plaintiff's status as a recipient of patient care.

Practical Ramifications for Pleading. If fraudulent concealment is pleaded, then affirmative acts on the part of the defendant must be pleaded to withstand a motion to dismiss. However, if it is shown that a confidential or fiduciary relationship existed at the time that the cause of action arose, then no affirmative acts of concealment need be pleaded. *Hagney v. Lopeman*, 147 Ill. 2d 458 (1992). Thus, to establish this latter situation, counsel should set forth specific allegations to demonstrate that a fiduciary or confidential relationship existed.

The *Orlak* court concluded that no fiduciary or confidential relationship existed between Plaintiff and the Hospital at the point when, Plaintiff claimed, the Hospital should have notified her of the HCV risk. However, it is doubtful that the Hospital would deny that a duty of confidentiality no longer existed as to her patient records and other medical information. Thus, counsel are well advised to set forth HIPAA regulations, hospital policies restricting the release of medical records as to current and past patients, and other indicia of confidentiality to help establish that such a relationship existed at the time of the alleged wrongful conduct.

Causal Connection Element. The *Orlak* opinion suggests a very low threshold test for arising from patient care: that only a causal connection exists between the alleged wrongful conduct and the patient care which occurred. It is not clear how such a connection could be causal, and perhaps this phrasing could be interpreted as simply any connection. Interestingly, the *Orlak* court cited to its decision of the same day, *Brucker v. Mercola*, 2007 Ill. LEXIS 1838 (Ill. 2007), in support of this point.

Another means of overcoming a statute of limitations argument is to show equitable estoppel, as set forth in the case of *DeLuna v. Burgiaga*, 223 Ill. 2d 49, 857 N.E.2d 299 (2006). Counsel is cautioned that this theory should be advanced only when all elements of equitable estoppel, including reasonable reliance, can be established.

Patient Care vs. When Cause of Action Arose. Counsel should be prepared to argue the distinction between when patient care occurred and when the cause of action arose. Plaintiff's counsel will try to establish that the cause of action did *not* arise from patient care because the plaintiff was not a patient at the time the wrongful act occurred. Defense counsel, in contrast, will argue that the simultaneous happening of these two events is not critical, but that instead so long as the wrongful act was in some way connected to the plaintiff having been a patient, then the wrongful act arose from patient care and the statute of repose applies.

The Fourth District Appellate Court has recently described the distinction between the two-year statute of limitations and the four-year statute of repose in *Follis v. Watkins*, 367 Ill. App. 3d 548 (Ill. App. Ct. 2006): the former is triggered by the plaintiff's discovery of the injury, whereas the latter is triggered by the defendant's wrongful act. However, for this limitations scheme to apply, the cause of action must be arising out of patient care. 735 ILCS 5/13-212(a).

Medical Judgment vs. Administrative Decisions. The Supreme Court had, a few months earlier, spelled out the distinguishing factor for cases requiring expert testimony as those which involve medical judgment as opposed to those which are simply administrative decisions in *Heastie v. Roberts*, 226 Ill. 2d 515 (2007). The *Orlak* dissent pointed to this recent categorization as support for its view that whether a case is arising out of patient care should turn on whether the wrongful conduct alleged is medical malpractice. Given the holding in *Heastie*, counsel should not automatically rule out arguments based on the distinction between medical judgments and administrative decisions. Even though the

Orlak court opted to not follow that approach, nonetheless *Orlak* neither overruled nor disagreed with *Heastie* and thus it could be cited as supporting this distinction.

Applicability to Other Theories. The language of the limitations statute itself states that it applies to all theories of recovery, including breach of contract, where the cause of action arises out of patient care. 735 ILCS 5/13-212(a). After the Illinois Supreme Court applied legal theories of liability to HMOs, the First District Appellate Court held that actions against HMOs are subject to the limitations scheme of Section 13-212, where the HMO can be held liable for medical malpractice. *Thornton v. Shah*, 333 Ill. App. 3d 1011, 777 N.E.2d 396 (1st Dist. 2002). Note the *Thornton* court's emphasis on the medical malpractice aspect of the cause of action as key to the applicability of 735 ILCS 5/13-212, thus broadening the arising out of patient care requirement. Given this precedent, counsel can interweave the medical judgment factor in argument on the issue of whether an action arose from patient care.

Cross References. Illinois Litigation Forms and Checklists C6.01 (Drafting a Complaint); Illinois Litigation Forms and Checklists C8.03 (Preparing the Answer: Form and Content).

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Class Certification: Vairo on Dukes v. Wal-Mart

2008 Emerging Issues 1845

Class Certification: Vairo on Dukes v. Wal-Mart

By Georgene Vairo

January 30, 2008

SUMMARY: Vairo on Dukes v. Wal-Mart The opinion in Dukes, the largest civil rights class actions suit in United States history, addresses several issues pertaining to class actions. The first issue is whether the commonality requirement of Rule 23 was met. Also, the court evaluates whether the class action, a sex discrimination action involving approximately 1.5 million plaintiffs, would pose manageability problems. Lastly, the court discusses the admissibility of the plaintiffs expert report and its relationship to class certification issues. This commentary, written by Georgene Vairo, Professor and author and editor of several books, including several chapters in Moores Federal Practice, analyzes the Ninth Circuits opinion.

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ARTICLE: *Dukes v. Wal-Mart*, 509 F.3d 1168, 2007 U.S. App. LEXIS 28558 (9th Cir. Dec. 11, 2007) involved perhaps the largest class action ever certified. The Ninth Circuit affirmed the district court's certification of a sex discrimination class action by approximately 1.5 million women employees of Wal-Mart.

The opinion focuses on three major contested points: 1) whether the requirements of Rule 23 were met, most importantly whether the commonality requirement was met; 2) whether the class action would pose manageability problems; and 3) the admissibility of the plaintiffs expert report and its relationship to the class certification issues.

(1) Background. The plaintiffs filed suit against Wal-Mart alleging sexual discrimination against woman employees. The district court agreed to certify a nationwide class of women who had been subjected to allegedly discriminatory pay and promotions policies. This class was estimated to number more than 1.5 million. They sought injunctive and declaratory relief, back pay, and punitive damages, but not traditional compensatory damages. The district court certified the class with respect to all these types of relief.

Both sides sought and were granted interlocutory appeal under Rule 23(f). The Ninth Circuit first issued an opinion on February 6, 2007 [see *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214, 2007 U.S. App. LEXIS 2601 (9th Cir. Feb. 6, 2007)], discussed in **May 2007 MOORES FEDERAL PRACTICE UPDATE** p. 115], but then withdrew it and issued the present opinion.

(2) Rule 23(a) Prerequisites Were Met. A class may be certified only if it meets the four requirements of Rule

23(a): numerosity, commonality, typicality, and adequacy of representation. The plaintiffs argued that, despite the breadth and diversity of the class, it met these requirements because it was united by a complex array of company-wide discriminatory practices. The Ninth Circuit agreed that the district court had not abused its discretion in finding that these requirements were met. All parties agreed that the numerosity requirement was met. The Ninth Circuit spent little time rejecting the defendants arguments that the typicality and adequacy of representation requirements were not met on the basis that only one low paid class representative was named, and that the class consisted of supervisory and non-supervisory employees. The court found that all women suffered the same sort of alleged discrimination. The hotly contested issue was whether the commonality requirement was met.

(3) Commonality Was Established Through Factual Evidence, Expert Testimony, Statistical Evidence, and Anecdotal Evidence. The commonality requirement focuses on the relationship of common facts and legal issues among class members. The Ninth Circuit construes this requirement permissively. The existence of only one significant factual or legal issue common to the class may be sufficient. The plaintiffs had presented four categories of evidence to support their commonality argument: (1) facts supporting the existence of company-wide policies and practices; (2) expert sociological opinions supporting the existence of company-wide policies and practices; (3) expert statistical evidence of class-wide gender disparities attributable to discrimination; and (4) anecdotal evidence from class members around the country of discriminatory attitudes held or tolerated by management. The district court had conducted a rigorous analysis of this evidence and was within its discretion in concluding that the commonality prerequisite was satisfied.

The plaintiffs' factual evidence consisted of evidence of (1) uniform personnel and management structure across stores; (2) extensive oversight of store operations by the defendant's headquarters, company-wide policies governing pay and promotion decisions, and a strong, centralized corporate culture; and (3) consistent gender-related disparities in every domestic region of the company. The plaintiffs used this evidence to show that the defendant operated a highly centralized company that promoted policies common to all stores and maintained a single system of oversight.

The plaintiffs proffered expert testimony from a sociologist to interpret and explain the facts suggesting that the defendant promoted a strong corporate culture that included gender stereotyping. The sociologist concluded that (1) the defendant's centralized coordination, reinforced by a strong organizational culture, sustained uniformity in personnel policy and practice; (2) there were significant deficiencies in the defendant's equal employment policies and practices; and (3) the defendant's personnel policies and practices made pay and promotion decisions vulnerable to gender bias.

The plaintiffs expert statistical evidence was also relevant to show commonality. A statistician analyzed data for each of the forty-one regions containing the defendant's stores, and concluded that there were statistically significant disparities between men and women employees in terms of compensation and promotions, that these disparities were wide-spread across regions, and that they could be explained only by gender discrimination. Another expert compared the defendant with twenty of its competitors and concluded that it promoted a smaller percentage of women. As with the sociologist's expert testimony, the Ninth Circuit refused to examine the relative probativeness of this statistical evidence; rather, it concluded that the district court did not abuse its discretion in considering this evidence as a valid component of its commonality analysis.

The plaintiffs also presented anecdotal evidence in the form of declarations by class members, who testified to being paid less than similarly situated men, being denied or delayed in receiving promotions in a disproportionate manner when compared with similarly situated men, working in an atmosphere with a strong corporate culture of discrimination, and being subjected to various individual sexist acts. The Ninth Circuit noted that anecdotal evidence of discrimination is commonly used in Title VII pattern and practice" cases to bolster statistical proof by bringing the cold numbers convincingly to life." There is no requirement that a plaintiff class submit a statistically significant number of declarations for such evidence to have value.

Finally, the Ninth Circuit ruled that the district court did not err in considering, as part of the commonality analysis, that the defendant permitted its managers to use subjectivity in interpreting company policies. While decentralized, discretionary authority is not inherently discriminatory, subjective decision-making is a ready mechanism for discrimination and courts should scrutinize it carefully. This factor could contribute to an inference of discrimination and was properly considered by the district court.

All four types of evidence, taken together, demonstrated that the defendant's female employees nationwide were subjected to a single set of corporate policies (not merely a number of independent discriminatory acts) that may have worked to unlawfully discriminate against them. Evidence of subjective decision-making policies provided further evidence of a common practice of discrimination. Accordingly, the Ninth Circuit concluded that the district court did not abuse its discretion in holding that the commonality prerequisite to class certification was satisfied.

Conclusion. The Ninth Circuit's opinion serves as a primer for how to present a claim of commonality. Of course, it is important to remember that the *Dukes* class sought certification under *USCS Fed Rules Civ Proc R 23(b)(2)*, and accordingly, did not need to prove the more exacting requirement that common questions predominate when class certification for monetary damages is sought under *USCS Fed Rules Civ Proc R 23(b)(3)*. Looking at the nature of the evidence provided in the *Dukes* case, it is unlikely that a predominance finding could have been made given the widespread nature of the class, even with the evidence of company-wide gender stereotyping and decision making. Nonetheless, the Ninth Circuit approval of class certification of such a huge nation-wide class is noteworthy.

(4) Rule 23(b) Requirements Were Satisfied Claims For Injunctive Relief Predominated Over Claims For Monetary Relief. As discussed above, the plaintiffs had moved to certify the class under *USCS Fed Rules Civ Proc R 23 (b)(2)*. Such class actions seek primarily injunctive or declaratory relief, but in the Ninth Circuit may include claims for monetary damages so long as damages are not the predominant relief sought. Looking at the size of the class-wide damages request, the defendant argued that the class should not have been certified because monetary claims predominated.

Even though the class claims amounted to billions of dollars, the Ninth Circuit ruled that the mere size of the request did not undermine class certification under *USCS Fed Rules Civ Proc R 23 (b)(2)*. This large amount was a function of the size of the defendant and the alleged harm and did not establish that the *primary* goal was monetary relief. Although the Ninth Circuit agreed with the defendant that the request for back pay did weigh against certification, certification is not improper when back pay is requested as long as such request does not predominate. Here, the court was convinced that the plaintiffs would have brought the suit to obtain injunctive relief even in the absence of a possible back pay recovery, and accordingly, that the injunctive relief claims predominated.

Similarly, the Ninth Circuit ruled that the request for punitive damages did not predominate over the requested injunctive relief. It would thwart congressional intent if plaintiffs were forced to forego the punitive damages provided for under Title VII in order to proceed as a class action. The Ninth Circuit also noted that the district court's order contained a provision allowing plaintiffs to opt out of claims for punitive damages.

The Ninth Circuit did throw one bone to the defendant, finding that putative class members who were no longer employees at the time the complaint was filed did not have standing to pursue injunctive or declaratory relief. However, class certification under *USCS Fed Rules Civ Proc R 23 (b)(2)* was appropriate at least as to the class members who were employees at that time. On remand, therefore, the district court would have to determine the appropriate scope of the class.

Conclusion. As the dissent strenuously argued, it is hard to understand how damages claims for billions of dollars cannot be said to predominate over Wal-Mart being told to behave in the future. The plaintiff class eschewed claims for compensatory damages surely to avoid the problem raised by the dissent and the defendant with respect to certification

under *USCS Fed Rules Civ Proc R 23 (b)(2)*. The point of the dissent is that the Wal-Mart class action is a damages class action in disguise and therefore needs to meet the factual predominance requirement of a *USCS Fed Rules Civ Proc R 23 (b)(3)* class action. Looking at the majority's concern about Congressional intent in terms of ensuring a meaningful remedy for victims of sexual discrimination, the Ninth Circuit took an expansive view of the reach of a *USCS Fed Rules Civ Proc R 23 (b)(2)* class action. It will be interesting to determine whether there will be a rehearing en banc. In any event, the result in *Dukes* may lead the Ninth Circuit to reconsider its view that claims for back pay and punitive damages are permissible so long as the claims for injunctive relief predominate.

(5) Class Action Was Manageable. Although *USCS Fed Rules Civ Proc R 23 (b)(3)*, not Rule 23(b)(2) contains a manageability requirement, the district court did consider manageability. It concluded, however, that the immense size of the class, while a concern, would not present undue obstacles to managing the class action. It outlined a two-stage trial plan based in large part on how other courts have handled similarly large and complex class actions. In the first phase, plaintiffs would attempt to prove that the defendant engaged in a pattern and practice of discrimination and, if so, that punitive damages were warranted. If the plaintiffs succeeded, the second phase would focus on remedies: first class-wide injunctive relief, then back pay.

The Ninth Circuit found it premature to address the defendant's objections to the tentative trial plan, but noted that there was a range of possibilities that would allow the class action to proceed in a manner both manageable and in accordance with due process, citing as an example *Hilao v. Estate of Ferdinand Marcos* [103 F.3d 767, 782-787 (9th Cir. 1996)]. In *Hilao*, the district court appointed **Moore's** Editorial Board Member Sol Schreiber as a special master to consider a representative sample of claims to determine the amount of compensatory damages due the plaintiff class. Schreiber's report and recommendations were then presented to the *Hilao* jury for consideration in reaching its verdict. Because Schreiber's thoughtful approach in *Hilao* showed that there existed at least one method of managing the large class action in the present case, the Ninth Circuit concluded that manageability concerns presented no bar to class certification.

Conclusion. The dispute about manageability, like those about commonality and whether injunctive relief claims predominated, stem from the billions of dollars at stake, and whether the class action is a *USCS Fed Rules Civ Proc R 23 (b)(3)* class action in disguise. The Ninth Circuit is technically correct that the claim about manageability is premature, and it is undoubtedly correct that there are methods, such as those suggested by my **Moore's** Board of Editors colleague, Sol Schreiber in the *Hilao* case, for solving such problems.

(6) Dissent. There was a vehement dissent by Judge Kleinfeld. In his view, the only one of the *USCS Fed Rules Civ Proc R 23 (a)* prerequisites that was met was numerosity. The situations of the class members were too divergent to meet the other requirements. Further, it was risible to say that injunctive and declaratory relief predominate' . . . billions of dollars are going to predominate over words and solemn commands and promises about how to behave in the future."

Moreover, the dissent found that the district court's management plan would violate the defendant's constitutional rights to due process and jury trial. There will never be an adjudication, let alone an adjudication by an Article III judge and a jury, to determine whether Wal-Mart owes any particular woman the money it will be required to pay, nor will any particular woman ever get a trial to establish how much she is owed." Nor was there any legitimate way for the jury or court to decide on a punitive damages award, when no compensatory damages were sought.

Judge Kleinfeld also complained that class action treatment would sacrifice the rights of women injured by discrimination. Women who have suffered great loss because of sex discrimination will have to share the punitive damages award with many women who did not. Women entitled to considerable compensatory damages in addition to lost pay will be deprived of them. Women who have left Wal-Mart will get injunctive and declaratory relief of no value to them, while new female Wal-Mart employees will benefit from the injustice done to other women. If the settlement is mostly words for the women and money for the lawyers, a realistic possibility, it will be a pyrrhic victory indeed." In

other words, what the district court characterized as an historic class action is simply an unprecedented one, according to the dissent.

Conclusion. If ever there is a case for en banc consideration, *Dukes v. Wal-Mart* is it. It presents a stark example of the possibilities of obtaining relief for victims of discrimination on the one hand, versus the draconian effect of class actions upon corporate defendants on the other. If rehearing is denied, and the Supreme Court denies certiorari, as the dissent predicts, the pressure on Wal-Mart to settle will be extreme. It matters little that the Ninth Circuit told that district court or a jury that they could credit Wal-Mart's experts on the merits. At what stage of the litigation would that happen? As discussed below, the Ninth Circuit has left the door ajar for arguing that opinions that meet the *Daubert* standard for class certification purposes do not necessarily meet *Daubert* for the purpose of raising a genuine issue of material fact.

(7) *Daubert's* Gatekeeping Function. The defendant challenged some of the sociologist's conclusions, arguing they did not meet the standards set by *Federal Rule of Evidence* 702 and *Daubert v. Merrell Dow Pharm., Inc.* [509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)]. However, the Ninth Circuit ruled that the defendant's argument went to whether certain inferences could be persuasively drawn from the data, while *Daubert* simply requires a court to admit or exclude evidence based on its scientific reliability and relevance. Whether the sociologist's inferences should be credited was a merits question for the jury. In the context of the commonality inquiry for certification purposes, it was enough that the sociologist presented properly analyzed, scientifically reliable evidence tending to show that a common question of fact existed.

Second, and perhaps most important, the Ninth Circuit held that district courts are not required to apply the full *Daubert* gatekeeping standard at the class certification stage. The Ninth Circuit approved the Second Circuit's reasoning: A *Daubert* motion is typically not made until later stages in litigation . . . and a district court should not postpone consideration of a motion for class certification for the sake of waiting until a *Daubert* examination is appropriate" [*In re Visa Check/Mastermoney Antitrust Litig.* 280 F.3d at 124, 132 n.4 (2d Cir. 2001)].

Third, the Ninth Circuit stated that an expert's testimony need not be exact or quantifiable. Moreover, the defendant did not challenge the expert's methodology, acknowledging that social science statistics may have probative value in class action claims. In sum, the district court was not required to apply *Daubert* at the class certification stage. And even if *Daubert* did apply at that stage, the proffered expert testimony satisfied *Daubert* because the expert used a well-accepted methodology to reach his opinions and because his testimony had a reliable basis in the knowledge and experience of [the relevant] discipline." Even though a jury might ultimately agree with defendant that the expert's social science analysis not enough to show that defendant engaged in actual gender discrimination, that question would have to be resolved at the merits stage of the litigation. At the class certification stage, it was sufficient that the expert presented properly-analyzed, scientifically reliable evidence" tending to show that a common question of fact (Does Wal-Mart's policy of decentralized, subjective employment decision making operate to discriminate against female employees?) existed with respect to all members of the class.

Similarly, with respect to the statistical evidence, the Ninth Circuit found that even if it were to conclude that defendant's statistical evidence was more persuasive than plaintiffs', this fact alone would not compel the conclusion that the district court improperly relied on plaintiff's expert's testimony as a valid component of its commonality analysis or that the district court erred in its ultimate conclusion that the commonality prerequisite was satisfied.

Conclusion. The Ninth Circuit's analysis here is confusing, but does leave the door open to a full-fledged *Daubert* hearing on the admissibility of the sociologists' testimony, as well as the statistical evidence that supported the claims of commonality for class purposes, and discrimination for merits purposes. The Ninth Circuit bounced back and forth

between whether the testimony could persuade a jury and whether it would meet a full-fledged *Daubert* standard.

The Ninth Circuit draws a basic distinction between class certification, on the one hand, and the merits of a discrimination claim, on the other hand. In this case, the plaintiffs expert used a valid statistical model to demonstrate that there was discrimination in compensation and promotion at Wal-Mart on a regional basis. Wal-Mart offered its own statistical analysis to demonstrate that if stores were examined individually and by departments, there was no discrimination. The Ninth Circuit determined that a district judge need not (and probably could not) decide which analysis is more persuasive at the class certification stage. Discovery might demonstrate that promotions were made store by store or that employees are promoted from one store to positions in other stores. The emerging facts could well demonstrate that one analysis has a much better fit than another. At the class certification stage, the key question is whether the plaintiffs have set forth sufficient evidence of commonality for the district court to determine that class certification is warranted. The courts determination that a valid statistical analysis is properly considered by a district judge in making the commonality determination makes sense, as does the courts conclusion that, once the merits are reached, the district court might conclude that Wal-Marts expert is more persuasive and that the class claim should be rejected on the merits. However much sense this distinction seems to make analytically, as a practical matter, Wal-Mart is the big-time loser, especially if it fails to persuade the district court at a *Daubert* hearing and motion for summary judgment.

References. 5-23 *Moore's Federal Practice -- Civil* § 23.23, 5-23 *Moore's Federal Practice -- Civil* § 23.43, 5-23 *Moore's Federal Practice -- Civil* § 23.46 [2][e]; 3 Stephen A. Saltzburg, Michael M. Martin & Daniel J. Capra, 702 Federal Rules of Evidence Manual 702.02 [5], 702 Federal Rules of Evidence Manual 702.03 [43][b], [d] (9th ed. 2006); 4-702 *Weinstein's Federal Evidence* § 702.05 [2][a], 4-702 *Weinstein's Federal Evidence* § 702.06 [4] (Matthew Bender 2d ed.).

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Georgene Vairo is a Professor of Law and William M. Rains Fellow at Loyola Law School, Los Angeles. Professor Vairo received her B.A. from Sweet Briar College, and was awarded a M.Ed., with Distinction, in Social Studies from the University of Virginia. She graduated first in her class from Fordham University School of Law. She served as a law clerk to the Honorable Joseph M. McLaughlin, U.S. Court of Appeals for the Second Circuit, when he sat with the U.S. District Court for the Eastern District of New York; practiced antitrust law with Skadden Arps Slate Meagher & Flom; and joined the faculty of the Fordham University School of Law in 1982, where she also served as Associate Dean from 1987 until 1995. She has written numerous articles on forum selection problems, mass tort litigation, federal practice and jurisdiction, and has written and edited several books, including Rule 11 Sanctions and the chapters on removal jurisdiction, venue, change of venue and multidistrict litigation in *Moore's Federal Practice*. From November 1988 until its closing in April 2000, Professor Vairo served on the Board of Trustees of the Dalkon Shield Claimants Trust, and since 1989 as the Chairperson. She serves on the editorial boards of several litigation and dispute resolution journals, including *Moore's Federal Practice*. She also is a member of the Rand Corporations Institute for Civil Justice Board of Overseers. She is a member of the American Law Institute, has participated in numerous academic conferences, and has lectured widely to the bench and bar at programs various national and local associations and institutes.



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Grace V.B. Garcia on MacFayden v. Maki, 70 Mass. App. Ct. 618 (2007)

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Grace V.B. Garcia on MacFayden v. Maki, 70 Mass. App. Ct. 618 (2007)

By Grace V.B. Garcia

January 29, 2008

SUMMARY: In *MacFayden v. Maki, 70 Mass. App. Ct. 618*, the Appeals Court of Massachusetts evaluated Mass. Gen. Laws. ch. 128, § 2E as an affirmative defense to tort cases occurring on a farm. Specifically, the Court ruled that Chapter 128, § 2E gives limited liability protection to pick-your-own farms under certain conditions, namely that a compliant sign is posted for visitors to see. This decision is important in that it expands the reading of the statute, thus requiring farms to have appropriate signage in order to obtain the statutes protection. This commentary, written by Grace Garcia, discusses the implications of this important decision.

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ARTICLE: In *MacFayden v. Maki, 70 Mass. App. Ct. 618*, the Appeals Court of Massachusetts evaluated Mass. Gen. Laws. ch. 128, § 2E as an affirmative defense to tort cases occurring on a farm. Specifically, the Court ruled that Chapter 128, § 2E gives limited liability protection to pick-your-own farms under certain conditions, namely that a compliant sign is posted for visitors to see. This decision is important in that it expands the reading of the statute, thus requiring farms to have appropriate signage in order to obtain the statutes protection.

Mass. Gen. Laws. ch. 128, § 2E. Massachusetts, through Mass. Gen. Laws. ch. 128, § 2E, provides the following statutory defense to farms:

No owner . . . of a farm who allows any person to enter said farm for the purpose of agricultural harvesting, including the cutting of Christmas trees under a so-called pick-your-own agreement shall be liable for injuries or death to persons . . . resulting from the conduct of such operation in the absence of willful, wanton, or reckless conduct on the part of said owner.

The statute further requires the following: Said owner . . . of said farm shall post and maintain signs which contain the warning notices specified herein. Such signs shall be placed in a location visible to persons allowed to enter said farm for the purpose of agricultural harvesting. The warning signs mandated by the statute effectively inform individuals of the farms limited liability.

The Trial Courts Evaluation of Mass. Gen. Laws. ch. 128, § 2E. In *MacFayden* the plaintiff fell over a snow-covered tree stump while looking to cut down her own Christmas tree on the defendants pick-you-own tree farm.

As a result of her injuries, the plaintiff filed a complaint alleging various counts of negligence. Despite the farm not having the designated Ch. 128, § 2E sign, the defendant filed a motion for summary judgment which the trial court granted.

In making its decision, the trial court acknowledged that the word shall in the statute mandated that farms post the obligatory sign warning people of their limited liability. Notwithstanding the mandate, the court found that the statute was ambiguous as to the consequence of failing to post the required sign. Based on the ambiguity, as well as the statutes preamble which made it an emergency act, the court enforced the limited exposure provided by the statute and granted the defendants summary judgment motion.

The Appeals Court Interpretation of Mass. Gen. Laws. ch. 128, § 2E. The Appeals Court reversed summary judgment finding no ambiguity in Ch. 128, § 2E. The Appeals Court reiterated that the basic tenet in statute interpretation is to interpret according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished. *MacFayden*, 70 Mass. App. Ct. at 621, quoting *Lowery v. Klemm*, 446 Mass. 572, 576-77 (2006). In doing so, the court determined the word shall, with respect to the posting of notice, makes such posting mandatory. The court held that the statute required the posting of the warning sign as a prerequisite to obtaining the limited liability protections granted by the statute. Because the warning was required, the court determined the legislatures intent to be two-fold: First, to limit pick-your-own farmers liability to visitors on those farms, and second, to require farmers to post clear and explicit notices to those visitors that their rights to file certain tort claims had been eliminated. *Id.* at 622. As a consequence of this interpretation, farm visitors have the ability to make informed decisions as to whether they want to proceed with activities at the farm.

The court stated that its decision follows the well-known basic tenet of statutory construction that statutes be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous. *Id.*, quoting, *Boston Police Patrolmens Assn. v. Police Dept. of Boston*, 446 Mass. 46, 50 (2006). A decision to the contrary, such as the trial courts decision would render the mandatory requirement to post the warning notice superfluous and give the owner of the tree farm discretion to post the waning notice. *Id.* at 623. Consequently, *MacFayden* now makes it clear that for a farm to obtain the protections afforded by Ch. 128, § 2E, it must comply with the statute and post the appropriate warning signs.

Despite the courts statement that it followed basic principles of statutory construction, the dissent argued that the Appeals Courts decision actually expanded the reading of the statute. Specifically, as the statute failed to contain a penalty for not posting the required sign or state that the posting of the sign was a prerequisite to being afforded Ch. 128, § 2Es protection, the courts decision to make the posting a prerequisite expanded the statute by making a requirement that the Legislature did not write. Indeed, the dissent argued that the courts decision read into the statute a provision which the Legislature did not see fit to put there. *Id.* at 624. Notwithstanding the dissent, now based on *MacFayden*, pick-your-own farms should definitely post the appropriate warning signs.

Other Possible Defenses for Farmers in Tort Cases. In the event you represent a farm in a tort case which does not have the appropriate signage, there are still other defenses that may be used. In Massachusetts, a landowner owes a single duty of reasonable care to all persons lawfully on the premises. *Mounsey v. Ellard*, 363 Mass. 693, 707 (1973). Specifically, the law imposes on a property owner a duty to maintain his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury and the burden of avoiding the risk. *Barry v. Beverly Enterprises-Massachusetts, Inc.*, 418 Mass. 590, 592-593 (1994) (quoting, *Taubiana v. Priestly*, 402 Mass. 84, 88 (1988)). However, a defendant in a premises liability case is not obligated to supply a place of maximum safety, but only one which would be safe to a person who exercises such minimum care as the

circumstances reasonably indicate. *Barry*, 418 Mass. at 593 (quoting, *Gadweuski v. Union Oil Co.*, 326 F.2d 524, 525 (1st Cir. 1964)).

It is well settled in Massachusetts that there is no duty to protect lawful visitors from dangers obvious to persons of ordinary intelligence. *OSullivan v. Shaw*, 431 Mass. 201 (2000) (no duty to warn plaintiff of risk of diving in shallow end of pool). An obligation to warn depends on the nature of the danger to be apprehended. If the risk is obvious, the defendant cannot readily anticipate the resulting injury. *Rainka v. Shing*, 2000 Mass. App. Div. 186 (Mass. App. Div. 2000).

Indeed, [k]nowledge of the condition is a predicate to what is open and obvious. *Rainka*, 2000 Mass. App. Div. LEXIS at *15. (holding defendant not liable for plaintiffs fall on cardboard boxes that were on the ground at a tag sale). Further, even if a plaintiff may have forgotten about the existence of the condition, such is not a defense to the application of the open and obvious rule. *Ware v. Evangelical Baptist Benevolent & Missionary Soc. of Boston*, 181 Mass. 285, 286 (1902) (defendant not negligent when plaintiff tripped while leaving a room that was about a five inches higher than the corridor she was entering, as plaintiff was aware of the uneven floor as she had passed by it once); see also, *Letiecq v. Denholm & McKay, Co.*, 328 Mass. 120 (1951) (the footstool plaintiff tripped over was obvious as she had seen it prior to her fall). Despite the usefulness of the open and obvious rule in a case like *MacFayden*, the court acknowledged that it was not used as an argument for summary judgment. *MacFayden*, 70 Mass. App. Ct. at 623 n.6.

Thus, if you represent a farm, you want to advise them to post the mandated signs under Ch. 128, § 2E. If, however, you are defending a farm that does not have such signs, it is important to argue the other basic tenets of premises liability that a landowner is generally not liable for open and obvious dangers.

Cross References

MA Pleading and Practice § 51.12, § 8.416.

ABOUT THE AUTHOR(S):

Grace V. B. Garcia is a Partner in the Boston office of Morrison Mahoney LLP. Ms. Garcias practice is concentrated in the areas of commercial litigation, construction law, product liability and premises liability. In 2005, 2006, and 2007, she was recognized by Boston Magazine and Law & Politics as a Super Lawyer Rising Star. Ms. Garcia is admitted to the bars of the Commonwealth of Massachusetts and the State of New York. She is actively involved in several bar associations and serves on the Massachusetts Bar Association's Litigation Section Council. Previously, Ms. Garcia served as a member of the MBA's Business Law Section Council (2003 -- 2006), New Lawyer Section Council (2000 -- 2003), co-chair of the Boston Bar Association's New Lawyer's Section (2002 -- 2004), and the BBA's Task Force on Pro Bono and New Lawyers (2002 -- 2003). Ms. Garcia is a part of the Massachusetts Associated General Contractors Safety Committee. Additionally, after being on the Executive Committee for several years, Ms. Garcia is the co-director for the Boston Chapter of the Downtown Women's Club for the 2007-2008 year. Ms. Garcia is the author of the Massachusetts Litigation Blog. In addition, Ms. Garcia has authored several articles including: Fundamentals of Electronic Discovery, Boston Bar Journal (March/April 2003) and Achieving Equitable Balance: Justice Wilkins and Chapter 93A, Boston Bar Journal (Nov./Dec. 2000) (co-author). She has lectured for various continuing legal education programs on electronic discovery, document retention, and deposition techniques.



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Forum Non Conveniens: Vairo on Adelson v. Hananel

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Forum Non Conveniens: Vairo on Adelson v. Hananel

By Georgene Vairo

January 29, 2008

SUMMARY: Vairo on Adelson v. Hananel In the Adelson decision, the court addresses two important issues pertaining to forum non conveniens. The first issue is the weight that should be afforded to the plaintiffs choice of forum. Secondly, the court addresses the extent to which the existence of proceedings in the foreign venue ought to be determinative. Also, this commentary, written by Georgene Vairo, Professor and author and editor of several books, including several chapters in Moores Federal Practice, discusses the First Circuits approach to determining whether there is personal jurisdiction over a foreign defendant.

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ARTICLE: *Adelson v. Hananel*, 510 F.3d 43, 2007 U.S. App. LEXIS 28033 (1st Cir. Dec. 5, 2007), involved a breach of contract action between a United States citizen and an Israeli citizen. The district court found that personal jurisdiction existed over the Israeli defendant, but dismissed on forum non conveniens grounds. The First Circuit affirmed the personal jurisdiction ruling, but reversed the forum non conveniens dismissal.

The opinion addresses two significant issues that arise in forum non conveniens motions: 1) the degree of deference that ought to be accorded to the plaintiffs choice of forum; and 2) the extent to which the existence of proceedings in the foreign venue ought to be determinative. It also provides an excellent illustration of the First Circuits generally liberal approach to determining whether there is personal jurisdiction over a foreign defendant.

(1) Background. The plaintiff, a U.S. citizen, was an international businessman with holdings around the world, including a corporation based in Massachusetts established to make business investments in Israel. The plaintiff hired the defendant, a citizen and resident of Israel, as the general manager of the Massachusetts corporation's operations in Israel. The plaintiff terminated the defendant's employment, which resulted in several lawsuits in an Israeli labor court. The plaintiff then filed the present suit in Massachusetts seeking a declaration of the parties' respective rights under the oral employment contract.

The district court found that it had personal jurisdiction over the defendant for the declaratory action. However, it dismissed the case on forum non conveniens grounds, finding that Israel was an adequate alternative forum and that the

balancing of public and private interest factors weighed in favor of the Israeli forum. The First Circuit reversed the dismissal on forum non conveniens grounds, ruling that the district court failed to give sufficient deference to the U.S. plaintiff's choice of a U.S. forum, and should not have given substantial weight to the existence of related litigation in the foreign forum.

(2) Personal Jurisdiction. The district court had applied the prima facie method to the resolution of the personal jurisdiction motion, rather than adjudicating the jurisdictional facts. Under this approach, the court considers only whether the plaintiff has proffered evidence that, if construed in the light most favorable to the jurisdictional claim, is enough to support findings of all facts essential to finding personal jurisdiction. To support specific personal jurisdiction, the plaintiff must show three elements: (1) the claims arise out of or relate to the defendant's forum activities; (2) the defendant's forum contacts represent a purposeful availment of the privilege of conducting activities in the forum state; and (3) the exercise of jurisdiction is reasonable.

With respect to the first element, relatedness, the First Circuit uses a flexible, relaxed standard that focuses on the nexus between the defendant's contacts and the plaintiff's cause of action. In a contract action, the court may look to the parties' negotiations and contemplated future consequences, along with the terms of the contract and the actual course of dealing. The court asks whether the defendant's activity in the forum state was instrumental either in the formation or breach of the contract. Here, according to the First Circuit, the district court had properly found (based on the version of events supplied by the plaintiff) that the employment contract was formalized and entered into in Massachusetts, when the defendant traveled there to meet with the plaintiff. The action arose from and was related to that activity in the forum.

The purposeful availment element ensures that jurisdiction is not based on random, isolated, or fortuitous contacts. The two key focal points are voluntariness and foreseeability. Here, these requirements were easily met. The defendant had freely negotiated and executed his own contract while in Massachusetts. Litigation in Massachusetts was foreseeable when the employment relationship was formalized in Massachusetts, the defendant had an ongoing business relationship with the state (where the offices and officers of the employer were located), and all of his budgets and operational funds were submitted to and obtained through that Massachusetts office. In short, the defendant knowingly affiliated himself with an entity based primarily in Massachusetts and, thus, the possibility of a suit there was amply foreseeable.

The third element, reasonableness, is determined in light of several factors: (1) the defendant's burden of appearing, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the judicial system's interest in obtaining the most effective resolution of the controversy, and (5) the common interests of all sovereigns in promoting substantive social policies.

These factors supported the exercise of jurisdiction. It was true that the defendant would be inconvenienced by litigating in Massachusetts: he lived and worked in Israel and was a legally blind diabetic. However, there was no unusual burden. Neither his foreign residence nor his medical condition prevented him from traveling internationally in the course of his employment or from agreeing to work for a U.S. company. Further, the plaintiff had an interest in litigating in Massachusetts, and Massachusetts had an interest in providing a convenient forum for its residents. Finally, the interests of the judicial system in achieving efficient resolution did militate against jurisdiction in Massachusetts, because of the prior suits pending in Israel. Foreshadowing its forum non conveniens analysis, the First Circuit found, however, that this factor alone was insufficient to tip the constitutional balance on the facts of this case. Accordingly, the First Circuit affirmed the district court's holding that personal jurisdiction could be exercised over the Israeli defendant.

Conclusion. There is nothing surprising in the courts personal jurisdiction ruling. The case for specific jurisdiction was straightforward, given the purposeful connection between the Israeli citizen and the State of Massachusetts. Nonetheless, the opinion provides a good example of how the First Circuit handles motions to dismiss for lack of personal jurisdiction.

(3) Weighing the Interest of the United States Plaintiff: A Defendants Heavy Burden. Forum non conveniens is a discretionary tool for the district court to dismiss a claim, even when it has proper jurisdiction. The First Circuit began by noting the power to dismiss on forum non conveniens grounds is limited by the principle that a plaintiff's choice of forum should rarely be disturbed. Accordingly, the party moving for dismissal bears the heavy burden of establishing that an adequate alternative forum exists and that considerations of convenience and judicial efficiency strongly favor litigating the claim in the second forum.

The parties did not dispute the availability and adequacy of the Israeli forum. Rather, the plaintiff argued that the district court, in dismissing, had improperly calculated the balance of public and private interest factors, and the First Circuit agreed. A plaintiff not only enjoys some degree of deference for the original choice of forum, but is entitled to heightened deference when that forum is the plaintiff's home. This heightened deference should have applied here as the plaintiff, while not a Massachusetts domiciliary, was a U.S. citizen seeking to litigate in a U.S. forum rather than a foreign forum. Thus, according to the First Circuit, the Massachusetts district court is still deemed a "home forum" where the alternative is foreign. Although dismissal is not automatically barred in such cases, a heavy presumption weighs in favor of that plaintiff's initial forum choice.

Conclusion. The First Circuit's opinion is important because it confirms the elevated importance of United States citizenship, as opposed merely to state citizenship, in the forum non conveniens analysis. Had the plaintiff here been a Massachusetts citizen, it would have been an easier case for reversing the district court. But the fact that any United States citizen would have to litigate in a foreign venue required a heightened deference as well. A logical extension of that heightened deference in favor of a plaintiff's "home forum" applies in cases such as this which involves a U.S. citizen plaintiff who is seeking to litigate against a foreign defendant in a United States forum. This heightened deference for the United States plaintiff's choice of forum is the flip side of the United States Supreme Court's explicit rejection, in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981), of providing deference to a foreign plaintiff's choice of a United States forum.

The First Circuit noted that while it has only implicitly recognized the strong presumption favoring a U.S. forum selected by U.S. plaintiffs, other circuits have articulated it more explicitly. The First Circuit's approach is thus now consistent with the approach of the Second Circuit in *Iragorri v. Int'l Elevator, Inc.*, 203 F.3d 8 (1st Cir. 2000), and the Eighth Circuit in *Reid-Walen v. Hansen*, 933 F.2d 1390, 1394 (8th Cir. 1991) (in a forum non conveniens case involving a foreign court, "the 'home' forum for the plaintiff is any federal district in the United States, not the particular district where the plaintiff lives").

(4) Weighing the Importance of Foreign Proceedings. The First Circuit noted that the district court had properly observed that the plaintiff was a U.S. citizen and that there was a heavy presumption "in favor of his choice of forum, but that the district court had ignored that presumption because of the existence of the concurrent actions in the Israeli court. That was the determinative factor in the district court's view. The district court therefore erred in elevating the importance of the concurrent Israeli litigation within the forum non conveniens analysis. Indeed, in its analysis up to that point, the district court had found that the "private interest factors did not weigh in favor of either party" and that the public interest was "also in equipoise between the parties." Having found the public and private interest factors to be in equipoise, the district court should have concluded that the defendant failed to overcome the heavy presumption in favor of the plaintiff's home forum. Instead, the district court in discussing the Israeli suit, stated, "I see no reason why Adelson cannot fairly litigate his claim in Israel."

According to the First Circuit, the existence of the concurrent Israeli litigation is not a relevant factor to a forum non conveniens analysis. There is nothing in the public interest factors expressed by the Supreme Court that invokes a comparison between the two competing fora. By focusing on the existence of parallel proceedings in a foreign court, the district court essentially converted the analysis into a determination of which of the two pending cases should go forward. In so doing, the court erroneously lowered the defendant's burden of proving that the balance of factors

justified dismissal of a suit from a U.S. plaintiff's choice of home forum.

Conclusion. There is little surprise in finding that it was error to dismiss on forum non conveniens grounds a case brought by a United States citizen against a foreign citizen on a claim arising out of a contract made in the United States. The archetypical case for dismissing on forum non conveniens grounds is a case brought by foreign citizens against a United States citizen on a claim that arose in a foreign jurisdiction. It is also not a surprise that the court would rule that no one factor here the existence of the foreign litigation would be determinative. What is a surprise is the First Circuits finding, without citation or analysis, that the existence of parallel foreign proceedings is not relevant at all in a forum non conveniens analysis. That is an interesting proposition.

First of all, one of the public interest factors expressed by the Supreme Court does allow the district court to take into account docket congestion, which suggests that if a case could be resolved sooner in a foreign jurisdiction that is a factor supporting dismissal. In other words, some weighing of the relative fora is appropriate. Similarly, determining whether the foreign forum is an adequate alternative forum under the *Piper* analysis also requires a look at that forum. Second, and more importantly, the Supreme Court in *Piper* made it plain that forum non conveniens involves a balancing. In *Piper*, the Third Circuit had elevated the importance of choice of law, and the fact that the plaintiff would not fare as well under foreign law as under United States law, as determinative. The Supreme Court reversed. It found that the application of less favorable law by the foreign jurisdiction could not be given substantial weight in the forum non conveniens analysis. In other words, it did not find the factor to have no weight. Rather, the Court clarified that the forum non conveniens doctrine needs to be applied flexibly. Thus, the First Circuit may well have understated the importance of parallel proceedings in the forum non conveniens analysis.

This underscores the importance of understanding the difference between a dismissal on forum non conveniens grounds and a transfer to another federal court under 28 U.S.C. § 1404(a). The existence of a parallel federal proceeding almost always leads to a transfer to the district in which the first case was brought. The district court likely was motivated by similar efficiency considerations. The First Circuit is likely correct not to have disturbed the United States plaintiffs choice of a United States forum, but its statement that the existence of the foreign litigation has no weight must be taken with a grain of salt. For example, where the private and public factors are less in equipoise, as for example, where the relevant claims can be said to arise in the foreign jurisdiction, the existence of parallel litigation may provide the tipping point.

References

2-12 *Moore's Federal Practice -- Civil* § 12.31; 16-108 *Moore's Federal Practice -- Civil* § 108.42; 17-111 *Moore's Federal Practice -- Civil* § 111.75.

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Brazas on Townsend v. Sears, Roebuck & Co.

2008 Emerging Issues 1818

Susan M. Brazas on Townsend v. Sears, Roebuck & Co., 2007 Ill. LEXIS 1701 (November 29, 2007).

By Susan M. Brazas

January 24, 2008

SUMMARY: On November 29, 2007, the Illinois Supreme Court issued two opinions addressing, for the first time in many years, conflict of laws analysis. In this surprising reversal of the trial and appellate courts, the Townsend court applied Michigan law to a products liability case for severe injuries suffered by a child run over by a lawn mower. The significant differences in the remedies available under Michigan law, as compared to Illinois law, dealt a blow to the plaintiff's prospects upon remand. This commentary, written by Susan M. Brazas, frequent author and lecturer on civil practice matters, discusses the impact and implications of this novel and ground-breaking opinion.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Illinois Supreme Court Confirms Strong Presumption of Situs of Injury and Contributory Negligence in Conflict of Law Analysis for Products Liability Case

The Illinois Supreme Court in *Townsend v. Sears, Roebuck & Co., 2007 Ill. LEXIS 1701* concluded that the situs of injury, and the situs of alleged contributory negligence, were to be given great weight in making a conflict of law and choice of law analysis. The case involved severe injuries, including a resulting foot amputation, suffered by a 3 year old boy when he was run over by a riding lawn mower being operated by his father. Plaintiffs alleged that the defendant lawn mower manufacturer failed to install a safety feature known as a no-mow-in-reverse feature which would prevent back-over injuries.

The accident occurred in Michigan, where the injured boy and his parents resided and where his father purchased the riding mower at the defendant's retail store. The defendant was headquartered in Illinois but was incorporated in New York.

The *Townsend* court first evaluated whether the laws of Illinois and Michigan were actually in conflict, as if they were not then no choice of law decision would need to be made, and Illinois law would apply to all aspects of the litigation. The *Townsend* court found that significant differences existed between the laws of the two states. Michigan has no strict liability law, but Illinois does; Michigan allows no punitive damages, but Illinois does; and Michigan has caps on non-economic damages for products liability cases, but Illinois does not.

The *Townsend* court devoted extensive discussion to the methodology for a conflict of laws analysis as described in a law review article and textbooks on the subject. This may well have been because the Illinois Supreme Court had not spoken on conflict of laws for several years.

The Second Opinion. Interestingly, on the same day as the *Townsend* opinion was released, however, the Supreme Court also issued an opinion addressing conflict of laws in *Barbara's Sales, Inc. v. Intel Corp.*, 2007 Ill. LEXIS 1698 (Nov. 29, 2007). The *Townsend* case cites to the *Barbara's Sales* opinion in a footnote; and the *Barbara's Sales* opinion cites to, and quotes from, the *Townsend* opinion.

The *Barbara's Sales* case involved a class action regarding the marketing of the Pentium 4 processor by Intel, whose principal place of business is in California. The court held that Illinois law governed the case and that class certification was improper. Key aspects of the decision were that a choice of law analysis should be undertaken only if it will be outcome-determinative; and that in the Illinois approach to choice of law analysis are the most significant relationship and lex loci delicti analysis; and that in doing this analysis the courts do not merely count contacts. As in *Townsend*, the court devoted extensive portions of the opinion to the principles set forth in the Restatement 2d of Conflict of Laws. (Note that the court had granted leave to the Conflict of Law Professors to file an amicus brief.)

Strategic Considerations. Prior to drafting an initial pleading (Complaint or Answer), counsel should consider whether another state's laws might be viewed to apply. Thus, the client can be informed upfront as to whether there are alternative forums, and whether it is likely that another state's laws will be applicable. Consultation with counsel in the other state could prove helpful to understand whether that state's laws are significantly different in key areas such as caps on damages and the availability of punitive damages, strict liability, and contributory negligence.

Arguing for Application of Illinois Law vs. Out-of-State Law. The *Barbara's Sales* court noted that generally, Illinois courts should not be burdened with applying another state's laws, in the absence of strong policy reasons and a strong connection to the case, and thus held Illinois law to apply. In contrast, the *Townsend* court made no mention of a concern for burden, and instead emphasized the strong preference for the site of the injury forum, unless the other state (in that case, Illinois) has a pivotal relationship with the case.

One advantage of this disparity between the two cases is that opposing arguments can be raised by citing to one of the two cases of the day. Neither the ease of application of the forum's own law nor the simplicity of the other state's laws should be overlooked in briefing a conflict or choice of law question. Similarly, the site of the injury and the forum's interest in the outcome should be considered, preferably with supporting affidavits, reports, or other writings.

Preparing for Conflict of Laws Analysis. The Restatement 2d of Conflict of Laws and the Illinois case law interpreting it do not specifically endorse a tallying of the factors to determine which state's laws should apply. Nonetheless, this can be inferred from the analysis of the *Townsend* and *Barbara's Sales* cases, where the Supreme Court ticked off the contacts of each state to reach a conclusion, in both cases deciding for the states whose contacts were most numerous. This was so even though the *Barbara's Sales* court denied that its approach was a mere counting of contacts.

Practical Application. Counsel are well advised to consult current law review texts and articles discussing the methodology and weight of factors before briefing motions involving disputes of choice of law. Although this is contrary to the usual approach to find precedential case law first and foremost, the Supreme Court's heavy reliance on law review articles and texts, in both cases, illustrates the importance of these sources in this particular area of law.

Still, research of case law throughout the state, and in federal courts as persuasive authority, can be helpful. The

Townsend court cited to federal court cases in its analysis. The Fifth District case of *Chochorowski v. Home Depot U.S.A., Inc.*, 376 Ill. App. 3d 167 (Ill. App. Ct. 2007) emphasized that one court's categorization of a factor (such as venue) as a substantive issue, and not a procedural issue, does not mean that this will be that factor's categorization in every case.

Chapman & Assocs. v. Kitzman, 302 Ill. App. 3d 780, 706 N.E.2d 1067 (5th Dist. 1999) describes that the most-significant-contacts approach must be undertaken along with an interest analysis to determine the significance of each factor. In *Allianz Ins. Co. v. Guidant Corp.*, 869 N.E.2d 1049 (2d Dist. 2007), the Second District applied a conflict of laws analysis to a discovery dispute and concluded that Illinois law applied to determine whether sought-after materials were privileged as work-product or attorney-client materials.

It seems that a widely held preference is to apply the law of the state where the injury or transaction occurred. As such, attorneys are well-advised to comb through the factual circumstances to gather and document all such connections or lack thereof. It is also important to know the residence of all parties and witnesses, which can be requested in interrogatories, to establish the forum's connections with the relevant persons. For corporations or other entities, the principal place of business, state of incorporation, and location of various offices and facilities should be determined. Due to the relatively sparse case precedent, attorneys should be creative in gathering and presenting sources and methods to identify a state's interest in the issue and connections to the transaction or injury.

Cross References. See generally Parness, Illinois Civil Procedure § 1.06, Choosing the Applicable Substantive Law for Civil Actions in the Illinois Circuit Courts (LexisNexis); Illinois Litigation Forms and Checklists C6.01, Drafting a Complaint (LexisNexis).

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Grace V.B. Garcia on Coombes v. Florio, 450 Mass. 182 (2007)

2008 Emerging Issues 1790

Grace V.B. Garcia on Coombes v. Florio, 450 Mass. 182 (2007)

By Grace V.B. Garcia

January 16, 2008

SUMMARY: In *Coombes v. Florio, 450 Mass. 182 (2007)*, a strongly divided Massachusetts Supreme Judicial Court ruled that a doctor may be liable to someone other than his patient for harm caused by a doctors failure to warn his patient of the side-effects of treatment. The Court, in reversing the trial courts grant of summary judgment in favor of the defendant doctor, expanded the duty of care that doctors owe, extending it to all persons who are foreseeably put at risk by the doctors failure to warn. This decision expands the potential liability of doctors and opens up the doors to further litigation in this area. This commentary, written by Grace V.B. Garcia, explores the implications of this important decision.

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ARTICLE: Broadening of a Doctors Duty of Care

In *Coombes v. Florio, 450 Mass. 182 (2007)*, a strongly divided Massachusetts Supreme Judicial Court ruled that a doctor may be liable to someone other than his patient for harm caused by a doctors failure to warn his patient of the side-effects of treatment. The Court, in reversing the trial courts grant of summary judgment in favor of the defendant doctor, expanded the duty of care that doctors owe, extending it to all persons who are foreseeably put at risk by the doctors failure to warn. This decision expands the potential liability of doctors and opens up the doors to further litigation in this area.

Background for the Courts Decision. On March 22, 2002, David Sacca, seventy-five years old, lost control of his vehicle when he lost consciousness causing him to strike and kill a pedestrian, Kevin Coombes. For three years prior to the accident, Dr. Roland Florio was Sacca's primary care physician. Prior to the accident, Sacca had been diagnosed with several serious medical conditions, requiring him to see Dr. Florio six or seven times a year. At the time of the accident Sacca had prescriptions for eight different medications, whose potential side effects included drowsiness, dizziness, lightheadedness, fainting, altered consciousness and sedation.

The last time Sacca saw Dr. Florio before the accident was on January 4, 2002, and Dr. Florio did not discuss the potential side effects of the medications or warn Sacca about driving. The evidence indicated that Sacca reported no problems with side effects or driving before the accident. Despite the lack of reported problems, the plaintiff, the administratrix of the estate of Coombes, sued Florio for negligence, alleging that Sacca lost control of his vehicle due to the side effects of the medication prescribed by Florio. The lower court granted the defendant summary judgment holding that the doctor did not owe a duty to care to anyone other than his patient. The administratrix appealed.

A Doctors Duty to Warn. In determining a duty of reasonable care, a court makes a determination by reference to existing social values and customs and appropriate social policy. *Cremins v. Clancy*, 415 Mass. 289, 292 (1993). In order to have any duty, however, the risk of harm needs to be reasonably foreseeable by the actor. For medical professionals, such as doctors, the Supreme Judicial Court has ruled that as part of a doctors duty of reasonable care, they are required to give appropriate warnings of a prescriptions potential side-effects to their patients. *Cottam v. CVS Pharmacy*, 436 Mass. 316, 321 (2002). When the potential side effects include those that can diminish capacity or state of consciousness, the warnings are meant to protect patients from foreseeable accidents, including automobile accidents.

In its decision in *Coombes*, with three of the six justices who heard the case joining in the opinion authored by Justice Ireland, the Court found that under common-law negligence Dr. Florio was negligent in prescribing medication to Sacca without giving him warnings of the potential side-effects and the duty to warn extended to Coombes because his injury was a foreseeable consequence of the negligence. Specifically, the Court found that [i]n the case of automobile accidents, it is clear that the foreseeable risk of injury is not limited to the patient. Although the plaintiff also made arguments to support her negligence claim based on an assumed duty of warning and a special relationship between a doctor and patient which extends to others who are foreseeably put at risk by the medical care provided, the Court found such argument inapplicable.

In determining that liability for failure to warn may extend to third-parties, the Court stated that it was not broadening the current duty. Rather, the Court based its decision in part on the fact that in cases outside the medical context it has extended a duty of care to third-parties when an accident is reasonably foreseeable. *Coombes*, 450 Mass. at 188. For example, in the case of an impaired driver, a risk of an accident is reasonably foreseeable. *See e.g. Michnik-Ziberman v. Gordans Liquor, Inc.*, 390 Mass. 6, 7-8 (1983) (liquor store liable for injuries to cyclist struck by minor driver to whom alcohol had been sold). Additionally, the Court has also found liability to third-persons in some cases in which there is foreseeable criminal conduct. *Carey v. New Yorker of Worcester, Inc.*, 355 Mass. 450, 454 (1969) (failure to remove known intoxicated trouble-maker from tavern, who previously had had to be removed by police, resulted in shooting of customer). Thus, the Court indicated that it was not stretching current law to hold that a physician owes a duty of reasonable care to everyone foreseeably put at risk by his failure to warn of the side effects of his treatment of a patient. *Coombes*, 450 Mass. at 190.

In evaluating the cost and benefits of such a duty, the Supreme Judicial Court found that public policy requires the duty it imposed on doctors and the cost of imposing the duty is limited, because tort law already imposes on a doctor a duty to warn a patient of the adverse side effects of medication. *Coombes*, 450 Mass. at 190. Thus, this decision, allegedly, places no further burden on physicians than that which they already have by current law. On the other hand, the benefits to the public, that is informing patients when risks of medication will impair them, is great.

Decisions in Other Jurisdictions. Massachusetts is not the only state to hold doctors to this duty of care. Hawaii, Maine, and Washington have also imposed a similar duty. *See e.g. McKenzie v. Hawaii Permanente Med. Group, Inc.*, 98 Haw. 296, 307-309 (2002) (a logical reason exists to impose upon physician, for the benefit of third parties, a duty to advise their patients that a medication may affect the patients driving ability when such a duty would otherwise be owed to the patient); *Joy v. Eastern Me. Med. Ctr.*, 529 A.2d 1364, 1366 (Me. 1987); *Kaiser v. Suburban Transp. Sys.*, 398 P.2d 14 (Wash. 1965).

The duty imposed in Massachusetts, however, is a broader duty than those imposed by other states. For example, in Florida and New Mexico the courts have limited a doctors duty to warn patients of the side effects of drugs to only those drugs that were administered by the doctor, as opposed to simply those for which the doctor has given a prescription. See e.g. *Cheeks v. Dorsey*, 846 So. 2d 1169, 1173 (Fla. Dt. Ct. App. 2003); *Lester v. Hall*, 970 P.2d 590 (1998). Although Massachusetts acknowledged that some states have not gone as far in imposing a duty, it declined to make such a distinction. *Coombes*, 450 Mass. at 191.

Potential Side Effects of the Courts Decision. There are several potential side effects that the *Coombes* decision may have. The following are three possible consequences: First, the *Coombes* decision may create a larger class of plaintiffs who will now add physicians to their civil actions. In its decision, the Court declined to address the argument, but rather stated that it would leave it to the Legislature to impose limits on a physicians liability. Such a statement, however, will not prevent further costs to the legal system, and possibly physicians malpractice insurance rates.

Second, the decision creates great uncertainty as to which warnings, for which prescriptions, a physician must give his or her patient. The Court limited its decision by stating that its holding does not imply that a doctor must warn a patient of every possible side-effect under the sun. Rather, a doctor must warn of those side-effects that may cause his or her patient to have a reasonably foreseeable accident. By not setting clear boundaries on what side-effects doctors must warn of, but rather leaving it up to a jury to make a factual determination that will, in itself, give rise to further litigation, the Court opened the door to significant additional demands on the judicial system and costs to litigants.

Third, by allowing a third-party to assert claims, the Court increases the probability that the confidential communications between a patient and the physician will be breached during discovery. It is likely that the third-party will be entitled to discovery regarding the communications between the physician and the patient. This will violate the strong public policy that currently protects such conversations.

Considerations for Practitioners. Practitioners representing plaintiffs must be careful that if they choose to assert claims against doctors in cases in which they represent third parties, they do not assert medical malpractice claims, but rather negligence claims. For a malpractice claim, there must be a physician-patient relationship and the *Coombes* decision has not changed this. See 450 Mass. at 186. Furthermore, this case does not address any duty to third-parties that a doctor has in his or her decision as to what medications to prescribe. Rather, it addresses only a duty to warn of the side-effects of the medication. Thus, practitioners need to be careful not to overreach when asserting claims.

On the other hand, practitioners who represent physicians should argue that *Coombes* does not expand a physicians duty to warn, but rather the duty they have is the same duty they had prior to the *Coombes* case: a duty to warn of the foreseeable risks of prescriptions that the doctor may give the patient.

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Grace V. B. Garcia is a Partner in the Boston office of Morrison Mahoney LLP. Ms. Garcias practice is concentrated in the areas of commercial litigation, construction law, product liability and premises liability. In 2005, 2006, and 2007, she was recognized by Boston Magazine and Law & Politics as a Super Lawyer Rising Star. Ms. Garcia is admitted to the bars of the Commonwealth of Massachusetts and the State of New York. She is actively involved in several bar associations and serves on the Massachusetts Bar Association's Litigation Section Council. Previously, Ms. Garcia served as a member of the MBA's Business Law Section Council (2003 -- 2006), New Lawyer Section Council (2000 -- 2003), co-chair of the Boston Bar Association's New Lawyer's Section (2002 -- 2004), and the BBA's Task Force on Pro Bono and New Lawyers (2002 -- 2003). Ms. Garcia is a part of the Massachusetts Associated General Contractors Safety Committee. Additionally, after being on the Executive Committee for several years, Ms. Garcia is the co-director for the Boston Chapter of the Downtown Women's Club for the 2007-2008 year. Ms. Garcia is the author of the Massachusetts Litigation Blog. In addition, Ms. Garcia has authored several articles including: Fundamentals of Electronic Discovery, Boston Bar Journal (March/April 2003) and Achieving Equitable Balance:

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Grace V.B. Garcia on Koe v. Mercer, 450 Mass. 97 (2007)

2008 Emerging Issues 1791

Grace V.B. Garcia on Koe v. Mercer, 450 Mass. 97 (2007)

By Grace V.B. Garcia

January 16, 2008

SUMMARY: In affirming the trial courts grant of summary judgment for the defendant, and reversing the Appeals Court, the Massachusetts Supreme Judicial Court in *Koe v. Mercer* reiterated the discovery rule for use in the calculations of the statute of limitations with regards to torts. The decision confirms the way in which statutes of limitations must be calculated and bolsters their importance to our legal system. This commentary, written by Grace V.B. Garcia, explores the implications of this important decision.

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ARTICLE: Discovery Rule Reiterated. In affirming the trial courts grant of summary judgment for the defendant, and reversing the Appeals Court, the Massachusetts Supreme Judicial Court in *Koe v. Mercer* reiterated the discovery rule for use in the calculations of the statute of limitations with regards to torts. The decision confirms the way in which statutes of limitations must be calculated and bolsters their importance to our legal system.

Fact pattern of Koe. Plaintiff, born in 1968, alleges that he was sexually abused by a pastor in his church at an event in 1983. Shortly after the incident, the plaintiff told his parents who discussed it with the defendant, an elder of the church and a member of the church's council. Nothing further was done. Plaintiff claimed that in 1984 or 1985 he was again sexually abused by the same pastor on two other occasions. Approximately a year later, the plaintiff ran away and became homeless for several years.

In 1998, the plaintiff began therapy to help him cope with his emotional problems. On February 8, 1999, the plaintiff met with a psychiatrist, who noted that the plaintiff wanted help with his anger and [h]as had a history of sexual abuse by a pastor. Plaintiff filed his complaint on February 28, 2002, alleging negligence against the defendant for allowing a pastor to sexually abuse him. No claims were brought against the pastor who died several years earlier.

In his deposition taken during discovery, the plaintiff stated that by February 8, 1999 he knew that he had been sexually abused by the pastor, that the abuse had been wrong, and that his psychiatrist was able to help him contemplate

a connection between the abuse and his emotional issues. Further, the plaintiff stated that on February 22, 1999, the psychiatrist suggested to him that his anger and depression could be related to the sexual abuse he experienced. Plaintiff continued with therapy and in a session with a social worker in March 2, 1999, the social worker claimed that the plaintiff was able to identify his emotional problems with the sexual abuse.

The defense filed a motion for summary judgment on the grounds that the applicable three-year statute of limitations had expired. In his opposition, in which he argued that he, himself, did not make the connections until March of 1999 or later, the plaintiff filed an affidavit of a psychologist who examined him. In the affidavit, the psychologist stated that the plaintiff had suffered post-traumatic stress disorder due to the sexual abuse and that the plaintiff's failure to make the connection between the abuse and his emotional problems prior to late 1999 or early 2000 was reasonable.

When does the cause of action accrue? Mass. Gen. Laws. ch. 260, § 2A provides for a three-year statute of limitation period for tort actions. The statute specifically states that [a]ctions of tort . . . shall be commenced only within three years next after the cause of action accrues. *See* Mass. Gen. Laws. ch. 260, § 2B. The statute does not define accrues; common law has determined that accrues means when the plaintiff is damaged as a result of the defendant's unlawful act or omission. *Pagliuca v. Boston*, 35 Mass. App. Ct. 820, 824 (1994).

The actual date a person is injured is not always easy to determine. Accordingly, the common law has developed the discovery rule. That rule holds that if the wrong is inherently unknowable at the time it actually takes place, the cause of action accrues when the plaintiff knows or should know that he has been injured. *Riley v. Presnell*, 409 Mass. 239, 245-48 (1991). The knowledge required to trigger the statute of limitations is not notice of every fact which must eventually be proved in support of the claim, but rather knowledge that an injury has occurred. *White v. Peabody Constr. Co.*, 386 Mass. 121, 130 (1982). Thus, a potential plaintiff need not be aware of every fact that must be proved to prevail upon a claim before the statute of limitations period begins to run. Indeed, it is important to be aware that Massachusetts does not require discovery of each of the elements of the cause of action duty, breach, causation, and damages before the limitation clock . . . starts ticking. *Krasnow v. Allen*, 29 Mass. App. Ct. 562, 568-69 (1990) (citing *Malapanis v. Shirazi*, 21 Mass. App. Ct. 378, 382 (1986)).

Consequently, a cause of action accrues on the happening of an event likely to put the plaintiff on notice. *White v. Peabody Constr. Co.*, 386 Mass. 121, 129-130 (1982). Whether an event is likely to put a plaintiff on notice is judged by an objective standard of a reasonable person. *Doe v. Creighton*, 439 Mass. 281, 284 (2003). Thus, [o]nce a plaintiff relies upon the discovery rule to argue that his claim was delayed due to an inability to recognize the cause of his injuries, he bears the burden of proving both an actual lack of causal knowledge and the objective reasonableness of that lack of knowledge. *Koe*, 450 Mass. at 101 (quoting *Doe*, 439 Mass. at 283).

What Is Reasonable? Whether a plaintiff's lack of knowledge is objectively reasonable is measured by the reasonable person standard. What is a reasonable person? There is no specific definition, although many factors can be considered. For instance, in sexual abuse cases, the factors that are used to determine whether a reasonable person in plaintiff's situation would realize the injuries were caused by the conduct of the defendant are normally the timing of the harm, meaning the person's age; whether the perpetrator attempted to disguise the harm; and whether the event can be considered a life-changing event. Important to note, however, is that [p]ersonal character traits, educational history and cultural backgrounds are usually immaterial in determining whether a lack of knowledge is objectively reasonable. *Koe*, 450 Mass. at 103. Thus, in arguing the reasonable person standard, one must look to the factors that are important to someone in the plaintiff's position, but not necessarily to the plaintiff's traits or characteristics.

How does the Discovery Rule apply? The discovery rule requires that before the three year statute of limitation period starts to run, two conditions must be met: (1) the plaintiff must have an awareness of his injuries and (2) the

plaintiff must be aware that the defendant caused his injuries. Applying this rule, the Supreme Judicial Court in *Koe* noted that the plaintiff was aware of his injuries as he admitted to experiencing emotional problems in 1998. Hence, the Court concentrated on when the plaintiff, as a reasonable person, should have become aware of the connection between his emotional problems and alleged abuse.

The Court determined that by February 22, 1999, the plaintiff should have known of the causal link between the abuse and the harm. Although the Court acknowledged that it was on that date that plaintiffs psychiatrist made the connection between the sexual abuse and the plaintiffs emotional state, as opposed to the plaintiff himself making the connection, the Court stated that the discovery rule does not grant plaintiffs the option of ignoring connections once they have been made aware of them. *Koe*, 450 Mass. at 102 (quoting *Bowen v. Eli Lilly & Co.*, 408 Mass. 204, 210 (1990)). Thus, in determining the running of the statute, it is irrelevant who makes the connection between the event and harm, only that the plaintiff has been informed, in some way, of that connection. Since *Koe* filed his complaint on February 28, 2002, more than three years after he should have know of the connection between his injuries and the defendants action, summary judgment was properly granted to the defendant.

Considerations for Practitioners. The calculation of the limitation period for torts is determined from the date that a reasonable person should have known of the causal connection between the alleged act and the harm. Although an issue of whether the plaintiff knew or should have known is often a question of fact for trial, in order to survive summary judgment, the plaintiff must demonstrate a reasonable expectation of proving that the claim is timely filed. Thus, if you represent a plaintiff, and you need to prove that a reasonable person would not have known of the causal connection before the date that the plaintiff made the connection and you may want to submit competent expert testimony or affidavits that focus on what a reasonable person should have known in the particular circumstances. Be aware, however, that you do not want the experts testimony or affidavit to focus on the plaintiffs ability to make the connection, but rather whether a reasonable person could or should have made the connection.

If, however, you represent the defendant, you want to argue that a reasonable person should have known of some connection between the alleged act and the harm, and to stress that the law does not required a person to fully comprehend the full consequences of the harm in order to start the clock ticking. Argue that some knowledge, as opposed to complete knowledge, will start the running of the statute of limitations period.

For additional discussion of statutes of limitations in Massachusetts, see 1-6 MA Pleading and Practice § 6.3 Computation of Time and Statutes of Limitation

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Garcia is the co-director for the Boston Chapter of the Downtown Women's Club for the 2007-2008 year. Ms. Garcia is the author of the Massachusetts Litigation Blog. In addition, Ms. Garcia has authored several articles including: Fundamentals of Electronic Discovery, Boston Bar Journal (March/April 2003) and Achieving Equitable Balance: Justice Wilkins and Chapter 93A, Boston Bar Journal (Nov./Dec. 2000) (co-author). She has lectured for various continuing legal education programs on electronic discovery, document retention, and deposition techniques.



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Sinclair and Harrison on Causes of Action in Medical Malpractice Cases

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Sinclair and Harrison on Election of Causes of Action in Medical Malpractice Cases Under Virginia Law

By Kent Sinclair and Gessner Harrison

April 1, 2010

SUMMARY: Important holdings by the Supreme Court of Virginia in *Centra Health, Inc. v. Mullins*, 277 Va. 59 (2009) clarify the issue of precisely when the administrators of a decedent's estate must elect between a survival personal injury claim and a wrongful death claim arising from the same negligent acts or omissions of healthcare providers. Related issues are also addressed. The impact of the holdings in this case is explored in this Commentary.

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ARTICLE: Introduction: Virginia law recognizes that it is possible for the negligent acts or omissions of healthcare providers to give rise to two distinct causes of action when a patient dies. The first of these is a survival personal injury claim governed by Code §§ 8.01-25 and 8.01-56, which is based on the theory that the negligent acts or omissions of a healthcare provider caused a decedent to suffer personal injuries prior to death, but did not cause the decedent's death. The second is a wrongful death claim governed by Code § 8.01-50, which is based on the theory that the negligent acts or omissions of a healthcare provider caused a decedent's death. The damages recoverable under each theory are also distinct. Under a survival personal injury claim, damages are limited to pain, suffering, inconvenience, the effect on the decedent's health while he or she was still alive, and medical expenses. By contrast, in a wrongful death claim damages may be awarded pursuant to the statutes for the sorrow, mental anguish, and loss of solace suffered by the decedent's family members, expenses for the decedent's hospitalization incident to the injuries causing death, and funeral expenses.

Although it has long been the law in Virginia that recovery may be had under only one theory or the other, in the recent case of *Centra Health v. Mullins*, 277 Va. 59 (2009), the Supreme Court of Virginia resolved the issue of precisely when the administrators of a decedent's estate must elect between a survival personal injury claim and a wrongful death claim arising from the same negligent acts or omissions of healthcare providers. In doing so, the Court also considered important related issues, including whether it is proper to employ multipart jury instructions and verdict forms providing for recovery on either theory and the availability of bifurcation to create separate trial phases for liability and damages. In addressing these issues, the Court provides valuable guidance as to the options available to pursue redress for acts of medical negligence and the means through which litigants can be assured of achieving just and fair results that provide damages only under one theory of recovery, if at all.

Background: In *Centra Health*, an 84-year-old patient was admitted to a hospital operated by Centra Health, Inc. for treatment of a broken hip. As a result of purported negligence by hospital staff in failing to remove a catheter as

ordered and failure to recognize and report the development of a urinary tract infection, the patient was released after the hip repair surgery, but readmitted to the hospital the following day for treatment of the continuing urinary tract infection, which had progressed into sepsis, and he remained hospitalized until his death several days later. The administrators of his estate brought suit, asserting a claim for wrongful death and an alternate survival claim for the personal injuries sustained by the patient prior to his death as a result of the hospital's negligent treatment resulting in the urinary tract infection and its attendant complications. The defendant denied negligence and asserted an affirmative defense of intervening causation to the wrongful death claim.

At all stages of the proceeding - before and during trial - the hospital made motions requesting that the circuit court compel the administrators to elect between the survival and wrongful death causes of action. The trial court overruled these motions, and specifically instructed the jury on the alternative theories. A verdict form directed the jury to complete only one of the two sections, and the judge instructed the jury on how to indicate the absence of liability as well as the alternative liability options. The jury returned a verdict for plaintiff on the survival claim only, setting damages at \$325,000. After post-trial motions and a further hearing, the circuit court entered a final judgment on the jury's verdict awarding damages in accord with the verdict. The hospital appealed.

Legal Principles: In resolving the issue of the timing of an election between a survival personal injury claim and a wrongful death claim as presented in *Centra Health*, the Court relied on the following well-established principles of Virginia law:

■ **Statutory scheme.** In *Centra Health*, the Court began its analysis by reviewing the "statutory scheme . . . concerning whether and under what circumstances the personal representative of a decedent can maintain concurrent causes of action seeking damages for both personal injuries suffered by the decedent under the survival statute and for the decedent's death arising from the same negligent acts or omissions under the wrongful death statute." In its analysis, the Court cited and quoted Code § 8.01-50, observing that this statute "governs actions for wrongful death of a decedent," providing specifically that "[w]henver the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation . . . the person who, or corporation . . . which, would have been liable, if death had not ensued, shall be liable to an action . . . notwithstanding the death of the person injured." The Court also quoted the relevant provisions of Code § 8.01-25, which "governs survival of causes of action that accrue during a decedent's lifetime."

■ **Survival.** Under Code § 8.01-25, "[e]very cause of action whether legal or equitable, which is cognizable in the Commonwealth of Virginia, shall survive . . . the death of the person in whose favor the cause of action existed." However, as the Supreme Court noted in *Centra Health*, Code § 8.01-25 also provides that "if the cause of action asserted by the decedent in his lifetime was for a personal injury and such decedent dies as a result of the injury complained of with a timely action for damages arising from such injury pending, the action shall be amended in accordance with the provisions of § 8.01-56." The Court further commented that Code § 8.01-56 "in part governs the maintenance of a pending personal injury action as a survival action following the death of the plaintiff." It then observed that under this statute, "when a person who has brought an action for personal injury dies pending the action, such action may be revived in the name of his personal representative" and that "[i]f death resulted from the injury for which the action was originally brought, a motion for judgment and other pleadings shall be amended so as to conform to an action under § 8.01-50, and the case proceeded with as if the action had been brought under such section." Importantly, the Court noted, Code § 8.01-56 specifically provides that "[i]n such cases, . . . there shall be but one recovery for the same injury." Summarizing the foregoing provisions, the Court, discussing its prior opinions in *Lucas v. HCMF Corp.*, 238 Va. 446, 384 S.E.2d 92 (1989) and *Brammer v. Norfolk & W. R. Co.*, 107 Va. 206, 57 S.E. 593 (1907), explained that it had previously "recognized that under Code § 8.01-56 'there shall be but one recovery for the same injury' for which both personal injury and wrongful death actions might be brought by the plaintiff," and that "if the injuries cause death, the recovery must be sought under Code § 8.01-50, the wrongful death statute."

■ **Prior case law requires election of remedies, but does not specify the timing of the election.** After examining the interplay of Code §§ 8.01-25, 8.01-50, and 8.01-56, the Court examined its two prior decisions concerning the issue of when an election between a survival personal injury claim and a wrongful death claim must be made. The Court began by observing that in *Lucas*, it had dealt with a situation in which a survival action brought by an administratrix against a

nursing home had been dismissed with prejudice following her medical expert's testimony that the negligence of the nursing home's staff had "hastened" the decedent's death, even though the administratrix contended that she could "present evidence from another expert to establish an intervening cause of death" or that, alternatively, she should be "permitted to amend the pleadings and proceed on a claim for wrongful death." The Court had observed in *Lucas* that "under Code § 8.01-56 the administratrix could not recover on both a survival claim for personal injuries sustained by the decedent and for a claim of wrongful death if both the injuries and the death arose from the same negligent acts." However, in its recent decision in *Centra Health* the Court also emphasized that it had nevertheless held in *Lucas* that the administratrix "should have been permitted . . . to present further evidence that the decedent's death could have resulted from an intervening cause and then have 'the trier of fact . . . resolve [the] conflicting testimony.'" Even so, the Court quickly pointed out that on remand in *Lucas*, it had "expressed no opinion as to whether the administratrix should be permitted to join the two causes of action or whether and when the administratrix would be required to elect between them if she did so." *Hendrix v. Daugherty*, 249 Va. 540, 457 S.E.2d 71 (1995), had addressed the issue of election of remedies in the context of a legal malpractice claim brought against attorneys who had counseled their client to pursue only a wrongful death action on facts that also gave rise to a survival action. In *Hendrix*, the Court it had observed that "[t]he plain language contained in Code §§ 8.01-25 and -56 unequivocally mandates that a person may not recover for the same injury under the survival statute and the wrongful death statute" and that "[t]here can be but one recovery." As a result, the Court concluded in *Hendrix* that "the plaintiffs . . . as a matter of law, could not have recovered in the underlying tort action . . . on both theories of wrongful death and survival." However, the Court also acknowledged in *Hendrix* that, on remand, "at an appropriate time *after discovery has been completed*, the plaintiffs must be required to elect whether they will proceed against the defendant attorneys on the theory that the attorneys breached a duty owed to the plaintiffs in the prosecution of the wrongful death action or breached a duty owed to the plaintiffs in the prosecution of the survival action." In the recent *Centra Health* decision the Court ultimately observed that "[s]ince deciding *Hendrix*, [the Court has] not been afforded the opportunity to address further the circumstances that would constitute the 'appropriate time after discovery has been completed' at which a circuit court must require an election between a survival personal injury claim and a wrongful death claim" and that it had not "specifically addressed whether there can be circumstances in which that 'appropriate time' might be after the trier of fact has resolved disputed issues of liability."

Key Issue #1: When is election between a survival personal injury claim and a wrongful death claim required in a medical malpractice case?

In answering this question, the Supreme Court of Virginia relied heavily on its prior holdings in *Lucas* and *Hendrix*. The Court began by noting that in *Lucas*, it had "recognized that the plaintiff was not constrained to bring only a wrongful death action if causation was in doubt," that "[i]n choosing to file a personal injury action, [the plaintiff only] had to prove the elements of that claim to recover damages," and that the plaintiff was "entitled to the opportunity to prove those elements." The Court then acknowledged that it had held in *Lucas* that "had the plaintiff been permitted to introduce evidence in support of the survival claim, the trier of fact would have had to resolve conflicting testimony regarding the cause of the decedent's death." Significantly, the Court then concluded that "[t]he error of the circuit court in *Lucas* was that the [circuit] court essentially required an election by the plaintiff between the survival claim and a wrongful death claim before the contested causation issue was determined by the trier of fact." Continuing, the Court then turned to its decision in *Hendrix*, observing that "[i]mplicit in the direction in *Hendrix* that . . . an election [between a survival personal injury action and a wrongful death action] will occur 'at an appropriate time after discovery has been completed' is the understanding that the plaintiff ought not be compelled to make the election without a full opportunity to develop its case." Based on the foregoing, the Court explained that upon its review of the record, "it is evident that *Centra Health* vigorously contested that [the decedent] had suffered any compensable injury for which a survival claim could be successfully maintained and also that any act of *Centra Health*'s employees had caused [the decedent's] death." The Court then emphasized that, notwithstanding *Centra Health*'s contrary assertion, it "did not hold in *Hendrix* that a plaintiff would always be required to elect between remedies prior to trial." Instead, the Court noted that "the election is required only at a time when the record sufficiently establishes that the personal injuries and the death arose from the same cause."

As a result, the Court concluded in its most recent decision that "[i]n this particular case, . . . compelling an election would put the administrators in the untenable, and manifestly unjust, position of having to elect between two potentially viable claims, which Centra Health was contesting on separate and independent grounds" and that, "[u]nder those circumstances, there was no 'appropriate time' prior to trial at which compelling an election would not have prejudiced the administrators and, consequently, unfairly benefited Centra Health." Consequently, the Court held that "the circuit court did not err in denying Centra Health's motion to compel the administrators to elect between the survival and wrongful death claims" prior to trial.

Key Issue #2: What methods are available to prevent potential prejudice to a defendant healthcare provider arising from the possibility that a jury could conflate the different elements of damages for a survival personal injury claim and a wrongful death claim?

In *Centra Health*, the Court highlighted that it was "not unmindful" of the contention, advanced by the defendant, that "in permitting a plaintiff to present evidence in support of a survival claim and a wrongful death claim when the issue of causation is disputed, a defendant may be subject to potential prejudice by the possibility that in a jury trial the jury could conflate the differing elements of damages from each claim in rendering a single verdict." Nevertheless, the Court concluded that "a defendant can obviate this potential for prejudice by requesting that the trial be bifurcated into separate proceedings to determine liability and damages." Drawing on its prior observation regarding the discretion vested in trial courts regarding the bifurcation of proceedings made in *Allstate Ins. Co. v. Wade*, 265 Va. 383, 579 S.E.2d 180 (2003), the Court explained that in its view, "in a case where there is any doubt as to when compelling an election would be proper, bifurcation is the most practical means to assure that each party receives a fair opportunity to present their case to the jury without prejudice to the other."

Key Issue #3: Were the jury instructions and verdict forms improper in that they permitted the jury, in awarding damages on the survival claim, to consider evidence relevant only to the claim for damages for wrongful death?

The Court answered this question in the negative in *Centra Health*.

The Court began its analysis of this issue by reciting a detailed description of the instructions and verdict forms provided to the jury:

The circuit court granted instructions proffered by the administrators that directed the jury to first consider whether Centra Health, through its employees, had been negligent in failing to provide an appropriate standard of care to [the decedent] and, if so, whether that "negligence was a proximate cause of injury or death to [the decedent]." In Instruction No. 16, which it later referred to as "the wrongful death damages [instruction]," the court advised the jury as to the evidence it could consider in awarding damages for wrongful death including "the sorrow, mental anguish, and loss of solace suffered by" [the decedent's] family, expenses for his hospitalization incident to the injuries that resulted in his death, and funeral expenses. Similarly, in Instruction No. 17, "the survival damage[s] instruction," the court advised the jury that if it were to award damages for personal injuries to [the decedent] "that did not cause his death," it should only consider the effect of those injuries on [the decedent's] health, his pain, suffering and inconvenience, and the medical expenses he incurred as a result. Centra Health noted its objection to these instructions, but did not request a separate instruction expressly cautioning the jury that if it chose to award damages under one theory it should disregard the damages evidence relevant to the other cause of action.

After the circuit court read the two damages instructions to the jury, the court provided this additional guidance:

They [the two damages instructions] are effectively going to be mutually exclusive. If you decide to award damages, you can do it under one.

If you find negligence caused the death, you can do it under [the wrongful death damages instruction]. If you find it just caused the injury, you can do it under [the survival damages instruction], but you can't do both. You've got to

choose. That's a jury issue for [you] to resolve, and you have to determine one or the other.

That will become apparent on the verdict form, but you don't award either unless you find for the plaintiffs and that the defendant was negligent.

The jury was given a multi-part verdict form, prepared by the administrators, that provided for alternative verdicts on either wrongful death or the survival personal injury claims. The verdict form directed the jury to complete only one of the two sections, the first of which permitted the jury to make individual awards to [the decedent's] widow and children as well as awards for medical and funeral expenses, while the second directed the jury to award damages in accord with the instruction for the personal injury survival claim. Each part also permitted the jury to render a verdict for Centra Health. The verdict form expressly referenced the two instructions detailing the source of damages for each claim.

. . . .

The circuit court gave the jury the following guidance with respect to its consideration of the verdict and how to render its decision on the verdict form:

[W]e have a verdict form and it's a little more complicated than the normal civil case because it has a Part A and Part B to it.

The Part A part is involving the wrongful death, and the Part B is what we call a survival action or injuries before [the decedent] died.

The jury . . . has got to decide whether or not there is any negligence, violation of [the] standard of care. And if that standard of care was violated, did it cause [the decedent's] injury or did it cause his death.

The circuit court then directed that if the jury found that Centra Health was not liable for either [the decedent's] death or any injury to him, it could indicate this by rendering its verdict for Centra Health under either of the two parts of the verdict form. The court further instructed that if the jury "decide[d] that the hospital is responsible, through its nurses, for the wrongful death of [the decedent]," it was to apportion the damages for the wrongful death among his survivors and to award damages for the medical and funeral expenses on the "wrongful death" part of the verdict form. If, however, the jury found that Centra Health had been negligent in its care of [the decedent], but "his death wasn't the result of any negligence or causation of the hospital nurse[s]," the jury should award damages under the "survival action" part of the form.

When the jury returned its verdict, consistent with the instructions on the verdict form and the directions of the circuit court, it rendered a verdict only on one of the two claims. In reading the verdict, the circuit court noted, "On Part A [the wrongful death claim] there is no verdict. Part B [the survival personal injury claim], we the jury, on the issues joined, instruction number 17, find the verdict in favor of the plaintiff and set his damages at [\$]325,000.

Following this detailed recitation of the instructions and verdict forms provided to the jury, the Court addressed the healthcare provider's contention that in returning the \$325,000 verdict on the survival personal injury claim, "the jury must have misunderstood or misapplied the . . . instructions with regard to the determination of damages for the survival claim and improperly considered evidence that was relevant only to the damages for wrongful death." In doing so, the Court acknowledged that it had previously "recognized that when a personal representative is permitted to go forward with both a personal injury survival claim and a wrongful death claim, there is at least the potential that the jury could conflate the differing elements of damage in rendering the single verdict." Ultimately, however, the Court determined that it was "not persuaded that the jury's verdict reflects any confusion as to the law or undue sympathy based on the loss of solace evidence for the wrongful death claim that was not relevant to damages for the survival claim."

As background and support for this conclusion, the Court observed that "[t]he record shows that the circuit court

was painstaking in its efforts to instruct the jury both in how it was to determine the liability, if any, of the defendant health care facility and then, based upon its determination, what quantum of damages could be assessed depending on whether that liability was for the wrongful death claim or for the survival claim." Continuing, the Court further observed that "[t]he law and its application were clearly detailed in the instructions, the court's further explanations, and in the verdict form." It then noted that, "[t]hough Centra Health might have requested a specific instruction expressly cautioning the jury to disregard evidence that was not relevant to the damages it might award, it did not do so," and further explained that "in any case such an instruction would have added little to the court's clear differentiation of the two causes of action in the other instructions." Finally, the Court, relying on its holding in *Stump v. Doe*, 250 Va. 57, 458 S.E.2d 279 (1995), explained that "[a] jury is presumed to follow the court's instructions" and that "an appellant who challenges a verdict bears the burden of rebutting that presumption." The Court then concluded that "[i]n this case, there is no indication that the jury failed to follow the court's instructions and nothing express in the record to rebut the presumption that the jury did not do so." Ultimately, the Court held that "in consideration of the fact that the jury's verdict reflects a clear understanding that the administrators were entitled to recover only for the survival claim if Centra Health was found to be negligent, but not liable for [the decedent's] death," the award was "adequately supported by the record."

Importance of Rulings: *Centra Health* is a pivotal case. The ruling unambiguously informs litigants in medical malpractice cases that under Virginia law, an election between a survival personal injury claim and a wrongful death claim is not required until such time that "the record sufficiently establishes that the personal injuries and the death arose from the same cause." It eliminates any uncertainty on this point that existed as a result of the issues not reached in *Lucas* and *Hendrix*. Thus, *in cases where the issue of causation remains contested throughout the trial*, the ruling also clearly indicates that plaintiffs will be permitted to present evidence concerning both claims to the jury and that the jury will then be compelled to choose between three options: award nothing on either claim, award damages on the survival personal injury claim but not the wrongful death claim, or award damages on the wrongful death claim but not the survival personal injury claim.

In a broader procedural perspective, the ruling plainly presents bifurcation of a trial into separate liability and damages phases as an option that will permit healthcare providers to avoid the potential for prejudice arising from possible conflation of elements of damages awardable under each type of claim. Finally, the ruling also approves a set of written and oral instructions, as well as multipart verdict forms, that may be used in cases where bifurcation is not sought and both claims are presented to the jury for consideration because causation is contested. These rulings undoubtedly provide valuable guidance to practitioners in developing the optimal trial strategy for cases in which both a survival personal injury claim and a wrongful death claim may lie.

RELATED LINKS: Regarding wrongful death and survival actions generally, see

- Charles E. Friend, *Personal Injury Law in Virginia*, Chapter 15: Wrongful Death;
- Charles E. Friend and Kent Sinclair, *Friend's Virginia Pleading and Practice*, Section 25.02 (Negligence Actions for Personal Injuries);
- Charles E. Friend and Kent Sinclair, *Friend's Virginia Pleading and Practice*, Section 25.04 (Survival of Actions);
- Charles E. Friend and Kent Sinclair, *Friend's Virginia Pleading and Practice*, Section 25.05 (Wrongful Death);
- Charles E. Friend and Kent Sinclair, *Friend's Virginia Pleading and Practice*, Section 26.23 (Survival of Actions);
- Kent Sinclair and Leigh B. Middleditch, Jr., *Virginia Civil Procedure*, Section 2.2 (Survival and Assignment of Causes of Action);
- Kent Sinclair and Leigh B. Middleditch, Jr., *Virginia Civil Procedure*, Section 2.11 (Wrongful Death Actions);
- Kent Sinclair and Leigh B. Middleditch, Jr., *Virginia Civil Procedure*, Section 3.7 (Election of Remedies Rules);
- Kent Sinclair and Leigh B. Middleditch, Jr., *Virginia Civil Procedure*, Section 5.11 (Actions for Wrongful Death);
- John L. Costello, *Virginia Remedies*, Section 17.07 (Medical Malpractice);
- Kent Sinclair and Leigh B. Middleditch, Jr., *Virginia Civil Procedure*, Section 2.2 (Survival and Assignment of Causes of Action);
- Kent Sinclair and Leigh B. Middleditch, Jr., *Virginia Civil Procedure*, Section 2.11 (Wrongful Death);

- Kent Sinclair and Leigh B. Middleditch, Jr., Virginia Civil Procedure, Section 3.7 (Election of Remedies Rules);
- Kent Sinclair and Leigh B. Middleditch, Jr., Virginia Civil Procedure, Section 5.11 (Actions for Wrongful Death)

Regarding medical malpractice generally, see

- Charles E. Friend, Personal Injury Law in Virginia, Chapter 20: Medical Malpractice;
- Charles E. Friend and Kent Sinclair, Friend's Virginia Pleading and Practice, Section 26.04 (Medical Malpractice)

Regarding damages recoverable for wrongful death, see

- Charles E. Friend, Personal Injury Law in Virginia, Chapter 15: Wrongful Death;
- Charles E. Friend and Kent Sinclair, Friend's Virginia Pleading and Practice, Section 23.07 (Damages- Wrongful Death);
- Kent Sinclair and Leigh B. Middleditch, Jr., Virginia Civil Procedure, Section 2.11 (Wrongful Death);
- John L. Costello, Virginia Remedies, Section 17.07 (Medical Malpractice)

Regarding damages recoverable for personal injury

- Charles E. Friend, Personal Injury Law in Virginia, Chapter 13: Damages;
- Charles E. Friend and Kent Sinclair, Friend's Virginia Pleading and Practice, Chapter 23: Damages;
- Kent Sinclair and Leigh B. Middleditch, Jr., Virginia Civil Procedure, Section 3.2 (Damages)

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Brazas on Davis v. American Optical Co.

2009 Emerging Issues 3351

Is Your Share Fair? Good-Faith Analysis of a High Settlement. *Brazas on Davis v. American Optical Co.*

By Susan Brazas

February 6, 2009

SUMMARY: Is Your Share Fair? Good-Faith Analysis of a High Settlement. Recently the Fifth District Appellate Court evaluated a trial courts assessment of a settlement where the dollar amounts of the settlement were partly based on the procurement of releases of product liability claims. This commentary discusses the review of settlements--rarely addressed by the appellate courts--and their implications.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: FIFTH DISTRICT APPELLATE COURT UPHOLDS GOOD FAITH SETTLEMENT APPROVAL WHERE AGREEMENT BASED ON RELEASE OF PRODUCTS LIABILITY CLAIMS BY COAL MINERS.

In *Davis v. American Optical Co.*, 2008 Ill. App. LEXIS 1202 (Dec. 3, 2008), the Fifth District Appellate Court made an analysis of the trial courts approval of a settlement in good faith. Even though the two settling defendants had admittedly paid more than their pro rata share, the court found that this was done in order to procure a release from the non-settling defendant for contribution, relating to products liability claims for defective masks sold for use by coal miners who allegedly contracted black lung disease as a result.

In *Davis*, two corporate defendants settled with the plaintiffs, who claimed that the masks and respirators sold by the defendants were defective and thus failed to prevent the plaintiff coal miners from contracting black lung disease. The settling parties then sought a dismissal, with prejudice, of the complaint as to these settling defendants, and also a dismissal of all third-party claims for contribution filed by the non-settling defendants.

The *Davis* court interpreted the Contribution Act, 740 ILCS 100/2, as allowing the dismissal of third-party contribution claims filed by other parties, even those who were not party to the settlement. The *Davis* court reasoned that this would promote the two purposes of the Contribution Act: the encouragement of settlements and the equitable apportionment of damages among tortfeasors. The *Davis* court also found that the dismissal of third-party claims was also expressly and implicitly provided by the Act.

Recent Case Developments. There is no extensive body of case law on the issue of settlements. The most notable recent opinion was in *Garley v. Columbia LaGrange Hospital*, 377 Ill. App. 3d 678, 881 N.E.2d 370 (1st Dist. 2007). The appellate court in *Garley* held that 1) because its own previous order of reversal and remand was general, rather

than limited to any specific parties, and consistent with the settlement agreement, the two defendant physicians remained parties for the purposes of the re-trial; and 2) collateral estoppel did not bar the plaintiff from re-litigating damages, including as to the two physicians who settled, upon re-trial, because there was no final judgment.

It should be noted that the standard of review for a good faith finding as to a settlement is abuse of discretion. Thus, the most effective time to object to a settlements approval is in the trial court, including via a motion to reconsider.

Strategic Considerations. The *Davis* court noted that it could not evaluate the dollar amount of the settlements, in that the two Exhibits wherein the dollar amounts were documented were, by agreement, confidential, and thus were not part of the record. The court noted that it was the appellants burden to have a complete record, citing *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 546-47 (1996). Thus, even where certain documents are deemed confidential and/or are sealed, counsel would be well-advised to have the confidentiality waived for the purpose of the record on appeal. An alternative method would be to move the appellate court to supplement the record on appeal with specifically identified documents, pursuant to Supreme Court Rule; or to move the trial court to include any potentially important documents in the court file, so that they are present in the record on appeal.

Cautions When Approaching Settlement. Attorneys should be cautious to request set-offs as appropriate. This can be easily overlooked with the press of time during trial. As did the settling defendants in *Davis*, counsel should also be careful to preserve their causes of action as against potential third-part defendants, and should keep updated on the status of any lien, especially workers compensation liens.

CROSS REFERENCES: 740 ILCS 100/2; LexisNexis Illinois Forms and Illinois Checklists (Civil; pleadings and motions).

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Brazas on Jackson v. Victory Memorial Hospital

2009 Emerging Issues 3354

Is It Time Yet? A New Twist on a Plaintiffs Right to Voluntarily Dismiss.

By Susan Brazas

February 6, 2009

SUMMARY: The 2nd Dist. Ct. re-visited the issue addressed by the 4th Dist. and abruptly reversed by the IL Sup. Ct. on the perils of voluntary dismissals. In *Jackson*, the 2nd Dist. breathed new life into a plaintiffs medical malpractice complaint which had been several years in the drafting. The unique approach to the time deadline for a 2-622 report and the applicability of res judicata to a voluntary dismissal make for surprising reading.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: SECOND DISTRICT APPELLATE COURT HOLDS THAT NO DECLARATION AS TO PRIOR VOLUNTARY DISMISSALS REQUIRED FOR A MEDICAL MALPRACTICE PLAINTIFF.

In *Jackson v. Victory Memorial Hospital*, 2008 Ill. App. LEXIS 1198 (Dec. 2, 2008), the Second District Appellate Court tackled the thorny issue of the ramifications of a plaintiff's voluntary dismissal in the face of difficulties obtaining a Section 2-622 reviewing physician's report. This is the first Appellate Court decision commenting on last year's important Illinois Supreme Court decision of *O'Casek v. Children's Home & Aid Society of Illinois*, 229 Ill. 2d 421, 892 N.E.2d 994 (2008). It is also one of the first Appellate Court decisions applying the Illinois Supreme Court's decision on the topic of res judicata in the context of voluntary dismissals, *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467 (2008).

In *Hudson v. City of Chicago*, the Illinois Supreme Court had addressed the interplay of the voluntary dismissal statute and the doctrine of res judicata. The *Hudson* Court found that the plaintiff's re-filed action was barred by res judicata, because plaintiff could have, but did not, pursue his case to conclusion in the trial court after one count of his original action was involuntarily dismissed with prejudice.

The *Jackson v. Victory Hospital* court held that the requirement that a plaintiff make a written declaration of having made no prior voluntary dismissals was inapplicable to the plaintiff's subsequently-filed complaint, because that complaint was filed after the passage of a revised version of the statutory provision which contained no such declaration requirement. The *Jackson* court also held that the principle of res judicata is inapplicable to render a plaintiff's voluntary dismissal--which is a non-final order--a final order. In practical terms, this meant that the plaintiff was not barred, by res judicata, from filing a complaint after having voluntarily dismissed a complaint after the court had granted a Section 2-615 motion to dismiss.

Practical Implications. The balancing act of a decision whether to voluntarily dismiss has perplexed attorneys, especially in recent years with the uncertainties of case law less than clear as to the ramifications of a voluntary dismissal. It is especially critical to keep abreast of the ever-changing landscape of case law on the subject of voluntary dismissals and of related issues such as notice and service.

Recent Related Case Law. Over the past year, several key decisions have addressed a plaintiff's rights to voluntarily dismiss and to re-file within one year. In its *Case v. Galesburg* decision, 227 Ill. 2d 207, 880 N.E.2d 171 (2007), the Supreme Court held that the one-year window of time, set forth in Section 13-217 of the Code of Civil Procedure, within which a voluntarily dismissed complaint may be re-filed is an absolute right and which must be protected. The *Case* court held, as did the *Hatchett* court, that the window of time between a voluntary dismissal and a re-filing must not be considered in assessing whether there was diligence in service under Supreme Court Rule 103(b).

More recently, the Illinois Supreme Court has addressed the evolving question of whether the legislative amendments to Section 2-622, passed after the *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 689 N.E.2d 1057 decision, re-enacted the pre-*Best* version of Section 2-622. *O'Casek v. Children's Home & Aid Society*, 229 Ill. 2d 421, 892 N.E.2d 994 (2008).

Critical to the *O'Casek* opinion was its overruling to the recent Fourth District cases of *Cargill v. Czelatdko*, 353 Ill. App. 3d 654, 818 N.E.2d 898 (4th Dist. 2004) and *Crull v. Sriratana*, 376 Ill. App. 3d 803, 878 N.E.2d 753 (4th Dist. 2007). The *Cargill* court had found that the 1998 legislative amendments to Section 2-622 which became effective following the Supreme Court's landmark decision in *Best* reenacted the procedural requirements of Section 2-622 requiring identification of the 2-622 reviewer, and requiring an affidavit that no prior voluntary dismissal has been taken. The *Crull* court held that the 2-622 reviewer must be licensed and identified or dismissal with prejudice could result.

The Fifth District had addressed one aspect of diligence as applied to notice of a voluntary dismissal in *Smith v. Bartley*, 364 Ill. App. 3d 725, 847 N.E.2d 642 (5th Dist. 2006). In *Smith*, the court found that notice of a voluntary dismissal need be provided to only those parties (or their counsel) who have actually appeared in the action. The *Smith* court proclaimed a plaintiff's right to voluntarily dismiss within one year as virtually unfettered, so long as the requirements of 735 ILCS 5/2-1009(a) are met. The *Jackson* court's decision gives new hope to the attorney contemplating a voluntary dismissal because of difficulties obtaining the necessary 2-622 report that there will still be a one-year window of time to muster the necessary information and support.

CROSS REFERENCES: 735 ILCS 5/2-615; 5/2-619; 5/2-622; 5/2-1009; LexisNexis Illinois Forms and Illinois Checklists (Civil; pleadings and motions).

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Brazas on Hanson-Suminski v. Rohrman Midwest Motors, Inc.

2009 Emerging Issues 3355

Be Careful What You Wish For: Consumer Fraud Act Claims Beware. *Brazas on Hanson-Suminski v. Rohrman Midwest Motors, Inc.*

By Susan Brazas

February 6, 2009

SUMMARY: Recently the Illinois Supreme Court continued its recent trend of review of cases under the Illinois Consumer Fraud Act. Although Illinois is not known as an extremely consumer-friendly state compared to some, in the recent case of *Hanson-Suminski*, the Illinois Supreme Court scrutinized the statements of a salesman of used vehicles and gave teeth to the Consumer Fraud Acts prohibition against deceptive statements by sellers.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: FIRST DISTRICT AFFIRMS JURY VERDICT AGAINST USED CAR SELLER FOR STATEMENTS CLAIMING LACK OF KNOWLEDGE OF PRIOR CRASHES.

In *Hanson-Suminski v. Rohrman Midwest Motors, Inc.*, 898 N.E.2d 194, 325 Ill. Dec. 461 (Nov. 7, 2008), the First District Appellate Court affirmed a jury's verdict and the trial court's judgment on a case filed on theories of common-law fraud and the Illinois Consumer Fraud Act, found at 815 ILCS 505/1 *et seq.* The Court declined to adopt the defendant car sales company's reasoning that allowing both a jury verdict and the trial court's judgment wrongly provided the plaintiff with a double recovery. Instead, the Appellate Court pointed out, the plaintiff was not being given a double recovery, but instead the judgment would be taken against the amount of the jury verdict.

Similarly, the First District disagreed with the defendant's argument that to allow the case to proceed under both a common-law fraud theory and a statutory basis under the Consumer Fraud Act was error under the doctrine of election of remedies. The Court also found that the jury's verdict was not against the weight of the evidence, and found that the court's judgment was not clearly erroneous. Lastly, the Court remanded the case to the trial court so that the plaintiff could petition for fees associated with defending herself in the appellate court, as she remained the prevailing party.

Practical Implications. Many an attorney wrestles with the decision of just how much argument to include in a post-trial motion. Even though in some instances the less is more approach is the best course, in this area extreme caution must be exercised. Specifically, the *Hanson-Suminski* Court found that it was not enough that the defendant had raised various points of argument during briefing in the trial court, but that instead a single post-trial motion, addressing all issues to be raised on appeal, was required, pursuant to 735 ILCS 5/2-1202(b) and Illinois Supreme Court Rule 366(b)(2)(iii). Thus, attorneys need to fully advise their clients that the preserving of issues on appeal via post-trial

motions with be a critical yet time-consuming and labor-intensive process.

Another recent Illinois Supreme Court case which contains a thorough analysis of the Consumer Fraud Act and its implications is *Imperial Apparel, Ltd. v. Cosmos Designer Direct, Inc.*, 227 Ill. 2d 381, 882 N.E.2d 1011 (2008). Note that the Consumer Fraud Act creates a broader scope of liability than does common-law fraud, and under the former theory plaintiffs need not prove all elements of a common-law fraud claim. This can be potentially more advantageous for a plaintiff, depending on the circumstances.

Strategic Considerations. This holding illustrates the real risk posed to attorneys who bring an appeal of a Consumer Fraud Act case. If the opposing party was the prevailing party at trial and, upon the appellate court reaching its decision, remains the prevailing party, then that party may petition the court for its attorneys fees. In the *Hanson-Suminski* case, the court allowed the plaintiff to file a supplemental petition for fees upon remand, citing *Check v. Clifford Chrysler-Plymouth of Buffalo Grove, Inc.*, 342 Ill. App. 3d 150, 166 (2003). Thus, counsel are well advised to caution clients that even if the trial courts ruling seems erroneous, a significant risk remains that the appellant who does not prevail will have to pay a significant sum for the winning partys attorneys fees. In the *Hanson-Suminski* case, the plaintiff had been awarded just over \$29,000 in attorneys fees. This amount was significantly less than the \$7000 or so award against the defendant under the common-law fraud and statutory actions. Note that even though technically the trial court must first make a threshold finding of bad faith by the party filing the appeal, *Krautsack v. Anderson*, 223 Ill. 2d 541, 861 N.E.2d 633 (2006), the *Hanson-Suminski* court makes no mention of this finding. Naturally, the attorney considering an appeal of a Consumer Fraud Act action will want to evaluate carefully the merits and problems of the case before proceeding to appeal.

CROSS REFERENCES: 735 ILCS 5/2-1202(b); Illinois Supreme Court Rule 366(b)(2)(iii); LexisNexis Illinois Forms and Illinois Checklists (Civil; pleadings and motions).

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Brazas on Ready v. United/Goedecke Services

2009 Emerging Issues 3356

Whose Fault is it, Anyway? A Look at the Contribution Act in the Context of a Partial Settlement. Brazas on Ready v. United/Goedecke Services

By Susan Brazas

February 6, 2009

SUMMARY: Recently the Illinois Supreme Court addressed the issue of whether the fault of non-settling defendants is to be apportioned when one or more defendants remain in a case at trial. In the case of *Ready v. United/Goedecke Services*, the Court clarified the apportionment question by a thorough analysis of the Illinois Contribution Act.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: ILLINOIS SUPREME COURT HOLDS THAT JURY VERDICT FORM WILL NOT INCLUDE APPORTIONMENT OF FAULT OF SETTLING DEFENDANTS.

In *Ready v. United/Goedecke Services*, 2008 Ill. LEXIS 1439, No. 103474 (Nov. 25, 2008) the Illinois Supreme Court interpreted the Illinois Contribution Act for the first time since its decision of five years prior in *Board of Trustees v. Coopers & Lybrand*, 208 Ill. 2d 259, 803 N.E.2d 460 (2003). In *Coopers & Lybrand*, the Court reversed the appellate court in concluding that the harm was indivisible and therefore could not be divided into portions, separately attributable to each defendant. Because the damages claimed against the defendants were exactly the same as, and indivisible, the defendant remaining in the case at trial was entitled to a setoff in the full amount of the settlement of the other defendant.

The *Ready* Court identified the central issue of its analysis as whether those defendants who have settled are defendants sued by the plaintiff within the meaning of the Illinois Contribution Act, 735 ILCS 5/2-1117. The opinion includes a painstakingly comprehensive analysis of the language, context, and history of the Contribution Act. The plurality opinion also acknowledges, in a strikingly unusual way, the vastly different conclusion as to the crucial statutory language among members of its own Court. The *Ready* Court concluded that the statutory language of Section 2-1117 is ambiguous. The bottom line key holding of *Ready* is: We hold that section 2-1117 does not apply to good-faith settling tortfeasors who have been dismissed from the lawsuit.

Practical Implications. This opinion underscores the importance of obtaining a good-faith finding whenever reaching a settlement. This should be done by filing a Motion for Good-Faith Finding and to Approve Settlement, and all parties should be given notice of the hearing and of the Motion.

If the settlement is an unconventional one as was discussed in the recent case of *Davis v. American Optical Co.*, No. 5-07-0385 (5th Dist. Dec. 3, 2008), then a good-faith finding is especially critical. However, the *Ready* holding puts pressure on the plaintiffs attorney to make a careful analysis of a proposed settlement, knowing that each setoff will reduce the bottom line total amount which the plaintiff will receive. Thus, when getting the clients authority to settle, both plaintiff and defense counsel should factor in the holding of *Ready* before giving the client the take-home figure for various settlement

Strategic Considerations. The attorney considering settlement should be careful to gather complete information about all possible deductions from a settlement or verdict before making the final decision of whether to settle or proceed to trial. Among the considerations, for those inclined to proceed to trial, is the importance of fully informing the client of the risk of an unexpected verdict dependent on whether co-defendants settle. A lone defendant could end up bearing the brunt of a verdict if all other defendants have settled, as there will be no opportunity to put before the jury information about the conduct or potential liability of the settling defendants. Such issues will undoubtedly be the subject of motions in limine, as was the case for the *Ready* litigation. Obtaining the courts rulings on such key issues in advance of trial, when possible, will aid the attorney and client in making the important decision of whether to settle or proceed to trial.

Cautions for a Complete Record. The *Ready* Court opinion gives pause to counsel as to the importance of including all documents remotely related to the issues and arguments. In particular, the *Ready* Court noted that it was unable to analyze whether the appellate court erred in applying the doctrine of procedural default, because the defendant failed to file in the Supreme Court the appellate court briefs pursuant to Illinois Supreme Court Rule 318(c).

Thus, counsel cannot assume that the Illinois Supreme Court has at hand the appellate court briefs filed by the parties; instead, any pertinent briefs must be affirmatively brought to the Supreme Court by a party filing them there, per Rule 318 (c). Further, the *Ready* court cautions against a party giving short shrift to an issue by addressing it only in a summary ending portion of a brief. Instead, all issues should be explored, with reasons and citations, in the argument portion of the briefs, pursuant to Illinois Supreme Court Rule 341(h)(7). Counsel should thus be cautious to address, within the substantive portion of any appellate brief, all potential issues.

CROSS REFERENCES: 735 ILCS 5/2-1117, 2-1118; Ill. S. Ct. R. 314, 371; LexisNexis Illinois Forms and Illinois Checklists (Civil; pleadings and motions).

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Ohio: Flying High With ESI

2009 Emerging Issues 3254

David P. Pierce on Electronically Stored Information -- Ohio: Flying High with ESI.

By David Pierce

January 5, 2009

SUMMARY: This Emerging Issues Analysis summarizes the legal developments in Ohio related to electronically stored information ("ESI") or "electronic discovery", as it is called in Ohio state courts. This commentary emphasizes Ohio state law in this emerging area, referencing federal precedent as necessary to guide state practice, and treats ESI evidentiary issues and new substantive claims that merit the practitioners attention.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: What is ESI, and why should Ohio lawyers care? Ohio's Rules of Civil Procedure recently were amended to create a framework for discovery involving electronically stored information (ESI). Revised Rules 16, 26, 33, 34, 36, 37, and 45 apply to all cases pending on or filed on or after July 1, 2008, with the usual exception for unfair or impracticable application to pending cases per Ohio R. Civ. P. 86 (EE). As a general proposition, Ohio's new rules largely adopt the changes made in the 2006 Amendments to the Federal Rules of Civil Procedure. Ohio lawyers who do not practice in federal court (or federal court practitioners who have avoided ESI issues) have the opportunity and obligation to familiarize themselves with the new rules and the special issues involved in dealing with ESI. This commentary will describe ESI, identify some of the challenges in managing ESI, summarize the changes to the rules, and address some emerging ESI trends and issues.

What is ESI?

Electronically stored information generically describes all information created, modified, transmitted, and stored in digital form, thereby requiring a computer (or other hardware) and software to access and use it. Revised Rule 34 includes a non-exhaustive definition that includes writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained. Conceptually, ESI is information that we all interact with every day when using electronic devices like computers and cell phones.

Why is ESI different from other discoverable information?

ESI's ethereal nature diverges from conventional discovery materials in terms of quantity, form, and cost. Presently, approximately 93% of all documents are created electronically. Redgrave, Jonathan M., *The Sedona Principles: Best*

Practices, Recommendations & Principles for Addressing Electronic Document Production. Annotated Version. BNA Books (2007). Stand alone desktop and laptop computers commonly hold multiple gigabytes of information. Each gigabyte is equal to upwards of 500,000 pages. Larger organizations commonly store terabytes of information; a single terabyte equals approximately five hundred million typed pages. *Committee on Rules of Practice and Procedures of the Judicial Conference of the United States, Report of the Civil Rules Advisory Committee*, at 3 (Washington, DC August 2004). Given the abundance and volume of ESI, traditional means of preservation and production such as reviewing each page of information before production, are often impractical if not impossible.

The difficulty of reviewing electronic information in advance of production is leading to new practices, including procedures for designating electronic records as privileged *after* producing them (see Ohio R. Civ. P. 16 (9), which invites the parties to establish such procedures). To illustrate, assume that an employer sues a former employee for breaching non-competition covenants and the employer requests a forensic image of the hard drive on the employee's new work computer. The parties can agree to allow a third-party service provider to image the hard drive, index it, and run certain searches for information. Before the search results are provided to the new employer, the employee and the employee's counsel receive the results from the service provider and have the opportunity to designate certain documents in the results as privileged. This paradigm diverges sharply from the tried and true method of collecting, reviewing, redacting, and producing paper, but provides for the exchange of truly massive quantities of information, while still preventing waiver of privilege.

In addition to the challenges attendant to the fast growing volume of ESI, the form that ESI can take also leads to special challenges. ESI includes far more than conventional documents like letters, reports, or memoranda and e-mails; it goes beyond mere paper copies of such documents. Some forms of ESI leave little or no paper trail. One example is the creation of an airline e-ticket whereby no permanent record exists following the time the ticket is printed. *Conference of Chief Justices. Guidelines for State Trial Courts Regarding Discovery of Electronically Stored Information*, at vi. (August 2006). Richard Van Duizend Reporter.

ESI also includes metadata. Metadata is commonly described as data about data and is defined as a set of data that describes and gives information about other data. *Scotts Co. LLC v. Liberty Mut. Ins. Co.*, No. 2:06-CV-899, 2007 U.S. Dist. Lexis 43005, at *11 n.2 (S.D. Ohio June 12, 2007) (citing Oxford English Dictionary).

Metadata is inherent to the interaction between computer programs and data files. Conceptually, among other things, metadata can be compared to a news report that accompanies every document, spreadsheet, or email on a computer. The metadata commonly answers the classic reporters questions: who, what, where, and when because it typically establishes when a document was created, by whom, and when it was last saved. But metadata news reports can provide much more information, including authenticity of a document, who modified the document, how they changed it, whether they explained the reason for their change, who reviewed the document, how many drafts were created, how much time it took to edit, when it was last accessed or opened, and other inside information. If you happen to have a document open while you are reviewing this article, you could click on the File pull-down menu, and select Properties to see some of your documents metadata. Some metadata can be modified by the user, and some cannot. In some cases, documents can be cleaned and metadata removed to deprive the person reviewing the file access to such inside information.

While some metadata is easy to view, other metadata is hidden or embedded. *The Scotts Company, supra*, at *11 n.2. Traditional document production (i.e. sending photocopies) will not reveal this metadata. While metadata is not specifically mentioned in the Ohio Rules of Civil Procedure or the corresponding federal rules, the federal rule drafters clearly contemplated that metadata was within the definition of ESI. *Minutes of April 15-16, 2004, Civil Rules Advisory Committee Meeting*, p.13, available at <http://www.uscourts.gov/rules/Minutes/CRAC0404.pdf>.

To illustrate the real life value of metadata, consider two examples of its possible use. First, in a trade secrets case, a former employee possesses information on his personal computer that is considered by his former employer to be trade secrets. The employer obtains the information in its native format by imaging the employee's hard drive. The

metadata reveals that someone accessed the information after the employees separation from employment. The employees possession of the information and his possible interaction with the information revealed through metadata may be innocent or inadvertent, but the former employer is likely to attempt to use such information as evidence to demonstrate misappropriation of its trade secrets.

Second, in a case involving expert testimony, assume that the testifying experts files are produced electronically, including an electronic version of his report. The metadata reveals that the author of the report is a person who is not testifying, and who does not even work for the same firm. Further, the metadata reveals that the report is based upon a template. The opposing party, with such information in hand, has advanced its ability to attack the witnesss credibility (i.e. the witness may be relying upon someone elses opinions and a form report) merely by obtaining and reviewing the metadata.

In addition to the substantial and growing volume of ESI and the varied forms that ESI and metadata can take, a third major challenge associated with ESI is the cost of maintaining it and producing it. In one case, it was necessary to restore approximately 200 backup tapes as part of discovery. The cost to do so was estimated at \$9.75 million and the court required the party seeking the information to pay for the production, except for the costs of screening the data for relevance and privilege. *Rowe Entmt, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 424-25 (S.D.N.Y. 2002). While *Rowe* is an extreme example, Ohios ESI provisions force practitioners to consider and question whether they and their clients are equipped to handle large scale ESI productions without the assistance of an outside vendor. See *Oce Business Services Survey*, available at http://www.obs-innovation.com/news_view.aspx?docid=165 (estimating 57% of law firms surveyed believe clients are not ready to meet E-discovery demands). While these vendors often facilitate more effective production and review of ESI, there is an added cost to the client associated with the use of any such consultant.

How have the rules changed?

The 2008 Ohio Amendments to the Rules of Civil Procedure lend a framework to the problem of managing ESI in litigation. Yet, the rules do not, and perhaps cannot, answer all questions that are likely to arise.

Rule 16, Pretrial Procedure:

Rule 16 now includes two additional topics for discussion at pretrials:

(8) The timing, methods of search and production, and the limitations, if any, to be applied to the discovery of documents and electronically stored information;

(9) The adoption of any agreements by the parties for asserting claims of privilege or for protecting designated materials after production;

Ohio R. Civ. P. 16. The rule is permissive rather than mandatory.

By way of comparison, the Federal Rules of Civil Procedure provide for a mandatory discussion relating to the disclosure or discovery of electronically stored information at least 21 days prior to a scheduling conference or the time that a scheduling order is issued. *Fed. R. Civ. P. 26 (f)*.

Some courts such as the Northern District of Ohio have even adopted local rules or orders concerning the preservation of such evidence. N.D. Ohio LR-Appendix K, Default Standard for Discovery of Electronically Stored Information. Best practices dictate that counsel should address with each other the preservation, search protocol, and production of ESI early on in the process and memorialize any such agreements in the form of a court order. Over time, Ohio courts are likely to adopt or modify local rules for ESI, and rules like the ones used in the Northern District of Ohio may serve as models.

Rule 26, General Provisions Governing Discovery:

Rule 26 has been amended to (a) include ESI within its descriptions of information that is subject to discovery requests, (b) regulate the burden of producing ESI, and (c) mitigate the effect of inadvertent production of privileged documents.

ESI, like other forms of discoverable information, need not be produced when the production imposes undue burden or expense. Ohio R. Civ. P. 26(B)(4). The party resisting production must show that the information is not reasonably accessible because of undue burden or expense. Ohio R. Civ. P. 26(B)(4). Neither the Ohio Rules of Civil Procedure nor their federal counterpart specifically defines the term reasonably accessible.

The Federal Rules Advisory Committee noted certain particular problems that often lead to information not being reasonably accessible without undue burden or expense. Examples include database information that requires additional reprogramming to retrieve information stored on a medium that must be converted to another form before it is searched, deleted data that requires forensics to recover, and legacy data from obsolete systems. Federal Rules Advisory Committee Final Report, Standing Committee (2005), at 42.

In *Zubulake v. UBS Warburg L.L.C.*, 217 F.R.D. 309, 321-322 (S.D.N.Y. 2003), the court listed three categories of information that are normally reasonably accessible. These categories were as follows: 1) active on-line data (i.e. hard drives); 2) near-line data (typically, robotic storage devices); and 3) off-line storage/archives (removable optical disks or magnetic tape media which can be labeled and stored in a shelf or rack). Conversely, the Court noted two additional categories that likely are not accessible: back-up tapes and fragmented or damaged data. *Zubulake v. UBS Warburg L.L.C.*, 217 F.R.D. 309, 321-322 (S.D.N.Y. 2003).

The most recent paper published by the Sedona Conference on the topic of reasonable accessibility suggests that additional factors should be considered: transient complexity, hidden complexity, extraction complexity, preservation complexity, search complexity, and dispersion complexity. *The Sedona Conference Commentary on Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible*, at 12 (July 2008). Federal courts have already taken the lead in analyzing more than mere availability of data and considering the complexities of making data accessible, retrieving it, and reviewing it.

To illustrate, an individual tagged image format file (TIFF), which is essentially a picture, may be located on a file server that is easily accessed, but because the TIFF is not a searchable format, it is difficult to locate the document. *The Sedona Conference Commentary on Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible*, at 11 (July 2008). Cf. *Goodbys Creek, LLC v. Arch Ins. Co.*, No. 3:07-CV-947-J-34HTS, 2008 U.S. Dist. LEXIS 79660, at *8 (M.D. Fla. Sep. 15, 2008) (requiring that documents which were produced as non-searchable TIFF files be produced in searchable format or that receiving party be given software to search the files); Connor Crowley, *Digital Discovery & E-Evidence Report*, dated November 1, 2007 (criticizing N.D. Ohio LR-Appendix K, Default Standard for Discovery of Electronically Stored Information for allowing production of non-searchable imaged files).

The practitioner is advised to learn about the various media that a client uses to store data as well as how difficult it would be to retrieve and search through ESI. If the information is difficult to retrieve solely due to a party's own unique proprietary system, this fact would seem to militate against a finding of inaccessibility. Another consideration is the number of different devices that need to be searched. In an appropriate case, courts may limit the search to groups of key employees or require that only a limited number of search terms or search software be used. *Zubulake v. UBS Warburg, L.L.C.*, 217 F.R.D. 309, 324 (S.D.N.Y. 2003) (court ordered sampling of 5 of 94 backup tapes to see if they contained relevant information). The sooner the lawyer understands these problems, the sooner they can be discussed with opposing counsel or brought before the court.

If court intervention is needed, the party requesting the information should be aware that the scope of discovery is more limited than in other contexts. The Staff Notes to Rule 26 make it clear that the Rule attempts to temper the virtually unlimited discovery traditionally authorized by Ohio Rule of Civil Procedure 26(B)(1). These potential problems associated with very broad discovery are particularly acute where ESI is involved.

Before the 2006 Amendments to the Federal Rules of Civil Procedure, several different tests were used to determine who should bear the costs of producing ESI. These tests were explained by the court in *Hagemeyer N. Am., Inc. v. Gateway Data Sciences Corp.*, 222 F.R.D. 594 (E.D. Wis. 2004). One test was a straightforward Cost Benefit Analysis. The theory underlying this test is that a party who wants discovery will pay fair value for it. A second test utilized by the courts was the Marginal Utility Test set forth in *McPeck v. Ashcroft*, 212 F.R.D. 33 (D.D.C. 2003). The theory behind this standard was that the more likely it is that the backup tape contains information that is relevant to a claim or defense, the fairer it is that the responding party search at its own expense.

Both of these tests contained inherent strengths and weaknesses. Therefore, a more sophisticated multi-factored test including eight factors was set forth by the court in *Rowe Entmt, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002). The first *Zubulake* decision stated that the *Rowe* test was the gold standard at the time. *Zubulake*, 217 F.R.D. at 320. Sometimes, however, even the gold standard can be improved. *Zubulake* established a weight-ordered seven-factor test:

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production, compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties of obtaining the information.

Zubulake, 217 F.R.D. at 321.

After a party resisting discovery has shown undue burden or expense, the requesting party may seek the information anyway for good cause. Ohio's Amended rule 26(B)(4) expressly incorporates several of the foregoing *Zubulake* factors for determining whether good cause exists as follows:

- whether the information is unreasonably cumulative or duplicative;
- whether the information sought can be obtained from a less costly source;
- whether the party seeking the discovery has had ample opportunity to obtain the discovery in the action; and
- whether the burden or expense of the proposed discovery outweighs the likely benefit.

In considering the last factor, the court can take into account other concepts at play in *Zubulake* such as the parties' resources and the amount in controversy. Further, the court has broad discretion in specifying the format, extent, timing, and allocation of expenses pertaining to the discovery. Thus, revised Rule 26(B)(4) encompasses two burden shifting tests: undue burden or expense to be established by the producing party versus good cause to be established by the requesting party. In addition to this burden shifting analysis, moreover, Rule 26 now includes a clawback provision to help deal with the problem of inadvertent production.

Lawyers producing ESI may struggle with the production of electronic media because they lack confidence that all privileged material has been removed prior to production. This phenomenon is a function of the volume of information to be produced and the time and expense required to review these materials.

The new clawback provision not only addresses the issue of inadvertent production of privileged documents in ESI, but also covers inadvertently produced conventional documents. According to the rule, a party receiving an inadvertently produced document must return, sequester, or destroy it after receiving notice from the producing party.

Ohio Rule Civ. P. 26 (B)(6)(b). This rule is consistent with new Ohio Rule of Professional Conduct 4.4(b) which requires a recipient who knows or reasonably should know that the document was inadvertently sent to promptly notify the sender of the same.

While such a clawback rule enables a party to regain possession of its materials, the remaining question is whether a subject matter waiver has occurred. In this regard, the new Ohio rule may not provide as much protection as the federal rules given the adoption of *Federal Rule of Evidence 502*. Pursuant to *Federal Rule of Evidence 502*, inadvertently producing a document does not operate as a waiver of the attorney-client or work product privilege provided that reasonable steps were taken to prevent disclosure and the holder of the privilege took reasonable steps to rectify the error. Reasonable steps include following *Federal Rule of Civil Procedure 26(b)(5)(B)*.

RULE 34. Producing documents, electronically stored information, and tangible things, or entering onto land, for inspection and other purposes:

Rules 33 and 34 now include references to ESI. The primary change to Rule 33 provides the party answering interrogatories with the option to produce business records, and business records now include ESI by definition.

In addition to the clarified scope now embodied in Rule 34 (the inclusion of ESI), the revised rule potentially gives counsel more influence over the form of documents that will be received. The requesting party may specify the form or forms in which electronically stored information is to be produced, but may not require the production of information in more than one form. Ohio R. Civ. P. 34 (B). If a form is specified, then the responding party must produce it in that form unless a proper objection is made. Ohio R. Civ. P. 34 (B)(1). If no form is specified, the responding party has the option to produce ESI in the form that it is ordinarily maintained or in any form that is reasonably usable. Ohio R. Civ. P. 34 (B)(3). Rule 45 includes similar revisions.

The new procedure authorized by Rule 34 has important consequences for the practitioner. To begin with, before requesting ESI, the lawyer should, to the extent possible, become familiar with the each partys information systems, and how documents from such systems can be integrated with the practitioners own tools. Although the federal rules require a discussion between counsel in connection with a 26(f) conference, such a discussion in a state court case may have to be initiated informally with opposing counsel, either with or without technical representatives present. If an opposing corporate party is unwilling to engage in such informal discussions, a party should consider deposing a corporate technical representative in accordance with Ohio Rule 30(B)(5) before initiating written discovery requests.

Once the lawyer understands how an opposing party maintains its ESI, the lawyer can request the information in an appropriate form. The most potentially rich ESI is likely to be ESI in its native form. If the document to be produced was created using Microsoft Word, for example, then the native form would be the familiar *.doc form of the document.

Native documents are likely to have most of their metadata intact. Native documents are usually text-searchable, and may provide cut and paste ability. Further, native form usually consumes the least amount of hard drive space. To review native form documents, however, the recipient must have compatible software.

The responding party should consider objecting to requests to produce ESI in native form, especially if the requesting party has not agreed to produce its own documents in native form. Additionally, native form may not necessarily be locked to prevent changes by the recipient. Moreover, it is difficult to Bates stamp native form documents without interfering with document metadata. As a practical matter, when electronic documents become paper exhibits, it is difficult to make sure that everyone is working with the same file, and that the file is authentic.

If a requesting party fails to specify the form of the production at the outset, it may be difficult later on to attempt to obtain metadata or another form of production provided that the responding party identifies in advance the form in which it intends to produce the documents. See *Scotts Co., supra*, at *12-14. A party may produce documents in any form that is reasonably useable if the request for production does not specify the form. Common forms of production include portable document files (PDF) or TIFF files. A practitioner who uses a PDF can Bates stamp the file. Moreover,

it is possible to create searchable PDF files.

Even if a searchable PDF file is created, such a file will not necessarily contain metadata (or at least not the original metadata). Therefore, the metadata will need to be extracted and produced separately if the parties agree to produce it or if the court orders such a production. At present, the Northern District of Ohio Default Standard requires a showing of particularized need for producing ESI in native format. N.D. Ohio LR-Appendix K, Default Standard for Discovery of Electronically Stored Information at 6.

Recent decisions have also declined to require the production of metadata. *See, e.g.,*

Mich. First Credit Union v. Cumis Ins. Society, Inc., No. 05-74423, 2007 U.S. Dist. LEXIS 84842, at *5 (E.D. Mich. Nov. 16, 2007); *Ky Speedway LLC v. Nascar*, No. 05-138 WOB, 2006 U.S. Dist. LEXIS 92028, at *24 (E.D. Ky. Dec. 18, 2006); *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 651 (D. Kan. 2005) (stating emerging standards of electronic discovery appear to articulate a general presumption against the production of metadata).

While the trend in published decisions may appear somewhat hostile towards the production of metadata, the Sedona Conference has recently suggested that organizations evaluate the potential benefits of retaining metadata (whether or not it is produced) to ensure that documents are authentic and to preclude the fraudulent creation of evidence. *See The Sedona Principles* Second Edition (2007) at Comment 12 (B). This need for authenticity may lead courts to require the production of at least a limited number of fields of metadata.

In addition to disputes over the form of ESI to be produced, a party requesting discovery needs to consider whether it wants to obtain both active and residual ESI or just active ESI. Active ESI is can be defined as ESI kept in the ordinary course of business, while residual ESI can be defined in the discovery request to include deleted and overwritten files. Residual ESI is more expensive to produce and courts may be more likely to shift the costs of such a production to the requesting party. Likewise, some vendors suggest specifically requesting certain computer artifacts in a particular case. These artifacts can include Windows registry history showing all software and external hardware devices connected to the computer; Master File Tables identifying the file structure and folders on a computer; Internet History Files which will disclose the internet activities of individuals and link files which may show usage of files stored on external storage devices. Scott Roseland, Cyberinfo@cybercontrols.net E-mail bulletin dated 9/23/2008.

Rule 37. Failure to Make Discovery: Sanctions:

Ohio Rule of Civil Procedure 37 now provides that absent exceptional circumstances, a court may not impose sanctions on a party for losing electronically stored information as the result of a routine, good-faith operation of an electronic information system. Ohio R. Civ. P. 37(F). The Rule lists 5 factors that a court may now consider in deciding whether to impose sanctions:

- Whether and when any obligation to preserve the information was triggered;
- Whether the information was lost as a result of the routine alteration or deletion of information that attends the ordinary use of the system in issue;
- Whether the party intervened in a timely fashion to prevent the loss of the information;
- Any steps taken to comply with any court order or party agreement requiring preservation of specific information;
- Any other relevant facts.

The best way to avoid a dispute as to whether the clients actions were routine or were in good faith is to become familiar with a clients information systems, document retention policy, and to make sure that an effective litigation hold is timely implemented.

The commentary to Rule 37 states that it does not displace existing law regarding preserving documents (a litigation hold). The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, at *8 (S.D.N.Y. 2003) (quoted in *Kemper Mortgage, Inc. v. Russell*, No. 3:06-CV-042,

2006 U.S. Dist. LEXIS 20729, at *3 (S.D. Ohio Apr. 18 2006). This duty often arises before suit or even before an administrative charge is filed and the cost of simply preserving ESI is the responsibility of the party who owns it. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, at *5-6 (S.D.N.Y. 2003). Litigation holds also are required in other settings like governmental investigations and audits. *The Sedona Conference Guidelines* at 44.

A party who fails to preserve documents can be subject to an independent claim for spoliation of evidence. In *Ed Schmidt Pontiac-GMC Truck Inc. v. DaimlerChrysler Motors Co.*, 538 F. Supp.2d 1032, 1034-37 (N.D. Ohio 2008), the court allowed an amended complaint under Ohio law for spoliation of evidence due to allegation that a proper litigation hold was not in place after the complaint was filed and based upon allegations of intentional destruction of evidence by replacing computer hard drives.

Even in the case of a litigation hold, however, not all documents need to be retained. The failure to preserve evidence does not warrant sanctions when the missing evidence could not be relevant *E.g.*, *Hildreth Mfg. v. Semco*, 151 Ohio App. 3d 693, 2003-Ohio-741 (Marion Cty. 2003) (failure to preserve hard drives did not warrant sanctions where there was no reasonable possibility that the missing hard drives contained evidence of the theft of trade secret information); *Kemper*, at *3; see also *The Sedona Conference Commentary on Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible* at 7 (July 2008) (proposing that ESI need not be preserved absent an agreement or court order unless there is a reasonable belief that it contains potentially relevant information that is likely to be discoverable).

In addition to spoliation claims, federal courts in Ohio have imposed significant sanctions against parties who fail to preserve documents. See, e.g., *Ferron v. Search Cactus*, L.L.C., No. 2:06-CV-327, 2008 U.S. Dist. LEXIS 34599, at *10 (S.D. Ohio Apr. 28, 2008) (allowing defendant access to plaintiffs computer systems in part because plaintiff failed to fulfill his duty of preserving information because of pending or reasonably anticipated litigation); *Grange Mut. Cas. Co. v. Mack*, Nos. 07-5097/07-5387, 2008 U.S. App. LEXIS 6113, at * 11-12 (6th Cir. Mar. 17, 2008) (affirming default judgment for a variety of electronic and paper discovery abuses including changing office computers and refusing to turn over other computers).

In addition to making sure that the clients own documents are preserved, the lawyer should consider putting the opposing party on notice as soon as a dispute has arisen and advising the adverse party to institute its own litigation hold on ESI and relevant documents. Likewise, the lawyer should consider issuing a preservation subpoena to non-parties. Such a subpoena may be necessary when the non-party does not have notice of the litigation or there is a danger that a corporate party may destroy ESI by performing routine back-up procedures without notice of the suit. *In re: Natl Century Fin. Enterprises, Inc.*, 347 F. Supp. 2d 538, 542 (S.D. Ohio 2004).

Conclusion. Given the rapidly evolving area of ESI and the uncertainty confronting lawyers on a variety of fronts, best practices dictate that counsel educate themselves about their own ESI management abilities as well as their clients capabilities and practices, and then promptly seek agreement regarding the scope and form of production, privilege review, and cost shifting. Such agreements can be memorialized in the form of a court order.

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Transfer Venue: Lonny Hoffman on In re Volkswagen of America, Inc.

2009 Emerging Issues 3274

Transfer Venue: Lonny Hoffman on In re Volkswagen of America, Inc.

By Lonny Hoffman

January 1, 2009

SUMMARY: The Fifth Circuit in *In re Volkswagen of America, Inc.*, 545 F.3d 304 (2008) found that a trial judge in the Eastern District of Texas abused his discretion in not transferring a case to the Northern District of Texas. Lonny Hoffman, George Butler Research Professor of Law at the University of Houston Law Center, in this Emerging Issues Analysis discusses why this cases will likely be a key precedent in future battles over venue.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Legal Background. A majority of the Fifth Circuit in an important *en banc* decision has found that a trial judge in the Eastern District of Texas abused his discretion in not transferring a case to the Northern District of Texas when the only basis for laying venue in the Eastern District was that the defendant was subject to jurisdiction there. Finding that the district judge abused his discretion in denying the defendant's request for transfer, the Fifth Circuit's decision in *In re Volkswagen of America, Inc.*, No 07-40058, 545 F.3d 304 (5th Cir., Oct. 10, 2008) will likely be a key precedent in future battles over venue, not only for cases filed in the Eastern District of Texas but also for cases filed anywhere in the circuit in which transfer of venue is at issue. That's because the appellate court's opinion addressed both (i) the proper measure a federal district court should use in deciding a motion to transfer under 28 U.S.C. § 1404 and (ii) the circumstances in which mandamus is appropriately exercised to review a district court's decision whether to grant transfer under the convenience transfer statute.

After a traffic accident that killed a seven-year old girl and seriously injured other passengers, suit was filed against Volkswagen AG and Volkswagen of America, Inc., in the Marshall Division of the Eastern District of Texas. Plaintiffs alleged that design defects in the car were the cause of the accident. Suit was properly laid in the Eastern District because Volkswagen was subject to jurisdiction in the Eastern District and, thus, venue was proper under 28 U.S.C. § 1391(a)(1). There were no other connection between the case and the Eastern District.

Volkswagen sought transfer under 28 U.S.C. § 1404(a) to the Northern District of Texas, Dallas Division, but the trial judge denied the request. Volkswagen then sought a writ of mandamus, which an initial panel of the Fifth Circuit denied in a split opinion. Request for rehearing was successful and a second panel then reversed course, granting Volkswagen's petition and issuing a writ that directed the district court to transfer the case to Dallas. *In re Volkswagen of Am., Inc.*, 506 F.3d 376 (5th Cir. 2007). Plaintiffs then filed a petition for rehearing *en banc*. *In re Volkswagen of Am., Inc.*, 517 F.3d 785 (5th Cir. 2008).

District court's § 1404(a) ruling may be tested through mandamus, under limited circumstances. Writing for a majority of the Fifth Circuit, Judge Jolly first confirmed that mandamus is an appropriate means of testing a district court's § 1404(a) ruling, though he simultaneously emphasized that use of the writ should be quite limited. A writ should not issue to correct a mere 'abuse of discretion, but a writ is appropriate to correct a clear abuse of discretion,' he wrote. This distinction--between a mere 'and clear' abuse of discretion--may not susceptible to sharp definition in all cases, his opinion acknowledged. Nevertheless, *In re Volkswagen* makes clear that when a trial judge issues a patently erroneous ruling, 'mandamus is available.

Fifth Circuit finds clear abuse of discretion. How, then, did the district judge in this case reach a patently erroneous decision that amounted to a clear abuse of discretion? It seems that he set the bar too high. The judge had required Volkswagen to show that the § 1404(a) factors must substantially outweigh 'the plaintiffs' choice of venue. This was the proper standard, according to the district court, because the plaintiff's choice of venue is to be given a degree of weight in the § 1404 analysis. Thus, only if the balance of convenience and justice substantially weighs in favor of transfer should the plaintiff's choice of venue be trumped.

Plaintiff's choice of venue treated as burden of proof question. A majority of the Fifth Circuit concluded, however, that no special weight should be accorded to a plaintiff's choice of venue when there is no meaningful connection between it and the litigation. Instead, the plaintiff's choice of venue is to be treated as a burden of proof question rather than one of a presumption.' The court reached this conclusion by noting that the district court's standard may be right for *forum non conveniens* dismissals but is not the proper measure for transfers under § 1404. Because there was no meaningful factual connection with the Eastern District, and far greater connection to Dallas, the trial judge applied the wrong standard in deciding whether to grant transfer.

Thus, according to the majority, when it would not aid convenience to transfer, then it is appropriate to honor the plaintiff's choice of venue. However, when the transferee venue is clearly more convenient, a transfer should be granted. In this case, then, the district judge should have found that a transfer to the Northern District of Texas, Dallas Division, would be for the convenience of the parties and in the interests of justice. [It bears emphasizing here that the dissent sharply disagreed with this characterization of the litigation, noting that the plaintiffs' case involved design defect allegations and, thus, bore no greater connection to Dallas than to Marshall or to anywhere else in the state for that matter.]

Immediate impact on cases filed in Eastern District of Texas. The most immediate impact *In re Volkswagen* will have is on cases filed in the Eastern District of Texas that, like this one, have no obvious connection to the district other than that they are technically authorized by the general venue provisions in 28 U.S.C. § 1391. Thus, defendants who have been sued in the Eastern District and who seek a way out may find the Fifth Circuit's decision significantly aids their prospects of having transfer granted to another federal district court where suit might otherwise have been brought.

Case will stand as critical Fifth Circuit precedent. More broadly, *In Re Volkswagen* is likely going to be a critical precedent for cases filed throughout the circuit. The majority's decision seems to give a far greater role to the appellate courts to monitor transfer decisions by the district judge. Notably, this broader oversight role would appear applicable whether the trial judge denies the transfer request--as in *In re Volkswagen*--or grants it. To be sure, Judge Jolly emphasized that the writ is an extraordinary remedy and that appellate courts are not to replace a district court's exercise of discretion with [their] own.' Only clear abuses of discretion that produce patently erroneous results' are subject to hindsight review by a superior court.

Additional litigation burdens and delay are certain. Nevertheless, these cautionary words are not likely to provide much of a restraint for the party on the losing end of a transfer battle. The result is that what was once a decision largely left to the sound discretion of the trial judge is now likely going to be a much more heated battleground in the appellate courts. The majority's imprecise distinction between mere and clear abuses of discretion may or may not result in better determinations by an appellate court of what district constitutes the more convenient venue. It is certain to produce greater additional litigation burdens and delay, a point Judge King emphasized in dissent.

RELATED LINKS: For discussion of the weight to be accorded the plaintiff's original choice of venue

- Moore's Federal Practice (3d ed.), § 111.13[1][c]

For discussion of mandamus review of transfer orders, see

- Moore's Federal Practice (3d ed.), § 111.61

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Attempts to Defeat the Statute of Frauds Defense in Virginia: Recent Cases

2008 Emerging Issues 3191

Attempts to Defeat the Statute of Frauds Defense in Virginia: Recent Cases Professor Kent Sinclair and Gessner H. Harrison discuss the Supreme Court of Virginia's Opinions in *Moorman v. Blackstock, Inc.*, 276 Va. 64 (2008) and *Delta Star, Inc. v. Michael's Carpet World*, 276 Va. 524 (2008):

By Kent Sinclair and Gessner H. Harrison

December 21, 2008

SUMMARY: Professor Kent Sinclair and Gessner H. Harrison examine recent attempts to defeat the Statute of Frauds defense in Virginia in light of the important Supreme Court of Virginia's opinions in *Moorman v. Blackstock, Inc.*, 276 Va. 64 (2008) and *Delta Star, Inc. v. Michael's Carpet World*, 276 Va. 524 (2008).

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ARTICLE: In Virginia, the contract-based statute of frauds defense is largely embodied in two statutes: Va. Code § 8.2-201, which is a part of the Uniform Commercial Code as it has been adopted in Virginia and which applies to a contract for the sale of goods for the price of \$500 or more, and Va. Code § 11-2, the general statute of frauds, which embraces specific types of agreements traditionally recognized at common law and to which Va. Code § 8.2-201 does not otherwise apply. Both statutes require that a writing, signed by the party to be charged, exist in order for the agreement to be enforceable in an action brought in a Virginia court. However, a person desiring to avoid the bar to enforcement created by each statute can establish, using evidence of certain types of written communications relating to or concerning the agreement, that the bar to enforcement does not apply. Such a person could also establish that the bar to enforcement does not apply because the agreement has been partially performed. Finally, such a person could also attempt to show that, as a matter of equity, the party seeking to take advantage of the bar to enforcement is estopped from relying on the statute of frauds altogether. In two recent cases, *Moorman v. Blackstock*, 276 Va. 64 (2008) and *Delta Star, Inc. v. Michael's Carpet World*, 276 Va. 524 (2008), the Supreme Court of Virginia determined whether parties seeking to enforce agreements for the sale of real estate and for the sale of flooring materials, respectively, presented evidence sufficient to overcome the statute of frauds defenses asserted in each case, based upon, *inter alia*, evidence of written communications between the parties and evidence of part performance of the agreement. The Court also determined in one of these cases whether the party seeking to avail itself of the protection afforded by the statute of frauds was equitably estopped from asserting it as a defense. In reaching these determinations, the Court provides buyers, sellers, and their counsel valuable guidance concerning what evidence is considered insufficient to prevent the statute of frauds defense from being asserted, and what evidence is considered insufficient to overcome the defense. This Commentary examines the disputes that the Court resolved in these cases, highlights the principles of law that the Court relied upon to resolve each dispute, and discusses the impact of the holdings reached in each case.

Background.

Virginia Code Ann. § 8.2-201(1) states, in pertinent part, that

Except as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.

The general statute of frauds, found in Virginia Code Ann. § 11-2, states, in pertinent part, that

Unless a promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, is in writing and signed by the party to be charged or his agent, no action shall be brought with respect to the nine types of agreements described in subsections (1) through (9) of the statute.

In *Moorman*, several family members and a certain trust, each of whom owned an undivided interest in a 200 acre family farm near a mountain lake resort, desired to sell the property to a developer who would agree to certain restrictions and conditions to assure that the property, located adjacent to their own individual residences, would be appropriately developed into an upscale residential neighborhood. After soliciting proposals from several prospective purchasers, the family members accepted the individual plaintiff's proposal, which provided for a purchase price of \$1.7 million and an express promise to abide by their desired restrictions regarding development. One of the family members, who had agreed to serve as liaison between the family members and the prospective purchaser, then began negotiating with the individual plaintiff towards a final written purchase agreement embodying all of the desired provisions, conditions, and other necessary specific terms of the sale. Plaintiff and the family members exchanged a number of electronic mail communications, facsimile communications, notes, and interim draft purchase agreements pertaining to and reflecting some, but not all, of the various terms, amendments, and additional conditions desired by the parties. After approximately 18 months, despite the various documents and communications exchanged between the parties, none of the interim draft purchase agreements -- including the last draft sent by the individual plaintiff -- contained all of the terms and conditions desired, and none was ever signed on behalf of both the purchaser and the sellers. Nevertheless, during this period, the individual plaintiff -- unbeknownst to the family members -- had contracted to resell the property to another developer for \$3 million. Approximately two months after receiving the last draft of the purchase agreement from the individual plaintiff, and still desiring to sell the family farm property, the family members sold the property to another developer for \$2.6 million.

The individual plaintiff and his development company, to whom he had intended to assign his interests in the agreement for the purchase of the family farm property, subsequently sued, alleging that they had a binding contract obligating the family members to sell them the family farm property for the previously agreed-upon purchase price of \$1.7 million, that the multiple written communications and documents exchanged between the parties satisfied the statute of frauds, and that, in any event, equitable estoppel and part performance justified granting them specific performance because they had incurred certain costs and had taken other certain actions in furtherance of and in reliance upon the parties' agreement. Following a bench trial, the circuit court agreed with plaintiffs and awarded them specific performance of the purported contract. The family members appealed, asserting that although the plaintiff desired to purchase the land for \$1.7 million and that the family members desired to sell the land to plaintiff for that purchase price, there was no written and signed contract between the parties for the sale of the land involved. The family members further contended that there never was an oral contract for the sale of the land because the parties never mutually agreed upon all of the same contract terms. For these reasons, the family members argued that the circuit court had erred in rejecting their statute of frauds defense and in enforcing the sale via specific performance.

In *Delta Star*, a company specializing in the sale and installation of various types of flooring products sued its customer, Delta Star, Inc., to recover the unpaid balance of the purchase price on an alleged contract for the purchase and installation of flooring in an entranceway and office area in the customer's building. The customer denied that there

was a contract for the purchase and installation of the flooring in the office area and filed a plea in bar contending that the alleged contract was not in writing as required by the Statute of Frauds and, therefore, was unenforceable. The trial court heard the parties' evidence, found that the customer had breached the contract with the flooring company, and entered judgment. It overruled the statute of frauds defense based on the exceptions set out in Va. Code § 8.2-201(3), finding that the goods at issue were specifically manufactured, that part performance of the alleged contract -- specifically, the flooring company's installation of the flooring in the entranceway and Delta Star's payment therefore -- extended to the disputed portions of the alleged contract concerning the offices, and that one of Delta Star's employees who had testified that it didn't want to act on the estimate for the office area and that it hadn't agreed to order the flooring for that area amounted to an admission that a contract for the installation of the flooring in the office area existed. The trial court also concluded that various sales proposals/quotes and an invoice provided by the carpet company qualified as confirmatory writings of the contract establishing its enforceability under Va. Code Ann. § 8.2-201(2), and that the parties' course of dealing under Va. Code Ann. § 8.2-202 established the existence of the alleged contract. The customer appealed, assigning error to all of these rulings.

Legal Principles. In resolving the dispute concerning the enforceability of the purported real estate sale agreement at issue in *Moorman*, the Court relied on the following well-established principles of Virginia law:

. Purpose underlying the general statute of frauds (Va. Code § 11-2): Relying on its prior decisions in *Lindsay v. McEneaney Assocs.*, 260 Va. 48, 5455, 531 S.E.2d 573, 576 (2000), and *Reynolds v. Dixon*, 187 Va. 101, 106, 46 S.E.2d 6, 8 (1948), in *Moorman*, the Court explained that the statute is founded in wisdom and sound policy and requires contracts of so important a nature as the sale and purchase of real estate to be reduced to writing since otherwise . . . it often happens either that the specific contract is incapable of exact proof or that it is unintentionally varied from its original terms. The Court further recognized the principle, stated in its prior opinion in *Gibbens v. Hardin*, 239 Va. 425, 430, 389 S.E.2d 478, 480 (1990), that with respect to a suit for specific performance, ascertaining whether there is a writing satisfying the statute of frauds insures that a court enforces the agreement made by the parties and reduces the likelihood that a court will create an agreement where none existed.

. Types of documents and other communications that may satisfy the writing requirement imposed by the general statute of frauds as it applies to agreements for the sale of real estate: Citing its prior decisions in *Janus v. Sproul*, 250 Va. 90, 91, 458 S.E.2d 300, 301 (1995), and *Reynolds*, 187 Va. at 107, 46 S.E.2d at 9, in *Moorman* the Court reaffirmed the well-settled principle that a legally sufficient, signed writing may consist of any kind of writing, from a solemn deed down to mere hasty notes or memorandum in books or papers. However, the Court was also quick to explain that the writing must nonetheless contain all the essential terms of the agreement.

. Terms that must be reflected in a writing purporting to accomplish a sale of real estate in order for the writing to satisfy the general statute of frauds: Relying again on *Reynolds*, 187 Va. at 108, 46 S.E.2d at 9, in *Moorman* the Court explained that [t]he essential terms to a contract for the sale of real estate include the names of the parties, the terms and conditions of the contract, and a description of the property sufficient to render it capable of identification.' In addition, the Court, citing *Phillips v. Mazyck*, 273 Va. 630, 636, 643 S.E.2d 172, 175 (2007), emphasized that mutuality of assent -- the meeting of the minds of the parties -- is an essential element of all contracts, and explained that [u]ntil the parties have a distinct intention common to both . . . there is a lack of mutual assent and, therefore, no contract. Continuing, the Court, relying upon *Phillips*, 273 Va. at 636, 643 S.E.2d at 175, and *Lucy v. Zehmer*, 196 Va. 493, 503, 84 S.E.2d 516, 522 (1954), instructed that [m]utual assent is determined exclusively from those expressions of [the parties'] intentions which are *communicated* between them.'

. Quality of proof required to satisfy the general statute of frauds as it applies to agreements for the sale of real estate: Revitalizing a string of prior decisions, including *Taylor v. Hopkins*, 196 Va. 571, 575, 845 S.E.2d 430, 432 (1954), *Frizzell v. Frizzell*, 149 Va. 815, 822824, 141 S.E. 868, 870 (1928), *Burruss v. Nelson*, 132 Va. 17, 21, 110 S.E. 254, 255 (1922), and *Dunsmore v. Lyle*, 87 Va. 391, 393, 12 S.E. 610, 611 (1891), in *Moorman*, the Court reaffirmed the longstanding principle that [i]n reviewing a claim for specific performance of an oral contract for the purchase and sale of real property, the evidence relied upon to establish the contract and its part performance by the party seeking to

enforce it must be clear and convincing.' Continuing, the Court, applied the principles established in *Reynolds*, 187 Va. at 107, 46 S.E.2d at 89 and *Rahm v. Klerner & Sons*, 99 Va. 10, 1314, 37 S.E.2d 292, 293 (1900). It concluded that if the court cannot ascertain, using this standard of proof, from the memoranda, or from other writings therein referred to, the essential terms of the contract, such writings do not take the case out of the statute of frauds.

. Where parties intend to memorialize their agreement in a signed contract, it is presumed that no agreement exists until there is a written contract that is formally signed, and this presumption can only be overcome by strong evidence: Placing its recent case in the tradition of *Atlantic Coast Realty Co. v. Robertson*, 135 Va. 247, 253254, 116 S.E. 476, 478 (1923), in *Moorman*, the Court explained that where parties intend to culminate their agreement with a signed contract, there is a strong presumption that no contract exists until a contract is formally signed and in writing. Continuing, the Court explained that [o]vercoming such a presumption requires strong evidence,' a standard flowing from the decision in *Andrews v. Sams*, 233 Va. 55, 58, 353 S.E.2d 735, 737 (1987).

. Required showing when invoking part performance exception to overcome the general statute of frauds: In *Moorman*, the Court emphasized that, as set forth explicitly in its prior decision in *Henley v. Cottrell Real Estate Co.*, 101 Va. 70, 73, 43 S.E. 191, 192 (1903), that one of the most important objects of the statute of frauds [is] to prevent the introduction of loose and indeterminate proofs of what ought to be established by solemn written contracts. Accordingly, the Court also reaffirmed its holding in *Runion v. Helvestine*, 256 Va. 1, 6, 501 S.E.2d 411, 414 (1998), explaining that when invoking part performance to overcome the statute of frauds, a party must show that: (1) the parol agreement relied on is certain and definite in its terms,' (2) the acts proved in part performance refer to, result from, or [were] made in pursuance of the agreement,' and (3) the agreement was so far executed that a refusal of full execution would operate a fraud upon the party, and place him in a situation which does not lie in compensation.'

. Required showing when invoking equitable estoppel to bar a party from asserting the general statute of frauds as a defense to enforcement: Restating some of the principles from the classic case of *Boykins Narrow Fabrics Corp. v. Weldon Roofing and Sheet Metal, Inc.*, 221 Va. 81, 86, 266 S.E.2d 887, 890 (1980), the Court explained in *Moorman* that a party seeking to invoke the doctrine of estoppel must prove by clear, precise, and unequivocal evidence the following elements: (1) A material fact was falsely represented or concealed; (2) The representation or concealment was made with knowledge of the facts; (3) The party to whom the representation was made was ignorant of the truth of the matter; (4) The representation was made with the intention that the other party should act upon it; (5) The other party was induced to act upon it; and (6) The party claiming estoppel was misled to his injury. Additionally, the Court specified, based on its prior opinions in *Chesapeake & Ohio Ry. Co. v. Walker*, 100 Va. 69, 94, 40 S.E. 633, 642 (1902), and *Hyson v. Dodge*, 198 Va. 792, 799, 96 S.E.2d 792, 797 (1957), that with respect to the estoppel . . . which affects the title to real estate, there must be the express intention to deceive, or such careless and culpable negligence as amounts to constructive fraud.

In resolving the dispute concerning the enforceability of the purported contract for the sale of goods at issue in *Delta Star*, the Court relied on the following principles of Virginia law:

. Factors qualifying goods as being specially manufactured and not suitable for sale to others in the ordinary course of the seller's business for purposes of Va. Code Ann. § 8.2-201(3)(a): In *Delta Star*, the Court relied upon its prior decision in *Flowers Baking Co. v. R-P Packaging, Inc.*, 229 Va. 370, 329 S.E.2d 462 (1985) as a classic illustration of specially manufactured goods that were not suitable for sale to others in the ordinary course of the seller's business. The Court pointed out that in *Flowers*, the customer, a commercial bakery, had engaged a cellophane-wrapping manufacturer via a verbal order to measure its cookie trays, determine the appropriate size for cellophane wrapping, and design artwork to be printed on the wrapping, and that the customer, following its acquisition by a different commercial bakery, had repudiated the manufacturing agreement and returned the cellophane wrapping featuring the customer's artwork to the manufacturer without payment, even though the cellophane wrapping conformed to the specifications of the order. Under these facts, the Court explained that it had held in *Flowers Baking Co.* that the parties' oral contract was enforceable under Va. Code Ann. § 8.2-201(3)(a) because the cellophane wrapping was manufactured to the size required by [the bakery's] containers, was imprinted with [the bakery's] name and unique

artwork, and was completely produced by the [manufacturer].'

Key Issue # 1 (*Moorman*): Did plaintiff present sufficient evidence to prevent the family members from asserting the statute of frauds defense under the equitable estoppel doctrine?

The Court answered this question in the negative in *Moorman*.

The Court began its analysis by pointing out that the circuit court's ruling estopping the family members from asserting the general statute of frauds embodied in Va. Code Ann. § 11-2 was based on the rationale that the plaintiff, in reliance on the family members' representation that they desired to sell the family farm property to him, had purchased for \$260,000 a small tract of land located in the center of the family farm that was owned by a third party and that plaintiff would have no use [for that tract] without the [family farm] tract. However, the Court, applying the factors identified and enumerated in *Boykins Narrow Fabrics*, *Chesapeake & Ohio Ry.*, and *Hyson*, concluded that [t]he record does not support the circuit court's ruling with regard to equitable estoppel in this case, for two reasons. Addressing the first of the enumerated factors, the Court explained that there was no evidence that the family members either falsely represented or concealed a material fact from the plaintiff. Second, addressing the sixth of the enumerated factors, the Court emphasized that the purchase of the small tract was never a condition of any purported contract between the parties, and that the plaintiff had never informed the family members of his intentions to sell their farm to a third party. As a result, the Court held that the plaintiff could not establish the requisite detrimental reliance necessary to sustain an equitable estoppel claim, and that the circuit court erred in ruling that the [family members] were equitably estopped from asserting a defense of the statute of frauds based on Va. Code Ann. § 11-2.

Key Issue #2 (*Moorman*): Did plaintiff present sufficient evidence to overcome the family members' statute of frauds defense?

The Court also answered this question in the negative in *Moorman*.

The Court began its analysis by analogizing the background facts and circumstances underlying its holding in *Gibbens* to those present in *Moorman*. In doing so, the Court pointed out that the trial court had found that a certain letter sent by the family members' liaison via facsimile to the plaintiff's attorney on July 2, 2004 established that, as of the date of that communication, the family [members] w[ere] in agreement on the material terms of the last . . . draft contract that plaintiff had transmitted to them. The Court disagreed with this finding, however. The Court emphasized that this letter was not a communication of mutual agreement between the parties, but rather, a communication reflecting the disagreement with the draft contract among the members of one party, specifically, the family members, and that [t]he letter expressly indicates that the parties had yet to agree upon numerous essential terms and conditions for the sale of the farm. Specifically, the Court explained that in this letter, the family liaison noted that the family still had not seen any development plans for the property, that the agreement still failed to address the tax consequences of the transaction, and that [plaintiff] had not included the desired restrictive covenants in the [earlier] draft of the proposed contract. Additionally, the Court, examining the draft of the proposed contract that had been transmitted to the family members, noted that this draft failed to include an exact date for closing and final payment. Ultimately, based on the foregoing, the Court found that [a]s in *Gibbens*, here there is a lack of clear and convincing evidence that the [family members] and [the plaintiff] ever mutually agreed to all the essential terms of a contract for the sale of the [family] farm to [plaintiff].

Continuing, the Court explained that the testimony of the parties and their attorneys corroborated that a signed agreement would be executed before the [family members] would be bound in the sale of their property. The Court then observed that the parties had exchanged numerous draft agreements, that the plaintiff's attorney specifically invited the family members' attorney to finalize one of the drafts, and that the family members' attorney also repeatedly requested that a contract be formalized by a signed writing. The Court also noted that the plaintiff advised his prospective purchaser that the required signatures were not yet on his purported contract with the [family members]. Based on the foregoing, the Court ultimately concluded that [c]learly, the [parties] never formalized their negotiations with a signed

contract for the sale of the [family] farm.

The Court then addressed the plaintiff's argument that the family liaison's email and facsimile communications with the plaintiff and his counsel concerning the proposed sales contract established that the liaison had the authority to bind all of the family members. In doing so, the Court acknowledged its prior holding in *Drake v. Livesay*, 231 Va. 117, 122, 341 S.E.2d 186, 189 (1986) that [a]gency may be inferred from the conduct of the parties and from the surrounding facts and circumstances. Nevertheless, the Court found that [a]lthough the circuit court found it clear that [the family liaison] was acting on behalf of and with the consent of the Moorman family,' the conduct of the parties . . . does not support a finding that [the liaison] acted as the agent of the . . . family members. The Court cited two reasons why this was so. First, the Court pointed out that one of the family members had testified that the liaison was no more than a spokesperson' for the family, as [i]t was much easier to have one person serve as the liaison . . . than have all five of us be involved.' Second, the Court explained that it was clear that plaintiff was aware that the [family members] were represented by [the liaison], due in no small part to the fact that [plaintiff's] own formalized draft agreements required the signatures of the entire Moorman family, rather than the signature of [the liaison], acting as the agent of the Moorman family. Accordingly, the Court concluded that the evidence [was] insufficient to establish that the [family liaison] had the authority to bind the whole Moorman family by his e mail and facsimile exchanges.

Finally, the Court turned to the plaintiff's argument that his actions in conducting certain surveying, engineering, and soil studies concerning the family farm property, as well as his purchase of the small tract of land located in the center of the family farm from a third party, constituted evidence of part performance sufficient to overcome the statute of frauds. The Court acknowledged that the circuit court had specifically held that this evidence was sufficient, even if the writings were insufficient to establish a contract for the sale of the land. Nevertheless, the Court, after reviewing the trial testimony, determined that plaintiff's testimony demonstrates that he did not actually engage in the acts of surveying, engineering, performing soil studies, and purchasing the [other] property [consisting of the small tract at the center of the family farm], in pursuance of the purported agreement. The Court explained that this was so because the plaintiff had testified that he merely did [] engineering work to obtain the right-of-way' from [another third party], and that plaintiff had admitted that [t]hese acts and the purchase of the [small] tract were not . . . part of the purported contract with the [family members] concerning the family farm property.

Based on all of these considerations, the Court ultimately held that the circuit court erred in finding that the various notes and memoranda between the [family members] and [plaintiff] regarding the purported oral contract for the sale of the [family] farm were sufficient to satisfy the statute of frauds, and held also that the evidence is insufficient to establish that [plaintiff] undertook any actions in furtherance of the purported contract so as to remove this case from the bar of the statute of frauds imposed by Va. Code Ann. § 11-2.

Key Issue #3 (*Delta Star*): Did the flooring company present sufficient evidence to overcome the customer's statute of frauds defense?

The Court answered this question in the negative in *Delta Star*.

In resolving the issue, the Court addressed the trial court's finding that there exists a confirmatory writing [under Va. Code § 8.2-201(2)] establishing an enforceable contract . . . for the purchase and installation of the [office] flooring. The Court acknowledged that the trial court's finding agreed with the flooring company's assertion, previously made at trial, that the flooring company's written proposals and its invoice for the purchase and installation of flooring in Delta Star's entryway constituted [such] confirmatory writings. The Court then explained that [a] writing in confirmation of the contract' presupposes that there exists an oral agreement between the parties and necessarily follows the formation of such an agreement. Continuing, the Court reasoned that the flooring company's written proposals by definition, cannot constitute confirmatory writings. This is so, the Court explained, because a proposal is an offer presented for acceptance or rejection and because [i]n submitting its proposals, [the flooring company] sought to form a contract, rather than to confirm a contract, concerning the purchase and installation of flooring in the office area. Similarly, the Court explained that the invoice for the entryway flooring also cannot serve as confirmation of a contract for the

purchase and installation of flooring in [the] office [area], because [t]he invoice confirms only the parties' agreement with regard to the entryway flooring. As a result of the foregoing, the Court d[id] not agree that a confirmatory writing existed under Va. Code § 8.2-201(2) that could render the proposed contract for the installation of flooring in the office area enforceable.

Additionally, the Court addressed the trial court's finding that, pursuant to Va. Code Ann. § 8.2-202, an enforceable contract was established by the parties' course of dealing. The Court began addressing this issue by reciting the pertinent language of this statute, which provides that the [t]erms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement . . . may be explained or supplemented . . . by . . . course of dealing.' The Court then observed that under this statutory language, the parties' course of dealing is relevant only to explain or supplement the terms of the parties' contract, but emphasized that [t]he parties' course of dealing cannot establish the existence of a contract. As a result, the Court held that the trial court erred in finding that Va. Code Ann. § 8.2-202 permitted the parties' course of conduct to establish the existence of an enforceable contract for the installation of flooring in the office area of Delta Star's building.

The Court also considered the three exceptions to the bar to enforcement imposed by the U.C.C. statute of frauds set out in Va. Code Ann. § 8.2-201(3)(a), (b), and (c).

Initially, the Court addressed the trial court's finding, made in reliance on the holding reached in *Flowers Baking Co.*, that the flooring materials were specially manufactured goods or products for [Delta Star] and not readily suitable for sale [to] others in the ordinary course of [the] business' for purposes of the exception embodied in Va. Code Ann. § 8.2-201(3)(a). Examining the factual background of the dispute, the Court noted that [i]n the present case, the flooring samples displayed in [the flooring company's] showroom are available to all customers, but all flooring materials selected by customers must be ordered directly from the manufacturer or distributor because [the flooring company] keeps no inventory. Continuing, the Court observed that the flooring materials chosen by Delta Star were selected from the samples displayed [and] were not altered in any way to suit only Delta Star. Based on the foregoing, the Court found that these flooring materials were suitable for sale to others in [the flooring company's] ordinary course of business, and that, [t]herefore, the flooring materials were not specifically manufactured' for Delta Star within the intentment of Va. Code Ann. § 8.2-201(3)(a). As a result, the Court concluded that [t]he trial court's reliance upon *Flowers Baking Co.* is misplaced because the facts of that case are distinguishable from the facts in the present case, and held that the trial court erred in ruling that the parties' contract was enforceable by virtue of Va. Code Ann. § 8.2-201(3)(a).

Next, the Court turned to consideration of the part performance exception to the U.C.C. statute of frauds set out in Va. Code Ann. § 8.2-201(3)(c). The Court began by noting that the trial court had found that there existed a single contract between the parties and that the installation of flooring in Delta Star's entryway constituted part performance thereof. The Court began its analysis of the part performance exception by explaining that [p]ursuant to Code § 8.2-201(3)(c), a contract that is not evidenced by a sufficient writing is enforceable with respect to goods for which payment has been made and accepted.' The Court then observed that [i]n the present case, payment has been made and accepted for only the entryway flooring. Accordingly, the Court reasoned, enforcement of any contract based upon part performance extends only to the entryway flooring and not to the purchase and installation of flooring in [the] office [area]. In doing so, the Court expressly agreed with Delta Star's contention that even if the present case involves a single contract, rather than three separate contracts, the purchase and installation of the entryway flooring does not take this case out of the Statute of Frauds.'

Finally, the Court considered whether the exception embodied in Va. Code Ann. § 8.2-201(3)(b) established the existence of an enforceable contract for the installation of flooring in the office area of Delta Star's building, based on the testimony of one of Delta Star's employees. The Court began by noting that the trial court had ruled that Delta Star admitted in its testimony the existence of a contract for the purchase and installation of [such] flooring, and acknowledged that [a]t trial, [the flooring company] contended that [the employee's] testimony regarding her attempt to cancel that portion of the alleged contract dealing with [the] office [area] constituted an admission that a contract existed, on the theory that you can't cancel something unless you're admitting that you got a contract and you want to

cancel it.' After examining the employee's testimony, however, the Court explained that [a] review of [the employee's] trial testimony reveals that she stated that Delta Star 'didn't want to act on the estimate [for the office area],' and that she further stated that Delta Star hadn't agreed to . . . order [that flooring] yet.' As a result, the Court ultimately concluded that the employee did not admit the existence of a contract for the purchase and installation of flooring in [the] office [area], and held that the trial court erred in holding otherwise and in declaring the contract enforceable under Code § 8.2-201(3)(b).

In light of these several factors, the Court held that the trial court erred in overruling Delta Star's Statute of Frauds defense and in finding that an enforceable contract existed . . . for the purchase and installation of flooring in [the] office [area of Delta Star's building].

Importance of rulings. In *Moorman* and *Delta Star*, the Court revitalizes and clarifies the conclusion it has reached in a number of prior cases: the statute of frauds defense is not easily overcome. In doing so, these decisions reinforce the strong public policy considerations that have long been at the heart of the defense -- specifically, that courts should not enforce parole agreements unless sufficient proof can be adduced by the party seeking enforcement as to their specific terms and as to the existence of mutual assent to those terms. Although neither of the parties seeking enforcement of the agreements at issue in *Moorman* and *Delta Star* were ultimately successful in overcoming the defenses asserted, the Court's analysis and conclusions reached in each case are nevertheless significant in that they suggest what the quality and quantity of proof necessary for a party to adduce would be in order for there to be a reasonable chance to overcome the defense. In *Moorman*, the Court clearly indicates that mutual assent as to all of the essential terms desired by each party, and not just the purchase price, is required to overcome the defense in the context of an agreement to sell real estate. In this context, *Moorman* clearly indicates that the mere exchange of unsigned interim draft agreements, as well as the exchange of written communications concerning the terms of those draft agreements, is insufficient to defeat the defense.

Furthermore, *Moorman* also establishes that the party seeking enforcement must reasonably assure that the person representing a group of owners has the authority to act on behalf of, and therefore bind, the group. Finally, both *Moorman* and *Delta Star* teach that the mere existence of writings purporting to establish that the parole agreement has the precise scope and specific terms that the party seeking enforcement claims is insufficient to overcome the defense. Instead, these cases indicate that the writings sought to establish the precise scope and specific terms of a parole agreement must objectively establish that the scope and terms are exactly what the party seeking enforcement claims them to be. In addition, both *Moorman* and *Delta Star* establish that part performance must unequivocally reflect the mutual assent of the parties as to the scope of the parole agreement, as well as the terms thereof, in order for it to serve as a basis for a court to determine that either the general statute of frauds embodied in Va. Code Ann. § 11-2 or the U.C.C. statute of frauds embodied in Va. Code Ann. § 8.2-201 will not bar enforcement of the agreement.

Virginia Cross-References. For further analysis of the topics of Virginia law addressed herein, please consult the following sources:

Regarding the statute of frauds, see Charles E. Friend and Kent Sinclair, *Friend's Virginia Pleading and Practice* § 24.11 (2008); John L. Costello, *Virginia Remedies* § 7.10 (2008); see also Michie's *Jurisprudence of Virginia & West Virginia*, Statute of Frauds §§ 1-46;

On the doctrine of estoppel, see John L. Costello, *Virginia Remedies* § 10.06 (2008); see also Michie's *Jurisprudence of Virginia & West Virginia*, Estoppel §§ 14-31 (Estoppel by Representations or Conduct), Estoppel § 36 (Estoppel by Contract), Estoppel § 39 (Evidence and Burden of Proof).

For the consequences of part performance on these doctrines, see Michie's *Jurisprudence of Virginia & West Virginia*, Contracts § 60 (Effect of Partial Performance), Contracts § 90 (General Consideration), Contracts § 101 (Void

Contracts); Statute of Frauds § 27 (Effect of Performance), Statute of Frauds § 35 (Requisites for Sufficient Part Performance).

The requirements and doctrines in specific performance, see Charles E. Friend and Kent Sinclair, Friend's Virginia Pleading and Practice § 24.04 (2008); John L. Costello, Virginia Remedies §§ 14.01-14.12 (2008); see also Michie's Jurisprudence of Virginia & West Virginia, Statute of Frauds §§ 31-40 (Specific Performance).

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Brazas on Travelers Casualty & Surety Co. v. Bowman, 229 Ill. 2d 461 (2008).

2008 Emerging Issues 3195

Performance Bond Breach: Which Statute of Limitations Applies? *Brazas on Travelers Casualty & Surety Co. v. Bowman, 229 Ill. 2d 461 (2008).*

By Susan Brazas

December 21, 2008

SUMMARY: Recently the Illinois Supreme Court considered the question of what statute of limitations applies for an insurance company's action for breach of indemnity agreement related to construction performance bonds. In *Travelers Casualty & Surety v. Bowman*, the Supreme Court examined the applicability of three possible statutes of limitation to a claim by an insurer against the owners of a metalworking company for breach of an indemnity agreement.

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ARTICLE: ILLINOIS SUPREME COURT HOLDS THAT 10-YEAR STATUTE OF LIMITATION FOR WRITTEN CONTRACTS APPLIES TO INSURERS ACTION FOR BREACH OF WRITTEN INDEMNITY AGREEMENT AS TO PERFORMANCE BONDS.

In *Travelers Casualty & Surety Co. v. Bowman*, the Illinois Supreme Court addressed the applicability of three statutes of limitation to a claim for breach of a written indemnity agreement: 735 ILCS 5/13-204, 735 ILCS 5/13-206, and 735 ILCS 5/13-214. The Kane County circuit court had initially granted the metalworking company owners motion to dismiss, finding that the four-year statute of limitations for construction improvements (735 ILCS 5/13-214) barred the insurers claim. However, the appellate court reversed, holding that the ten-year statute of limitations for written contracts (735 ILCS 5/13-206) applied. The appellate court rejected the business owners alternative argument that the two-year statute of limitations for claims of indemnity and contribution (735 ILCS 5/13-204) applied to bar the claim.

In this opinion, the Supreme Court affirmed the appellate court, but remanded the case to the trial court for determination of when the statute of limitations started to run, because the date of the business owners refusal to tender payment could not be determined from the record.

Practical Implications. Although the trial court initially found the complaint subject to the construction improvements (four-year) statute of limitations, the Supreme Court held that the key inquiry was nature of the defendants liability. Here, although the business owners did provide the metalworking work for a construction project, Travelers sought to hold them liable not for their construction work, but instead for their breach of the indemnification agreement.

A plaintiff's attorney cannot assume that only the statute of limitations which seems likely to apply to a claim will actually be held applicable. Certainly, at first blush the applicability of the construction modification statute of limitations would seem to be a reasonable conclusion. However, the final decision of the *Travelers* Court was that it was indeed the ten-year statute of limitations which applied. Where it cannot be determined with certainty which statute of limitations will be viewed as applicable, it is advisable to inform the client. If, for example, the client has come to the attorney after the expiration of one possible time limit but prior to the expiration of another, the potential for dismissal on this grounds should be discussed, verbally and in writing, with the client.

Another practical caution to be gleaned from *Travelers v. Bowman* is that a client should be urged to weigh carefully the risk of doing business as an individual rather than a corporation, especially where large dollar projects or indemnification agreements are in place.

Strategic Considerations. One lesson to be learned from the *Travelers v. Bowman* opinion is that it is advisable to research carefully all possible statutes of limitation which might be argued to apply to a client's claim. Further, all such possible statutes of limitation should be argued, in the alternative, at the trial court level. As was the case in *Travelers*, the business owners were able to raise the two-year statute of limitations for the first time on appeal, but this was only because they had prevailed in the trial court. *Shaw v. Lorenz*, 42 Ill. 2d 246, 248 (1969). Had they been the appellants, they would have waived this argument, and would not have been allowed to make this argument for the first time on appeal.

Of course, an attorney cannot predict with certainty whether a client will prevail in the trial court. Thus, it is advisable to raise all possible alternative arguments, at least in written briefing, in order to preserve them for appeal. In any case, the court rejected this alternative argument, finding that 735 ILCS 5/13-204 does not apply to claims for express indemnification based on a written contract. Instead, that statute of limitations applies only to cases where there is an underlying tort claim for injury to person or property. In so holding, the *Travelers* court overruled the case of *United General Title Insurance Co. v. AmeriTitle, Inc.*, 365 Ill. App. 3d 142 (2006).

Making a Record. The *Boren* court remanded the case because it could not determine, from the record, when the insurers' cause of action accrued. The court looked to the express language of the indemnification agreement to conclude that the accrual was at the point when the business owners refused to make indemnification payments after the insurer had demanded that they do so. Thus, the procuring of affidavits, responses to requests to admit and other discovery requests, and depositions will all aid the attorney to develop a record to avoid the need for remand in such a situation.

CROSS REFERENCES:

735 ILCS 5/2-1009; 735 ILCS 5/13-204; 735 ILCS 5/13-206; 735 ILCS 5/13-214; 735 ILCS 5/13-217; LexisNexis Illinois Forms and Illinois Checklists (Civil; pleadings and motions).

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Brazas on Boren v. The Boc Group, Inc., 895 N.E.2d 53, 324 Ill. Dec. 53 (2008).

2008 Emerging Issues 3196

Trial or Mistrial? Exploring the Sanctity of Motions in Limine and Remarks about Trial Attorneys. *Brazas on Boren v. The Boc Group, Inc., 895 N.E.2d 53, 324 Ill. Dec. 53 (2008).*

By Susan Brazas

December 21, 2008

SUMMARY: Recently the Fifth District Appellate Court considered the trial courts granting of a motion for new trial based on claims of inflammatory remarks about trial attorneys, billboard advertising, and the current climate about lawsuits and the trial system.

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ARTICLE: FIFTH DISTRICT AFFIRMS GRANTING OF NEW TRIAL DUE TO PREJUDICIAL REMARKS AND BILLBOARD PHOTO VIOLATIVE OF MOTIONS IN LIMINE RULINGS.

WELDING ROD INJURIES? Call 1-800-INJURED Milwaukee. This was the writing on a billboard shown on an overhead screen by defense counsel during the cross-examination of the plaintiffs physician neurologist from Milwaukee, in *Boren v. The Boc Group, Inc., 895 N.E.2d 53, 324 Ill. Dec. 53* (5th Dist. Sept. 9, 2008). Although the image was shown only for a fleeting moment, according to the trial judge, nonetheless the trial court concluded, one year after judgment on the jury's verdict for the defendants, that this and other remarks about welding claims being a cottage industry were together so inflammatory that a new trial was warranted. The Fifth District Appellate Court of Illinois affirmed the trial courts granting of a motion for new trial.

Practical Implications. Motions in limine have long been regarded as a powerful, yet potentially dangerous weapon. *Reidelberger v. Highland Body Shop, Inc., 83 Ill. 2d 535, 550 (1981)*. No attorney can foresee exactly what remarks, events, or visuals might surface to push the envelope on the courts in limine rulings. Pushing too close to the prohibited subject could prove costly, in the form of a motion for new trial and briefing; an appeal; and another trial. Thus, counsel for all parties should consider carefully the possible ramifications of treading too close to the prohibited subject matter, even if the comment or visual is quite brief.

However, not every remark violative of a courts in limine order will be grounds for a new trial. In *McDonnell v. McPartlin, 192 Ill. 2d 505, 535 (2000)*, the plaintiffs neurologist made one brief reference to a prior trial, which was in violation of the courts in limine order prohibiting reference to the mistrial of five months earlier (when the parties agreed that an impartial jury could not be selected from the jury pool). The trial and appellate courts in *Boren* concluded that the potential prejudice of this one statement was adequately cured by the courts instruction to disregard that

testimony; and, because the remark did not reveal the outcome of the prior trial.

Closing Arguments. Counsel are well advised to consider carefully the possible ramifications of remarks which might later be viewed as in violation of motions in limine rulings. Even if an entire trial has proceeded without incident, offhanded remarks in closing argument could alone be sufficient grounds for a mistrial. Among such grounds are where the statements made are not supported by the evidence in the record, and where the statements are improper expression of personal opinion. *Kerns v. Lenox Machine Co.*, 74 Ill. App. 3d 194, 198, 392 N.E.2d 688, 691 (1979). The standard of review for a trial courts granting of a new trial is abuse of discretion. *Ervin v. Sears, Roebuck & Co.*, 65 Ill. 2d 140, 144, 357 N.E.2d 500, 502 (1976). However, less latitude is allowed on review of a denial of a motion for new trial. *Magnani v. Troggi*, 70 Ill. App. 2d 216, 220, 218 N.E.2d 21, 24 (1966). **Strategic Considerations.** Among the factors leading the circuit court to grant the motion for new trial was the revelation that the defendants, in federal multi-district litigation (MDL), had disclosed in discovery there that they had funded approximately \$600,000 in studies about the neurological effects of welding. This was critical because the defendants were allowed to present testimony at trial that the plaintiffs neurologist expert had assisted with a study of welding rod injuries which had received extensive funding from trial attorneys.

The lesson to be learned from this aspect of the *Boren* case is that discovery requests should include inquiries about whether discovery is ongoing in any other matters. One might even request that an opposing party produce, in discovery, any and all discovery responses it makes in any case pending which involves a similar theory of recovery or mechanism of injury. Confidentiality concerns can be allayed by offers to first redact from the discovery responses any data which identifies other parties, and especially any medical information.

Cautions When Drafting Motions in Limine. As is noted by the *Boren* court, the conduct of counsel and witnesses is to be measured against the specifics of a courts order as to motions in limine. Generally the trial transcript is not available for immediate viewing, and therefore attention to detail in the drafting of motions in limine is critical. Often the only written reference available to the court for review in making rulings on objections as violative of in limine orders is the text of the motions in limine. Counsel are thus well advised to reduce all possible motions in limine to writing, and to spell out in great detail within the text of the motions in limine exactly what is sought to be barred from evidence.

It is also easier to reference specific areas of prohibited subjects by drafting the motions in limine as separate documents. An index with brief description of the subject of the motion, and the courts rulings, can also serve as a handy reference tool for attorneys (and an extra copy should be provided to the court and to opposing counsel). The text of the motion in limine--and the wording of the courts order granting or denying the motion--will be extremely important as a reference both during trial and afterward in post-trial motions or on appeal. Thus, counsel should carefully draft all motions in limine, and should reduce to written form all revisions to them as well as orders reflecting the courts rulings on the motions.

CROSS REFERENCES:

Illinois Supreme Court Rule 306; LexisNexis Illinois Forms and Illinois Checklists (Civil; pleadings and motions).

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Garcia on The Alphas Co., Inc. v. Kilduff, 72 Mass. App. Ct. 104 (2008)

2008 Emerging Issues 3134

Grace V.B. Garcia on The Alphas Co., Inc. v. Kilduff, 72 Mass. App. Ct. 104 (2008)

By Grace Garcia

December 7, 2008

SUMMARY: Litigants, although diligent in their discovery efforts, sometimes lack the facts needed to defeat a motion for summary judgment and invoke Mass. R. Civ. P. 56(f) to forestall the motion and obtain more time. Grace Garcia, a partner at Morrison Mahoney LLP in Boston, explains the showing that parties requesting further discovery are required to make under Rule 56(f) in light of the ruling in *The Alphas Co. v. Kilduff*.

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ARTICLE: Further Discovery Should Be Allowed If Party Shows by Affidavit That It Cannot Otherwise Establish Facts Essential to Its Opposition to Summary Judgment

In *The Alphas Co., Inc. v. Kilduff*, 72 Mass. App. Ct. 104 (2008), the plaintiff challenged a lower courts denial of the plaintiffs request to conduct further discovery, filed in response to the defendants motion for summary judgment. The Appeals Court determined that the lower court abused its discretion in failing to allow the plaintiff to conduct further discovery prior to granting the defendants motion for summary judgment. In its decision, the court explained the showing that parties requesting further discovery under Mass. R. Civ. P. 56(f) are required to make for a court to grant the request.

The case arose out of a business dispute involving the purchase of fruit in which the plaintiff alleged that the defendants engaged in deceptive financial schemes associated with the sale of the fruit. After only limited discovery, as a result of a court order, the defendants moved for summary judgment. The plaintiff opposed the motion and sought additional discovery pursuant to Mass. R. Civ. P. 56(f). The court denied plaintiffs request for further discovery and allowed defendants summary judgment motion, finding that there was no basis upon which a reasonable trier of fact could find for the plaintiff. The appeals court, using an abuse of discretion standard, reversed the trial court.

Rule 56(f). Mass. R. Civ. P. 56(f), which is identical to the Federal Rule, is a method of buying time for a party who, when confronted by a summary judgment motion, can demonstrate an authentic need for, and an entitlement to, an additional interval in which to marshal facts essential to mount an opposition. *Resolution Trust Corp. v. North Bridge Assocs., Inc.*, 22 F.3d 1198, 1203 (1st Cir. 1994). Consequently, after a party moves for summary judgment, the opposing party can request that it be given time to conduct further discovery prior to the court ruling on the summary judgment motion. Thus the Rule is used as a defense to a summary judgment motion when there is an objection as to the

timing of that motion. *Tetrault v. Mahoney, Hawkes & Goldings*, 425 Mass. 456, 458 (1997). To properly make a request for further discovery, the party must follow the mandates of Rule 56(f) or else face a denial. *See e.g. Aronson v. Commonwealth*, 401 Mass. 244, 254-55 (1987). Specifically, the Rule states as follows:

Should it appear from the affidavits of a party opposing the motion [for summary judgment] that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Based on Rule 56(f) it is appropriate for a court to allow further discovery before ruling on a summary judgment motion if the party opposing a summary judgment motion shows by way of affidavit that it cannot show the facts essential to justify its opposition without the requested discovery. *Commonwealth v. Fall River Motor Sales*, 409 Mass. 302, 307 (1991). Thus, a court may not routinely grant the request; rather the requesting party must make a minimal showing that the requested discovery is warranted.

How to Make a Rule 56(f) Request. To effectively use Rule 56(f), the party should make a specific request for further discovery in their opposition to the summary judgment motion. The request should comprise of the following five points:

(1) Authority: An affidavit must always be submitted. The affidavit should be based on first-hand knowledge and should state the basis for the request.

(2) Time: Although there is no set deadline for raising a Rule 56(f) request, the party invoking Rule 56(f) should show that it has done so in a timely fashion. Thus, the request should be raised immediately in the written opposition to the summary judgment motion.

(3) Good Cause: The party requesting discovery should show good cause for the party's failure to conduct the requested discovery earlier. A request for further discovery under Rule 56 is not meant for the lazy. Rather, the rule is meant to be used by those who have been diligent in the discovery process, but despite their diligence, have not been able to obtain the requested discovery. Thus, the party must be cognizant of the discovery deadline contained in the court's tracking order or other court imposed discovery deadlines. If the deadline is imminent, the party may also want to seek an extension of that deadline.

(4) Utility: The requesting party should not make a blanket request for further general discovery. Rather, the requesting party should state the specific discovery it seeks and the facts it anticipates such discovery will reveal. Thus, the party will want to state why they believe it is probable that the proposed facts, which would raise a material question of fact and defeat summary judgment, exist and can be found during further discovery. The showing for this factor does not need to be in a form suitable as evidence at trial, but it must rise above mere speculation.

(5) Materiality: The requesting party must show that if the facts are found during the requested discovery, such facts would be relevant to the pending summary judgment motion.

Resolution Trust Corp., 22 F.3d at 1203-1208. Although the party opposing summary judgment under Rule 56(f) does not need to show all five elements, if the party does show all five points, then a strong presumption arises in favor of relief. *Id.* at 1203. The requesting party should argue that the rule should be applied generously. *Id.*

Practitioner Points. Rule 56(f) requests are used to defend against summary judgment. The request, however, cannot be used as a fishing expedition for discovery. Rather, it must be shown that the requested discovery will be relevant to the issue being adjudicated in the summary judgment motion. Consequently, the requesting party must show that the information it seeks in discovery would raise a material question of fact, thereby giving a valid basis to deny the motion for summary judgment. The request must be timely and be in the form of an affidavit, meeting the requirement that the affiant have firsthand knowledge. The request should indicate that the requested discovery can be completed

within a reasonable time frame.

To argue against a request for further discovery brought under Rule 56(f), a party must argue that there are teeth to the Rule, and that it does not apply to every case in which a party opposing summary judgment wants further discovery. A party arguing against further discovery should argue that the requesting party was not vigilant, and did not actively engage in discovery during the time it was available. Further, a party can argue that the requesting party is merely seeking to abuse discovery and waste time and judicial resources.

It also cannot be forgotten that a grant of a Rule 56(f) request does not indicate that the court has denied the pending summary judgment motion. Rather, such a ruling acts as a continuance of the summary judgment in order to give time to conduct the requested discovery.

For additional discussion of Rule 56(f) see: Massachusetts Pleading and Practice Ch. 56, (discussing the requirements of Rule 56).

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Grace V. Bacon Garcia is a Partner in the Boston office of Morrison Mahoney LLP. Ms. Garcia's practice is concentrated in the areas of commercial litigation, construction law, product liability and premises liability. In 2005, 2006, 2007, and 2008 she was recognized by Boston Magazine and Law & Politics as a "SuperLawyer Rising Star."

Ms. Garcia is admitted to the bars of the Commonwealth of Massachusetts and the State of New York. She is actively involved in several bar associations and has served on the Massachusetts Bar Association's Litigation Section Council (2006-2008), the MBA's Business Law Section Council (2003-2006), the MBA's New Lawyer Section Council (2000 -- 2003), co-chaired the Boston Bar Association's New Lawyer's Section (2002 -- 2004), and served on the BBA's Task Force on Pro Bono and New Lawyers (2002-2003).

Ms. Garcia has authored several articles including: *Practical Implications of the Electronic Discovery -- Related FRCP Amendments*, Massachusetts Bar Association Section Review (2007)(co-author); *Fundamentals of Electronic Discovery*, Boston Bar Journal (March/April 2003), *Ethical Restraints of the Tripartite Relationship*, 3:2 Massachusetts Bar Association Section Review 15 (Spring 2001); and *Achieving Equitable Balance: Justice Wilkins and Chapter 93A*, Boston Bar Journal (Nov./Dec. 2000)(co-author); as well as contributed articles to legal blogs. Ms. Garcia has lectured for various continuing legal education programs on electronic discovery, document retention, and deposition techniques. Further, Ms. Garcia was a Legal Writing and Research Instructor for Boston University School of Law's first year J.D. program from 2003 to 2006. Ms. Garcia is a graduate of the University of Rochester (B.A., *cum laude*) and Boston University School of Law (J.D., *cum laude*), where she was an Edward F. Hennessey Scholar and a Paul J. Liacos Scholar. While at Boston University, Ms. Garcia was a Case and Note Editor for the American Journal of Law and Medicine and a member of the ABA National Appellate Advocacy Moot Court Team Northeast Champion.

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Garcia on Iannacchino v. Ford Motor Company, 451 Mass. 623 (2008)

2008 Emerging Issues 3137

Grace V.B. Garcia on Iannacchino v. Ford Motor Company, 451 Mass. 623 (2008)

By Grace Garcia

December 7, 2008

SUMMARY: It has gotten just a little bit harder for a plaintiff in Massachusetts to draft a viable complaint. In *Iannacchino v. Ford Motor Company* the MA Supreme Judicial Ct. has determined that plaintiffs in MA courts will be held to the new, heightened pleading standard applied in federal courts. This Emerging Issues Analysis discusses that revised standard and what it means to plaintiffs and defendants.

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ARTICLE: Massachusetts Supreme Judicial Court Adopts Federal Pleading Standard for Motion to Dismiss

In weighing a motion to dismiss, Massachusetts has long followed the U.S. Supreme Court case of *Conley v. Gibson*, 355 U.S. 41 (1957), which stated that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. In *Iannacchino v. Ford Motor Company*, 451 Mass. 623 (2008), however, the Massachusetts Supreme Judicial Court has retired the *Conley* language and has adopted a new heightened standard for considering a motion to dismiss.

Mass. R. Civ. P. 8 and 12. Fed. R. Civ. P. 8(a)(2) requires that a complaint contain a short and plain statement of the claim showing that the pleader is entitled to relief in order to give the defendant fair notice of what the claim is and the grounds upon which it rests. *Conley*, 355 U.S. at 47. The Massachusetts Rules of Civil Procedure, adopted in 1974, were patterned on the Federal Rules of Civil Procedure. *Van Christro Advertising, Inc. v. M/A-COM/LCS*, 426 Mass. 410, 414 (1998). Therefore, it is not surprising that Mass. R. Civ. P. 8(a)(1) is identical to Fed. R. Civ. P. 8(a)(2) in requiring a complaint to contain a short statement showing the pleader is entitled to relief.

A defendant can attack the complaint in several ways, including, under both the Federal and Massachusetts Rules of Civil Procedure, using Rule 12(b)(6), that is, moving to dismiss for [f]ailure to state a claim upon which relief can be granted. In construing the Massachusetts Rules, the courts follow the construction given to the Federal rules absent compelling reasons to the contrary or significant differences in content. *Id.* (quoting *Rollins Envtl. Servs., Inc. v. Superior Ct.*, 368 Mass. 174, 179-180 (1975)). For many years, Massachusetts had followed the Federal interpretation of Rule 12(b)(6), which employed a very low standard to survive a dismissal. Now, however, under both Federal and State law, based on the decisions of both *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007) and *Iannacchino v. Ford Motor Company*, allegations in a complaint must meet a higher, although not difficult, standard in order to avoid a

dismissal under Rule 12(b)(6).

Bell Atl. Corp. v. Twomble. In *Bell Atl. Corp. v. Twomble*, the U.S. Supreme Court addressed whether the plaintiffs, a class of telephone and internet subscribers, failed to state a claim against local exchange carriers for actions that were designed to discourage competition in violation of the Sherman Act, 15 U.S.C.S. § 1. Finding that the plaintiffs provided no foundation for showing that there was an agreement between the providers, which agreement was necessary to prove a violation of the Sherman Act, the Court ruled that the plaintiffs failed to state a claim and reversed the Court of Appeals for the Second Circuit. The Court held that the case should be dismissed [b]ecause the plaintiffs here have not nudged their claims across the line from conceivable to plausible.

In the decision, written by Judge Souter, the Court acknowledged that under the fifty-year old *Conley* standard a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some set of [undisclosed] facts to support recovery. *Id. at 1968*. In order to move away from what the Court indicated was a misunderstood standard, the Court ruled that plaintiffs should have a higher burden to meet when faced with a Rule 12(b)(6) motion. Under this new standard, a plaintiff is required to assert factual allegations that, assuming they are true, are enough to raise a right to relief above the speculation level. *Id. at 1965*. This does not mean that a plaintiff needs to set forth detailed factual allegations in order to survive a motion to dismiss. Rather, a plaintiff is now required to include in its complaint factual allegations that are plausibly suggesting (not merely consistent with) a right to relief in order to meet the basic requirement of Rule 8(a)(2) that the plain statement in the complaint possess enough heft to show that the plaintiff is entitled to relief. *Id. at 1966*.

Thus, under the new federal interpretation of Rule 8(a)(2), a plaintiffs obligation to provide the grounds of his entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. *Bell Atl. Corp. v. Twomble*, 127 S. Ct. 1955, 1964-65 (2007). Now, the plaintiffs pleadings must indicate a right to relief that is beyond the level of speculation.

Iannacchino v. Ford Motor Company. In *Iannacchino v. Ford Motor Company*, a group of plaintiffs alleged that the defendants manufactured certain vehicles whose door handles failed to comply with applicable federal safety standards, and were, therefore, defective and unsafe. As a result, they brought several claims, including violation of Mass. Gen. Laws ch. 93A and breach of implied warranty. In their complaint, the plaintiffs did not allege any personal injury or property damage arising from the noncompliance, rather, they argued that their vehicles were worth less due to the alleged defect. In deciding that the plaintiffs complaint did not contain sufficient factual allegations to proceed with their claims, the Court ruled that the complaint should be dismissed. Although the Court used the *Conley* standard in determining the dismissal, it took the opportunity to adopt a new standard for dismissal under Mass. R. Civ. P. 12(b)(6). As a result, a defendant will now be entitled to judgment under Rule 12(b)(6) when a complaint fails to provide factual allegations sufficient to raise a right to relief above the speculative level.

The Effect of *Iannacchino*. The Massachusetts adoption of the Federal Rule 12(b)(6) standard detailed in *Bell Atl. Corp. v. Twomble* raises the bar for plaintiffs in proceeding with civil actions within the Commonwealth. Under the old standard, a complaint would pass muster as long as it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Now, however, plaintiffs have to assert sufficient factual allegations that are more than mere conclusory statements. This standard does not require that a plaintiff prove its case in the complaint. Rather, a plaintiff need only state enough factual matter, which will be assumed to be true for purposes of a motion to dismiss, to suggest the basis of a claim. Thus, the showing required is only a plausible standard, not a probability standard; the rule requires only enough facts to raise a reasonable expectation that discovery will reveal [supportive] evidence. *Id. at 1965*.

A plaintiff will no longer be able to abuse discovery based on speculative allegations on the hope that it will find something during the discovery process to support its claim. Thus, money will be saved on all sides. This higher standard will help prevent claims that appear to be groundless based on the face of the complaint; these claims can be dismissed before parties are required to expend money in the discovery process or to settle solely to avoid further costs.

In addition, court time and judicial resources expended on complaints that lack merit will be saved.

Although motions to dismiss are not as common as other dispositive motions, defendants should use the refined Mass. R. Civ. P. 12(b)(6) standard to evaluate each complaint to determine whether to move for dismissal. Be aware, however, that a well-pleaded complaint may proceed even if it strikes a savvy judge [or practitioner] that actual proof of those facts is improbable, and that a recovery is very remote and unlikely. *Id. at 1966*. Nevertheless, if a plaintiff has simply made a bald allegation, without articulating the factual basis that suggests it is entitled to relief, defendants now have a strong argument for such dismissal using the revised Mass. R. Civ. P. 12(b)(6) standard. **For additional discussion of the 12(b)(6) standard see: Massachusetts Pleading and Practice §12.8 (Motion to Dismiss for Failure to State a Claim); Massachusetts Pleading and Practice, Ch. 8 General Rules of Pleading; Moore's Federal Practice -- Civil § 12.34 Failure to State Claim--Rule 12(b)(6) Motion; Moore's Federal Practice -- Civil § 8.04 (Claim for Relief Requires Showing That Pleader Is Entitled to Relief)**

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Ms. Garcia is admitted to the bars of the Commonwealth of Massachusetts and the State of New York. She is actively involved in several bar associations and has served on the Massachusetts Bar Association's Litigation Section Council (2006-2008), the MBA's Business Law Section Council (2003-2006), the MBA's New Lawyer Section Council (2000 -- 2003), co-chaired the Boston Bar Association's New Lawyer's Section (2002 -- 2004), and served on the BBA's Task Force on Pro Bono and New Lawyers (2002-2003).

Ms. Garcia has authored several articles including: *Practical Implications of the Electronic Discovery -- Related FRCP Amendments*, Massachusetts Bar Association Section Review (2007)(co-author); *Fundamentals of Electronic Discovery*, Boston Bar Journal (March/April 2003), *Ethical Restraints of the Tripartite Relationship*, 3:2 Massachusetts Bar Association Section Review 15 (Spring 2001); and *Achieving Equitable Balance: Justice Wilkins and Chapter 93A*, Boston Bar Journal (Nov./Dec. 2000)(co-author); as well as contributed articles to legal blogs. Ms. Garcia has lectured for various continuing legal education programs on electronic discovery, document retention, and deposition techniques. Further, Ms. Garcia was a Legal Writing and Research Instructor for Boston University School of Law's first year J.D. program from 2003 to 2006. Ms. Garcia is a graduate of the University of Rochester (B.A., *cum laude*) and Boston University School of Law (J.D., *cum laude*), where she was an Edward F. Hennessey Scholar and a Paul J. Liacos Scholar. While at Boston University, Ms. Garcia was a Case and Note Editor for the American Journal of Law and Medicine and a member of the ABA National Appellate Advocacy Moot Court Team Northeast Champion.

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William C. Bochet on Carbis Sales, Inc. v. Eisenberg

2008 Emerging Issues 1792

William C. Bochet on Carbis Sales, Inc. v. Eisenberg, 935 A.2d 1236 (App. Div. 2007).

By William C. Bochet

January 16, 2008

SUMMARY: *Carbis Sales, Inc. v. Eisenberg*, 935 A.2d 1236 (App. Div. 2007), was a suit against insurance defense counsel for malpractice in their representation of a ladder distribution company in a personal injury trial. The court ordered a new trial in an opinion that addresses the full spectrum of issues that typically arise in professional liability cases against attorneys. It is also a rare instance in which all parties came out winners. This commentary, written by William C. Bochet, discusses the implications of this important decision.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Appellate Division Grants New Trial on Legal Malpractice Case

Carbis Sales, Inc. v. Eisenberg, 935 A.2d 1236 (App. Div. 2007), was a suit against insurance defense counsel for malpractice in their representation of a ladder distribution company in a personal injury trial. The court ordered a new trial in an opinion that addresses the full spectrum of issues that typically arise in professional liability cases against attorneys. It is also a rare instance in which all parties came out winners.

Not Net. The underlying action involved a personal injury case in which plaintiff alleged he suffered back injuries as a result of a fall from a ladder. The claimant contended that Carbis Sales, Inc., negligently altered the ladder and that the alteration caused the accident. The jury accepted the plaintiff's version of events and awarded damages that ultimately came to exceed one million dollars.

Israel N. Eisenberg, Esq., tried the case on behalf of Carbis Sales. The shocking result did more than upset his client and its insurance carrier. They sued him and his firm for negligence, contending Mr. Eisenberg was not prepared and failed to present appropriate evidence and witnesses. The case was tried and the jury found that the attorney was indeed deficient. It awarded damages of \$362,561.70.

Mr. Eisenberg and his firm appealed. Among their contentions was an assertion that the trial court should not have permitted the plaintiffs' legal malpractice expert to offer opinions that were not based upon generally accepted professional standards. This involved so-called "net opinions," which are frequently a source of complaint in professional liability cases. A net opinion by an expert is an opinion that is not premised upon the facts of the case or

generally accepted standards of care. An opinion that is outside of the factual context of the case is not admissible at trial. So, too, opinions which are "personally held views" of the expert are inappropriate. *Bucklew v. Grossbard*, 87 N.J. 512, 435 A.2d 1150 (N.J. 1981), *Kaplan v. Skoloff*, 339 N.J. Super. 97, 770 A.2d 1258 (App. Div. 2001).

The conclusions of the expert who testified against Israel Eisenberg were found not to be net opinion. The appellate panel noted that the expert cited case law, treatises and the Rules of Professional Conduct in his testimony that the defendant attorney's efforts as trial counsel for Carbis failed to reach professionally acceptable standards. More importantly, the court's opinion outlines deficiencies in Mr. Eisenberg's performance which clearly sustain the expert's testimony. He spent little time preparing for trial and failed to call both expert and lay witnesses. The appellate panel was sufficiently offended by these omissions that it had no difficulty permitting the expert's testimony.

Timeliness is Next to Godliness. Another ground for appeal by the defendants was the trial court's failure to order the plaintiff to produce an investigator's memo from an interview with a witness. The appellate court could have rejected this point as without merit, pursuant to N.J. Court Rules, R. 2:11-3, since the witness had been deposed and the memo was not evidential. Rather, the court pointed out that the defendants' motion came after the discovery end date for the case. On that basis alone, the trial judge was justified in denying the defendants' motion. This stands as a warning that the Appellate Division's adherence to discovery deadlines under the 2001 rule amendments ("Best Practices") is not necessarily softening.

Everybody Wins. The appellate court opinion was written by Judge Anthony Parrillo. It systematically rejected each of the defendants' points on appeal. Ordinarily, one would think that the defendants lost their appeal. In this case, however, the Appellate Division ordered a new trial on all issues, the same outcome as if the defendants had prevailed. This anomaly occurred as a result of plaintiff's cross-appeal. The jury awarded damages, which seemed inexplicable. The plaintiffs sought a new trial on the issue of damages and cross-appealed when that relief was not granted. The appellate court agreed that the damages phase of the case was disjointed but chose to order a new trial on both liability and damages. In effect, both sides achieved what they wanted.

The reasoning behind this result is not clearly manifested in the opinion. Judge Parrillo faults the trial court's instructions and comments by defense counsel. The opinion also mentions that a retrial would require evidence of liability. Nonetheless, it would seem that plaintiffs should still have retained their hard-won determination of liability. The issue of damages proximately caused by that negligence would remain for the next new trial. Such a process routinely occurs in personal injury cases when negligence is admitted. One suspects that the Appellate Division simply felt that the trial court's instructions to the jury so confused the overall result that justice requires a new trial on all issues.

Not to Be Disgorged. N.J. Court Rules, R. 4:42-9 sets forth instances in which the court may award fees in certain actions. There are also statutes which shift attorneys' fees to the prevailing party (*e.g.*, Consumer Fraud, NJS 56:12-42). These are exceptions to the so-called American Rule which states that parties to litigation are obliged to pay their own attorney's fees. Another exception was crafted by the New Jersey Supreme Court as a special gift to lawyers. In *Saffer v. Willoughby*, 143 N.J. 256 (1996), the court held that attorneys' fees are collectible by a successful claimant in a legal malpractice case. Also, a negligent attorney may not recover or retain fees paid for a matter negligently handled.

Although not necessary to the outcome, the *Carbis Sales* opinion states that plaintiffs may not recover the entire fee paid to the firm for whom Israel Eisenberg worked, even if they prevail in the retrial. This is premised upon the fact that another attorney in the firm handled the case before Mr. Eisenberg took over. As there were no complaints about that lawyer's work, the firm may keep the fees earned during that period.

Cross References. For more information, see LexisNexis Practice Guide NJ Trial & Post-Trial § 8.08[7]: Determining if Expert's Conclusions Constitute Net Opinion; LexisNexis Practice Guide NJ Trial & Post-Trial § 10.07[5]: Incorporating Award of Counsel Fees in Judgment; 1-8 LexisNexis Practice Guide NJ Civil Discovery § 8.04[2]: Conducting Discovery within Time Frame Allowed by Track Assignment; Professional Negligence: Law of

Malpractice in NJ § I-A *et seq.*; Professional Negligence: Law of Malpractice in NJ II-A.

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William C. Bochet on Weber v. Mayan Palace Hotel & Resorts

2008 Emerging Issues 1793

William C. Bochet on Weber v. Mayan Palace Hotel & Resorts, 2007 N.J. Super. LEXIS 375 (App. Div. 20

By William C. Bochet

January 16, 2008

SUMMARY: The Appellate Division provided civil trial counsel with much-needed clarification as to restoration standards and procedures applicable to N.J. Court Rules, R. 1:13-7(a). Universally detested, the rule deals with the so-called "administrative" dismissal of complaints or other affirmative pleadings against a party where there has been a failure to serve or enter default for a period of four months. The dismissals are preceded by a computer generated "notice" issued 60 days before an order is entered. Although the dismissal is without prejudice, the rule is silent as to what procedure follows a dismissal or what standards apply in vacating the order. The Appellate Division has now lifted some of the fog surrounding the rule in *Weber v. Mayan Palace Hotel & Resorts, 2007 N.J. Super. LEXIS 375 (App. Div. 2007)*. This commentary, written by William C. Bochet, discusses the implications of this important decision.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Administrative Dismissal Rule Procedure Clarified by Appellate Panel

The Appellate Division provided civil trial counsel with much-needed clarification as to restoration standards and procedures applicable to N.J. Court Rules, R. 1:13-7(a). Universally detested, the rule deals with the so-called "administrative" dismissal of complaints or other affirmative pleadings against a party where there has been a failure to serve or enter default for a period of four months. The dismissals are preceded by a computer generated "notice" issued 60 days before an order is entered. Although the dismissal is without prejudice, the rule is silent as to what procedure follows a dismissal or what standards apply in vacating the order. The Appellate Division has now lifted some of the fog surrounding the rule in *Weber v. Mayan Palace Hotel & Resorts, 2007 N.J. Super. LEXIS 375 (App. Div. 2007)*.

Distinguishing Dismissals. Elena Weber filed a complaint against the Mayan Palace Hotel as a result of injuries sustained from a fall in a restaurant at that Mexican facility. The complaint was dismissed without prejudice eight months later, pursuant to N.J. Court Rules, R. 1:13-7(a). More than one year after that order was entered, the plaintiff moved to vacate same, showing unsuccessful efforts at service before the dismissal order was entered. An "affiliate" of the defendant opposed the effort to restore, allegedly because the wrong party was named and there was no jurisdiction over the correct party. The trial court refused to vacate the dismissal.

The Appellate Division reversed that refusal. It held that dismissals under N.J. Court Rules, R. 1:13-7(a) should be routinely vacated. The rule is administrative in nature and justice should not be denied by virtue of its provisions.

Complaints must be reinstated even if an extended period of time passes or if the cause of delay is careless conduct by counsel. This continues a line of cases which virtually mandate restoration of actions dismissed for administrative purposes only. See *Ghandi v. Cespedes*, 390 N.J. Super. 193, 915 A.2d 39 (App. Div. 2002) and *Rivera v. Atl. Coast Rehab. Center*, 320 N.J. Super. 340, 729 A.2d 42 (App. Div. 1999).

Counsel should not view this decision as opening the door for restoration of cases dismissed for other reasons. For example, a dismissal for failure to supply discovery is dealt with differently. In *Cooper v. Cons. Rail Corp.*, 391 N.J. Super. 17, 916 A.2d 1061 (App. Div. 2007), the court made it clear that attorney neglect is no basis to avoid dismissal under N.J. Court Rules, R. 4:23-5(a)(2) where there was an earlier dismissal for discovery lapses. Also, attorney neglect is no basis for excusing a failure to file a timely demand for trial de novo in the arbitration program *Hartsfield v. Fantini*, 149 N.J. 611, 695 A.2d 259 (1997). The trial bar's sense of relief must be left as a sigh, not a shout.

Filling the Gap. The rule pertaining to administrative dismissals (N.J. Court Rules, R. 1:13-7) leaves open what is required of counsel for both the plaintiff and defendant once the court's computer spits out its barely legible "order". In *Weber*, above, the Appellate Division provides welcome instruction. The order of dismissal can be followed by successful service of the complaint. At the same time, the defendant must be advised that the case has a present "dismissed" status. After service is effected, the plaintiff must promptly move to vacate the dismissal order. When that occurs, the time for defendant's responding pleadings begins to run. See *Stanley v. Great Gorge Country Club*, 353 N.J. Super. 475, 803 A.2d 475 (Law Div. 2002).

More Than a Staple is Needed. The defendant responded to plaintiff's motion to restore with a brief and documents which were simply affixed thereto. The appellate panel chided counsel for this violation of N.J. Court Rules, R. 1:6-6 and N.J. Court Rules, R. 4:46-2. Documents or other exhibits used in motions must be supported by a certification or affidavit by a witness who has personal knowledge of the authenticity of same. These are "...not merely formal requirements...". They go "...to the heart of procedural due process." *Celino v. General Accident Ins.*, 211 N.J. Super. 538, 512 A.2d 496 (App. Div. 1986). See also *Valley Nat. v. American Motor Ins.*, 316 N.J. Super. 152, 719 A.2d 1028 (App. Div. 1998).

Cross References. For more information, see LexisNexis Practice Guide NJ Pretrial Practice § 2.06[4]: Restoring Action After Dismissal; LexisNexis Practice Guide NJ Pretrial Practice § 2.15: Applying for Entry of Judgment More than Four Months from Entry of Default.

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"Implied Authority" to Reveal Client Confidential Conflict-Checking Information

2008 Emerging Issues 1775

Wald on "Implied Authority" to Reveal Client's Confidential Conflict-Checking Information (Colo. RPC

By Eli Wald

January 11, 2008

SUMMARY: In its new Rules of Professional Conduct (Rules) the Colorado Supreme Court has adopted a Comment purporting to resolve, for the first time, the tension between the conflict of interest rule, Colo. RPC 1.7 requiring conflict-checks before lateral moves, and confidentiality, Colo. RPC 1.6, which prohibits the disclosure of the very same conflict-checking information. New RPC 1.6, Comment 5A states that an attorney contemplating a move has implied authority to disclose confidential conflict-checking information. This Commentary, written by Professor Eli Wald, a legal ethics expert and member of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct and the Colorado Bar Association Ethics Committee, explores the new Colorado Comment and its importance to lawyers contemplating a lateral move.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Overview. In its new Rules of Professional Conduct (Rules) the Colorado Supreme Court has adopted a Comment purporting to resolve, for the first time, the tension between the conflict of interest rule, Colo. RPC 1.7 requiring conflict-checks before lateral moves, and confidentiality, Colo. RPC 1.6, which prohibits the disclosure of the very same conflict-checking information. New RPC 1.6, Comment 5A states that an attorney contemplating a move has implied authority to disclose confidential conflict-checking information. This Commentary, written by Professor Eli Wald, a legal ethics expert and member of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct and the Colorado Bar Association Ethics Committee, explores the new Colorado Comment and its importance to lawyers contemplating a lateral move.

The Problem: Lawyer Mobility and the Tension Between Conflict-Checks and Confidentiality. Colo. RPC 1.7 Comment 3 states that a lawyer should adopt reasonable procedures to prevent and detect conflicts of interest. *See generally*, Colo. RPC 5.1(a) on the responsibility of partners or supervisory lawyers to ensure a law firm's compliance with the rules of professional conduct, and specifically Colo. RPC 5.1 Comment 2, stating that: Such policies and procedures include those designed to detect and resolve conflicts of interest. Standard conflict-checking procedures require a moving attorney to disclose to the new firm the identity of her clients and a brief description of the subject matter of the representations. *See, e.g.*, David W. Evans, *Ethical Issues and Financial Data -- Conflicts of Interest*, 1004 PLI/CORP 229, 239-40 (1997).

Colo. RPC 1.6(a), however, deems information relating to the representation of a client confidential. This sweeping

definition includes the client's identity and a description of the matter handled for the client, the exact information necessary for conflict-checks. *See*, Eli Wald, *Lawyer Mobility and Legal Ethics: Resolving the tension between Confidentiality and Contemporary Lawyers Career Paths*, 31 *J. Legal Prof.* 199, 203-07 (2007); Paul R. Tremblay, *Migrating Lawyers and the Ethics of Conflict Checking*, 19 *Geo. J. Legal Ethics* 489, 500-05 (2006). Consequently, lawyer mobility leads to a clash between confidentiality and conflict of interest rules.

The tension between confidentiality and conflict of interest rules is not new; rather, the impossibility of simultaneously complying with both ethical obligations has always posed a problem for moving attorneys. Nor is the tension unique to Colorado, as its rules of professional conduct are based upon and follow the ABA Model Rules of Professional Conduct. However, in the traditional landscape of legal practice when lawyers seldom moved between firms the problem rarely arose and was therefore easier to ignore. Increased lawyer mobility makes the problem more acute, as it implicates more lawyers and thus impacts more clients. *See*, Charles W. Wolfram, *Ethics 2000 and Conflicts of Interest: The More Things Change...*, 70 *Tenn. L. Rev.* 27, 59 (2002) (Movement by lawyers between law firms has become institutionalized, universal, and routine).

The Colorado Solution: Implied Authority to Reveal Confidential Conflict-Checking Information. Colo. RPC 1.6 Comment 5A attempts to resolve the tension. It reads, in relevant part:

A lawyer moving (or contemplating a move) from one firm to another is impliedly authorized to disclose certain limited non-privileged information protected by Rule 1.6 in order to conduct a conflicts check to determine whether the lawyer or the new firm is or would be disqualified.

Colo. RPC 1.6(a) generally holds that an attorney may reveal confidential information if the disclosure is impliedly authorized in order to carry out the representation. Comment 5A permits disclosure of conflict-checking information by deeming it impliedly authorized. *See also*, Boston Bar Ass'n Ethics Comm., Op. 2004-1 (2004) (the Opinion lends support to the position that attorneys have implied authority to disclose conflict-checking information although its position is dicta because it found that conflict-checking information was not confidential under Massachusetts confidentiality rule). The Comment further clarifies that such disclosure is prohibited in the unusual circumstances where this basic disclosure may materially prejudice the interests of a client or a former client, and cautions the moving attorney to insist in advance that the new firm keep the information disclosed in confidence. *See*, Colo. RPC 1.6 cmt. 5A.

Practice Tip. Colo. RPC 1.6 Comment 5A resolves the tension between confidentiality and conflict rules by allowing disclosure of confidential conflict-checking information. In light of the Courts interpretation of implied authority, a Colorado moving attorney should feel free to share confidential conflict-checking information with a potential new law firm, to the extent necessary to conduct the conflicts-check.

Analysis of Colorados Proposed Solution. The confidentiality of conflict-checking information is a rule more honored in the breach than in the observance and thus the intention of the Colorado Supreme Court to resolve the tension between conflict rules and confidentiality is to be commended. Unfortunately, its proposed solution -- an expansive reading of implied authority -- is inconsistent with implied authority as defined in the Rules, and worse, it contradicts basic principles of agency law from which the notion of implied authority is derived.

The term implied authority is not explicitly defined in the Rules. Colo. RPC 1.6 explains that implied authority to disclose client information exists in order to carry out the representation. It is hard to see how disclosure of conflict-checking information by an attorney contemplating a move to a new law firm is necessary to carry out the representation of a current client. Quite the contrary, lawyer mobility, unless the current client decides to join the attorney and move, is likely to result not in carrying out the representation but rather in its termination.

Colo. RPC 1.6 Comment 5 offers three examples where an attorney has implied authority to make disclosures:

1. Allowing an attorney to admit a fact that cannot properly be disputed;

2. Making disclosures that facilitate the satisfactory resolution of a matter on behalf of a client;
3. Permitting sharing of confidential information within a firm representing a client.

The first two examples are consistent with the working definition of implied authority in the Rule as they clearly serve the interests of the client in a quick and efficient resolution of the matter and are therefore appropriate in carrying out the representation. The third example also serves the interests of the client by allowing him to benefit from the insights of other attorneys at the firm.

All of these examples support the conclusion that an attorney has implied authority to disclose client information when disclosure benefits the client by bringing about the quick and efficient resolution of a matter. Once again, it is difficult to see how disclosure of confidential conflict-checking information fits within this definition. It is conceivable that if a client decides to move with his attorney to a new law firm, the lawyer may be able to better represent the client, for example, by taking advantage of resources available at the new, but not the old, law firm. Such a speculation, however, can hardly serve as a justification for the Courts expansive reading of implied authority. First, clients who decide not to move with the attorney to a new law firm will likely suffer delay and inconvenience. Surely, disclosure of their confidential conflict-checking information does not further their representations. Moreover, even clients who decide to move with the attorney to a new law firm will ordinarily experience delays and inconvenience as their attorney settles in at the new firm.

The Restatement (Third) of The Law Governing Lawyers further supports the conclusion that the Colorado Supreme Court erred in construing implied authority to encompass permission to disclose confidential conflict-checking information. Section 61 states that A lawyer may use or disclose confidential client information when the lawyer reasonably believes that doing so will advance the interests of the client in the representation. Comment b makes it clear that Section 61 explores implied authority stating that no explicit request or grant of permission is required. The Comment clarifies that implied authority only exists to take steps reasonably calculated to further the client's objectives in the representation, and requires that a lawyer have a reasonable belief that the use or disclosure will further the objectives of the client in the representation. Disclosure of confidential conflict-checking information clearly advances the interest of the lawyer exploring a possible move. It does not, however, advance the objectives of the client in the representation and therefore, contrary to the position taken by the Colorado Supreme Court, no implied authority exists allowing its disclosure.

Furthermore, Section 26 of the Restatement, exploring generally an attorneys authority to act on behalf of a client, references agency law and specifically the Restatement on Agency for a finer definition of implied authority. Restatement (Third) of Agency § 2.01, defines implied authority as the power to do what is necessary, usual, and proper to accomplish or perform an agent's express responsibilities or to act in a manner in which an agent believes the principal wishes the agent to act based on the agent's reasonable interpretation of the principal's manifestation in light of the principal's objectives and other facts known to the agent.

The definition does not support the Colorado Supreme Courts broad reading of implied authority in Comment 5A. Even assuming that clients derive some abstract benefit from disclosure of confidential conflict-checking information because increased lawyer mobility in turn means that clients are likely to be able to retain the lawyer of their choosing, implied authority requires more than such an abstract speculative benefit. Because a move never directly accomplishes a lawyers express responsibility to a client and would usually be inconsistent with the objectives of current clients to efficiently and quickly resolve the representations, no implied authority exists to allow for disclosure of confidential conflict-checking information.

Recommendation to Colorado Attorneys Contemplating a Move. Pursuant to new Comment 5A a Colorado lawyer contemplating a lateral move may share with the potential new firm confidential conflict-checking information consistent with the demands of the conflict of interest rules, unless the disclosure will materially prejudice the interests of his current clients, in which case the moving attorney should seek informed client consent before disclosing the

confidential information.

Recommendation to Attorneys Outside Colorado Contemplating a Move. The Colorado Supreme Courts expansive reading of implied authority is inconsistent with its meaning within the rules of professional conduct and with agency law in general. Therefore, moving attorneys outside of Colorado faced with the tension between the demands of confidentiality and conflict-checks should not rely on the Colorado precedent of expansive implied authority as granting permission to reveal confidential conflict-checking information. Rather, moving lawyers should seek their clients informed consent before revealing confidential conflict-checking information, *see*, ABA Model Rules of Professional Conduct, Rules 1.0(e) and 1.6(a), including seeking a future-looking informed consent at the outset of the representation.

Recommendation to Jurisdictions Seeking to Resolve the Tension Between Confidentiality and Conflict-Checks Demands. Increased lawyer mobility requires resolving the tension between confidentiality and conflict-checks requirements. Jurisdictions contemplating revising their rules of professional conduct should not follow the Colorado precedent. Instead, such jurisdictions can adopt an explicit exception to their confidentiality rule permitting disclosure reasonably necessary to ensure compliance with conflict-checks requirements, revise their confidentiality rule to explicitly deem conflict-checking information not confidential (consistent with the approach of the old Model Code of Professional Conduct), or encourage moving attorneys and new law firms to employ middle counsel -- legal ethics experts outside of the new firm -- charged with conducting the conflict-check pursuant to ABA Model Rule 1.6(b)(4). *See*, Eli Wald, *Lawyer Mobility and Legal Ethics: Resolving the tension between Confidentiality and Contemporary Lawyers Career Paths*, 31 *J. Legal Prof.* 199, 227239 (2007).

Related Commentary: Eli Wald on the New Colorado Rules of Professional Conduct. *LexisNexis Expert Commentary* (January 2008),

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Wald on the New Colorado Rules of Professional Conduct

2008 Emerging Issues 1752

Wald on the New Colorado Rules of Professional Conduct

By Eli Wald

January 7, 2008

SUMMARY: The Colorado Rules of Professional Conduct are changing. The Amendments approved by the Colorado Supreme Court go into effect January 1, 2008 and create two categories of pitfalls for practicing attorneys. Colorado lawyers should note that the Court significantly revised the current Colorado Rules consisted with Ethics 2000 the recently revised American Bar Association Model Rules of Professional Conduct. Non-Colorado attorneys should be aware that, in spite of its commitment to uniformity, the Court did keep in tact some specific Colorado Rules that differ from the Ethics 2000 approach. This Commentary, written by Professor Eli Wald, a legal ethics expert and member of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct and the Colorado Bar Association Ethics Committee, highlights some of the important rule changes.

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ARTICLE: Overview

The Colorado Rules of Professional Conduct are changing. The Amendments approved by the Colorado Supreme Court go into effect January 1, 2008 and create two categories of pitfalls for practicing attorneys. Colorado lawyers should note that the Court significantly revised the current Colorado Rules consisted with Ethics 2000 the recently revised American Bar Association Model Rules of Professional Conduct. Non-Colorado attorneys should be aware that, in spite of its commitment to uniformity, the Court did keep in tact some specific Colorado Rules that differ from the Ethics 2000 approach. This Commentary, written by Professor Eli Wald, a legal ethics expert and member of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct and the Colorado Bar Association Ethics Committee, highlights some of the important rule changes.

Analysis

Rule Changes Consistent with the Ethics 2000 Approach

Rule 1.0 Definitions. The new Rules include a definitional section, Rule 1.0. Rule 1.0(e), imposes substantive demands regarding the nature of communications between attorney and client. Informed consent denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives. Comment 6 explains that in assessing the adequacy of information and explanation provided to a client, an attorney should consider the experience and sophistication of the client, as well as whether he or she is represented by other counsel in giving the consent. Comment 7 cautions attorneys that in general a lawyer may not assume consent from a clients silence.

Rule 1.4(a) Communications. Rule 1.4(a) expands on the old Colorado communications rule and adds subsections detailing circumstances under which an attorney must communicate with a client. New subsection 1.4(a)(1) requires an attorney to promptly inform the client when the clients informed consent is required; new subsection 1.4(a)(2) requires reasonable consultation with the client about the means by which the clients goals are to be accomplished, *see also*, Colo. RPC 1.2(a) (allocation of authority within the relationship between attorney and client); and new subsection 1.4(a)(5) mandates consultation with the client about any relevant limitation on the lawyers conduct when the lawyer knows that the client expects assistance not permitted by the Rules or other law. Read in conjunction with Rule 1.13 (on communicating with entity clients), new Rule 1.4 seems to reflect a trend of demanding more communication between attorney and client. When considered in the context of Rule 1.0(e) (informed consent), Rule 1.4 seems to require more detailed substantive communications between attorney and client. *See generally*, Eli Wald, *Taking Attorney-Client Communications (and therefore Clients) Seriously*, 42 U. S. F. L. Rev. __ (forthcoming 2008).

Rule 1.6(b) Exceptions to Confidentiality. While subsection 1.6(a) continues to broadly extend the protection of confidentiality to information relating to the representation, subsection 1.6(b) greatly expands exceptions to the general rule. Subsection 1.6(b)(1) follows Ethics 2000 and permits disclosure of confidential information to prevent reasonably certain death or substantial bodily harm. Subsection 1.6(b)(2) retains Colorados current Rule 1.6(b) allowing for disclosure to reveal the clients intention to commit a crime and the information necessary to prevent it.

The Court also followed Ethics 2000 in adopting subsection 1.6(b)(5), permitting disclosure to secure legal advice about an attorneys compliance with the Rules of Professional Conduct, other law or a court order, and subsection 1.6(b)(7) allowing disclosure to comply with other law or a court order. Colorados current Colo. RPC 1.6(c), permitting disclosure to allow an attorney to establish a claim or defense in circumstances relating to the representation was carried forward to subsection 1.6(b)(6).

Practice Tip: Three Consequences of Colorados Unique Crime Exception

(1) Whereas other jurisdictions adopting Ethics 2000 have six exceptions to confidentiality enumerated in subsections 1.6(b)(1)-(6), Colorado has seven exceptions, leading to inconsistency in terms of numbered exceptions. A Colorado attorney conducting comparative research, for example, about permission to reveal confidential information to comply with a court order should note that in most jurisdictions the exception appears in 1.6(b)(6) and not in 1.6(b)(7).

(2) Whereas Ethics 2000 adopted a new exception (ABA Model Rule 1.6(b)(2)) generally permitting disclosure to prevent the client from committing a crime or a fraud reasonably certain to result in substantial injury to the financial interests of a third party in which the client is using the lawyers services, Colorados corresponding 1.6(b)(3) only covers fraud by the client because crimes are covered by Colorados broader 1.6(b)(2), which allows for disclosure to prevent any crime.

(3) Colorados 1.6(b)(4) tracks ABA Model Rule 1.6(b)(3) in generally allowing disclosure to prevent or mitigate a substantial injury to the financial interest of a third party resulting from fraud or a crime by the client, because subsection 1.6(b)(2) does not apply to completed crimes. *See*, Colo. RPC 1.6, Cmt. 6A.

Practice Tip: Although the new exceptions dramatically expand the circumstances under which an attorney is

allowed to reveal confidential information, they do not give a lawyer a general license to override confidentiality. All 1.6(b) subsections are subject to the caveat that a lawyer may only reveal information relating to the representation to the extent reasonably necessary. However, Comment 15A clarifies that while disclosure pursuant to Rule 1.6 is always permissive, other Rules of Professional Conduct or other law may require disclosure. In other words, whatever disclosures Rule 1.6 makes permissive, other Rules or law may render mandatory. *See*, Colo. RPC 1.6, Cmt. 15A.

Rules 1.7 and 1.9 Conflict of Interests. The general conflict of interests rules, Rules 1.7 and 1.9, feature new formulation and organization but no substantive changes. When faced with a conflict of interest, the practitioner should note three Comments providing useful guidance: Comment 22 deals with future-looking waivers and states that the effectiveness of such waivers will be determined by the extent to which a client reasonably understands the material risks entailed by the waiver. Comment 24 generally permits positional conflicts of interest subject to the requirements of the general conflicts rule, 1.7. Comment 31 deals with confidentiality among co-clients and following the Restatement of the Law Governing Lawyers states that generally confidentiality does not attach among co-clients. *See Restatement of the Law, Third, The Law Governing Lawyers*, § 75.

Rule 1.8(j) Attorney-Client Sexual Relations. New subsection 1.8(j) prohibits an attorney from having sexual relations with a client unless the sexual relationship existed prior to the commencement of the attorney-client relationship. When the client is an entity, Comment 19 explains that subsection 1.8(j) prohibits an attorney for the entity from having a sexual relationship with a constituent of the entity who has authority concerning the entity's legal matters.

Rule 1.13 Reporting Misconduct. Promulgated following the corporate scandals of the late 1990s and early 2000 and ensuing federal legislation, *see*, Eli Wald, *Lawyers and Corporate Scandals*, 7 Legal Ethics 54 (2004), Rule 1.13 sets forth detailed procedures relating to communicating effectively and reporting misconduct both within an entity client (the so-called reporting up-the-ladder, per subsection 1.13(b)), and outside of the entity client, per subsection 1.13(c).

Practice Tip: The practitioner must be cautioned that while disclosure pursuant to the Rule is permissive, it does trump Rule 1.6. *See*, Colo. RPC 1.13(c), Cmt. 6.

Rule 1.18 Duties to Prospective Clients. Rule 1.18 extends limited confidentiality and conflict of interest protection to prospective clients, defined as persons who discuss with an attorney the possibility of forming an attorney-client relationship. Subsection 1.18(b) generally prohibits a lawyer from using or revealing information learned in the consultation, and subsection 1.18(c) generally prohibits representation of a client with interests materially adverse to those of a prospective client in the same or substantially related matter, if the lawyer received information during the consultation that could be significantly harmful to the prospective client. *See*, Colo. RPC 1.18.

Rule 4.4(b), (c) Inadvertent Disclosure. Subsections 4.4(b) and (c) regulate a lawyer's obligations regarding inadvertent disclosure. Subsection 4.4(b) mandates prompt notice to the sender if a lawyer receives a document, relating to the representation of a client, which the lawyer knows, or reasonably should know, was inadvertently sent. Subsection 4.4(c) adds that a lawyer who receives notice from a sender that a document was inadvertently sent shall not examine the documents and abide by the sender's instruction as to its disposition. *See*, Colo. RPC 4.4.

Practice Tip: In light of new subsections 4.4(b) and (c), attorneys should exercise caution when supervising document review by subordinate attorneys and non-lawyers.

Colorado Unique Rules

Rule 1.5 Writing Required. Colorado Rule 1.5 mandates writing within a reasonable timeframe after the commencement of the representation regarding the basis or rate of the fee and expenses, unless the attorney has regularly represented the client. This differs from the ABA Model Rule 1.5, which recommends that the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible be communicated to the client in writing. In addition, Colorado Rule treats any material changes to the basis or rate of the lawyers fee or expenses subsequent to the initial fee agreement as a business transaction with the client, per Rule 1.8(a), requiring the clients informed consent, confirmed in writing signed by the client. However, such a change which is reasonably likely to benefit the client is deemed by Comment 3A to be immaterial and therefore exempt from the demands of Rule 1.8(a). *See, Colo. RPC 1.5, 1.8.*

Practice Tip: Failure to familiarize oneself with Colorado's more client-friendly Rule 1.5 may have dire consequences for the out-of-state attorney. For example, Colorado subsection 1.5(e) continues to prohibit referral fees; subsection 1.5(f) states that fees are not earned until the attorney confers a benefit on the client or performs a legal service for the client; and subsection 1.5(g) states that nonrefundable fees and nonrefundable retainers are prohibited.

Rule 1.10(e) Screening. Responding to practice realities featuring increased lawyer mobility, *See, Eli Wald, Lawyer Mobility And Legal Ethics: Resolving The Tension Between Confidentiality Requirements And Contemporary Lawyers' Career Paths, 31 J. Legal Prof. 199 (2007)*, Colorado has adopted new subsection 1.10(e) allowing timely screens, defined in subsection 1.0(k), if the matter is not one in which the personally disqualified attorney substantially participated in, the personally disqualified attorney is apportioned no fees resulting from the matter, the disqualified attorney gives prompt written notice to affected former clients, and the screen is objectively effective. *See, Colo. RPC 1.0(k), 1.10(e).*

Rule 1.15 Accounting. Colorado Rule 1.15 is significantly more detailed and demanding than its ABA Model Rule counterpart. The Rule regulates required bank accounts, trust accounts (often referred to as COLTAF Colorado Lawyer Trust Account Foundation), and required accounting records.

Rule 6.1 Pro Bono. While Colorado Rule 6.1 and corresponding comments follow the ABA Model Rule, the Colorado Comment includes a detailed preface and recommended Model Pro Bono Policy for Colorado Licensed Attorneys and Law Firms, approved by the Court in late 2005.

Rules 7.17.6 Legal Services. Colorado's regulation of information about legal services, Rules 7.17.6, continues to be more detailed and expansive than its ABA counterpart. For example, Colo. RPC 7.1 specifically prohibits comparing an attorneys services with other lawyers services unless the comparison can be factually substantiated, *see, Colo. RPC 7.1(a)(2)*; deems as false or misleading a communication likely to create an unjustified clients expectation about the results an attorney can achieve, *see, Colo. RPC 7.1(a)(3)*; regulates the form of unsolicited communications an attorney may send, *see, Colo. RPC 7.1(c)*; and prohibits even non in-person solicitation of a prospective client believed by the attorney to be in need of legal services which arise out of a personal injury or death of any person, within thirty days of such occurrence, *see, Colo. RPC 7.3(c).*

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McDonnell on Ross v. May Company

2008 Emerging Issues 1685

McDonnell on Ross v. May Company

By Joseph B. McDonnell

December 26, 2007

SUMMARY: An at-will employment relationship may under certain circumstances be converted into a contract of employment, which can be terminated only for cause. May a contractual employment relationship be abrogated by an employers offer of additional benefits which are accepted by an employee? The answer may surprise you. This commentary, written by Joseph McDonnell, an experienced Illinois litigator, examines this question.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Employment Law in Illinois -- Evolution. The employer-employee relationship and the proper termination of that relationship has received increasing attention in recent years. Traditionally, Illinois has followed the common-law rule that an employee hired without a fixed term of employment is an at-will employee, meaning that either he or the employer may terminate the employment relationship at any time, with or without cause.

The rule is subject to several exceptions. An employee may not be discharged in retaliation for making a workers compensation claim (*Kelsay v. Motorola, Inc.*, 74 Ill.2d 172 (Ill. 1978)) nor for activities in furtherance of a clearly-mandated public policy, e.g. reporting criminal activities to the employer. *Palmateer v. International Harvester*, 85 Ill.2d 124 (Ill. 1981).

Moreover, an at-will employment relationship may be converted into an enforceable contract of employment where an employee handbook or other policy statement by the employer creates enforceable rights, if the traditional elements of contract formation are present. (*Vickers v. Abbott Laboratories*, 308 Ill.App.3d 393 (1999); *Duldulao v. Saint Mary of Nazareth Hospital Center*, 115 Ill. 2d 482 (1987)).

In *Ross v. May Company*, the First District Appellate Court considered whether an at-will employment relationship had, by virtue of the issuance of employee handbooks by the May Company during plaintiffs at-will employment, created enforceable contract rights; and, if so, whether such rights had been abrogated by the employer when it offered new benefits to plaintiff and his co-employees, which were accepted.

The trial court determined, first, that the handbooks issued in 1987 and 1989 created an employment contract, altering plaintiffs at-will employment status and obligating defendant to observe progressive disciplinary procedures before it could terminate plaintiffs employment. The court further determined, however, that additional benefits (paid

personal days, short and long-term disability benefits, an insurance reimbursement plan, and enhanced retirement benefits) which were offered to and accepted by plaintiff abrogated the earlier contract relationship and returned plaintiff to an at-will employment status. The trial court dismissed plaintiff's additional claim of promissory estoppel based on alleged representations by defendant's agent, on the grounds that plaintiff could not establish reasonable reliance on those representations.

On appeal, the First District affirmed the dismissal of the promissory estoppel claim because the employee handbooks consistently stated that only the Vice-President of Human Resources could alter an at-will employment status. Therefore, statements by defendant's manager could not reasonably be relied upon by plaintiff to alter his at-will employment status.

With respect to the breach of contract claim, however, the Appellate Court reversed the trial judge, finding that the contractual relationship created by the handbooks was not altered by the additional benefits made available to plaintiff and his co-employees in 1990. This is because the additional benefits were unilaterally offered by the employer and were not bargained for; there was no reciprocal agreement or consideration received by the plaintiff for the relinquishment of his contract rights evidenced by the employee handbooks.

The fact that plaintiff had accepted the benefits and continued his employment with the defendant made no difference; mere continued employment, standing alone, does not constitute consideration supporting the unilateral modification of an existing contract of employment. *Doyle v. Holy Cross Hospital*, 289 Ill.App.3d 75, 80 (1997); *aff'd* 186 Ill. 2d 104. Since the 1990 benefits were offered to all employees, at-will and contractual, and no promises were made to plaintiff in return for which he agreed to relinquish his contractual rights as an employee, his status as a contractual employee was unchanged and his termination by defendant, without complying with the disciplinary procedures, was unlawful.

Tips for Practitioners. Many corporate employers have adopted employee handbooks or other policy statements setting out the terms of the employment relationship. Most contain statements that, absent explicit language to the contrary, the relationship is an at-will relationship which may be terminated by the employer at any time, with or without cause. Practitioners should be careful, in any disputed employment termination case, to examine not only the employee handbook but all policy statements which may have been issued by the employer, in order to determine whether an at-will employment relationship has been altered. The difference can be important, since union contracts or other circumstances may entitle the employee to a hearing or other protections before his employment can be appropriately terminated.

Cross References

1-1 Employment in Illinois § 1-3 (§ 1-3 Special Forms of Illinois Employment Relationships, Employment At Will).

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McDonnell on Eclipse Mfg. Co. v. United States Compliance Co.

2008 Emerging Issues 1691

McDonnell on Eclipse Mfg. Co. v. United States Compliance Co.

By Joseph B. McDonnell

December 26, 2007

SUMMARY: When an insurance company breaches its duty to defend its insured, may it nevertheless raise policy defenses in an action to enforce a judgment taken against its insured? This commentary, written by Joseph McDonnell, an experienced Illinois litigator, examines this question and other important issues surrounding an insurers duty to defend in Illinois.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: An insurers duty to defend its insured has been the subject of seemingly endless litigation in Illinois. The seminal case on the subject is *Maryland Casualty Company v. Peppers*, 64 Ill.2d 187 (Ill. 1976). The general rules that have emerged may be simply stated. If the facts alleged in the underlying complaint against the insured fall within, or potentially within, the policy's coverage provisions, the liability insurer has a duty to defend the insured. *National Fire Ins. Co. of Hartford v. Kilfoy*, 375 Ill.App.3d 530 (1st Dist. 2007). The insured's duty to defend is broader than its duty to indemnify. *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384 (Ill. 1993). Provisions that limit or exclude coverage are construed liberally in favor of the insured and against the insurer. *State Farm Mutual Automobile Ins. Co. v. Villicana*, 181 Ill. 2d 436 (Ill. 1998). The insurance company may weigh the following options where the complaint contains allegations which fall within, or potentially within, the policy coverage: it may, defend the suit; defend under a reservation of rights; or seek a declaratory judgment of no coverage. *L.A. Connection v. Penn-America Inc. Co.*, 363 Ill.App.3d 259 (3rd Dist. 2006).

In *Eclipse*, a class action arising out of unsolicited fax advertisements transmitted to plaintiff and several other businesses without their permission, Hartford was tendered the defense of United States Compliance Company within days of its being served with summons and a copy of the Complaint. Hartford refused to defend on the basis that the allegations did not come within the coverage of its policy. However, it did not file an action seeking a declaratory judgment of no coverage. *Eclipse* eventually settled the case for just under \$4 million, the limits of Hartford's policy. *Eclipse* then took an assignment from United States Compliance Company of its rights under the Hartford policy and then filed a third party citation against Hartford to enforce the consent judgment entered into with U. S. Compliance.

Hartford attempted to raise its policy defenses in the citation proceeding, but the trial court ruled against it and entered a turnover order requiring that Hartford's policy limits be applied to satisfy the consent judgment in favor of *Eclipse*. On appeal, Hartford contended that the turnover order should be reversed because its policy did not cover U. S.

Compliance's transmission of the unsolicited faxes. Hartford admitted that it had breached its duty to defend U. S. Compliance under the policies. However, it asserted that, under Minnesota law, which it contended should control, Hartford's breach of its duty did not estop it from raising policy defenses in the citation proceeding and that, under Minnesota law, there was no coverage under the policies.

The Second District held, however, that there was no need to apply conflict of law principles because, based upon its reading of *Home Insurance Co. v. National Union Fire Insurance of Pittsburgh, Pennsylvania*, 658 N.W.2d 522 (Minn. 2003), Minnesota law agreed with Illinois law on the issue of estoppel of an insurance company to raise policy defenses after it has refused to defend.

In *Home Insurance*, the Minnesota Supreme Court, according to the Second District, had explicitly adopted the Illinois rule that providing notice of the suit sufficiently triggers an insurer's duty to defend. The case also implied, according to the Second District, that Minnesota would adopt Illinois' position that an insurer will be estopped from raising policy defenses if it does not defend the suit or file a declaratory judgment action to determine its obligations under the policy. *Home Insurance*, 658 N.W. 2d at 533; slip op at 15.

Tips for Practitioners. The safest course, in advising insurance companies regarding a disputed duty to defend, is to defend the suit under a reservation of rights and, simultaneously, file a declaratory judgment action (through separate counsel) to determine the issue of coverage. It should also be kept in mind that, where there is a conflict between the interests of the insured and the insurer, the insured must be permitted to select his own counsel to represent the insured in the underlying action, and the insurer's obligation is satisfied by paying the reasonable costs of the defense, pending a determination of coverage in the declaratory judgment action.

For Further Discussion on Class Actions, see 1-7 Illinois Civil Procedure § 7.08 (§ 7.08 Special Joinder Devices, Class Action).

For Further Discussion on Insurers Duty to Defend, see 1-3 Insurance Bad Faith Litigation § 3.09 (§ 3.09 Duty to Defend Third Party Actions); 1-3 Insurance Bad Faith Litigation § 3.10 (§ 3.10 When Duty to Defend Arises); 1-5 *The Law of Liability Insurance* § 5.01 (§ 5.01 Scope of the Duty to Defend).

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McDonnell on Barbara's Sales, Inc. v. Intel Corp.

2008 Emerging Issues 1664

McDonnell on Barbara's Sales, Inc. v. Intel Corp.

By Joseph B. McDonnell

December 21, 2007

SUMMARY: What considerations do the Illinois courts entertain in determining, under conflict-of-laws principles, which state law is to govern the substantive rights of the parties in a class action suit, where more than one state (including the forum state) has significant contacts with the transactions in question? This commentary, written by Joseph McDonnell, an experienced Illinois litigator, examines this question and other important issues in pursuing class actions lawsuits in Illinois.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: The Illinois Supreme Court recently issued one of its most significant class action decisions since *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100 (2005). In *Avery*, the court had overturned a verdict rendered on a nationwide class action suit against State Farm based on the use of replacement parts for the repair of State Farm-insured vehicles. The court there held that the Illinois Consumer Fraud and Deceptive Practices Act (815 ILCS 505/1) applies only to fraudulent transactions which take place primarily and substantially in Illinois. Therefore, Illinois law precludes relief arising out of transactions which occur entirely outside Illinois.

Background. In this case, the Supreme Court considered two certified questions arising from a decision of the Circuit Court of Madison County. The complaint contained alternative counts based upon California and Illinois consumer fraud laws. The circuit court held that Illinois substantive law applied, and certified a class limited to Illinois consumers. Both parties appealed the order, plaintiff on the basis that it limited the class to Illinois residents and defendant on the basis that the court should have denied class certification entirely.

The Appellate Court reversed, finding that California law applied, and directed the circuit court to reconsider its class certification order in light of California law. The Illinois Supreme Court granted Intel's petition for leave to appeal.

Whither Goest Thou? Illinois or California? The conflict-of-laws issues presented to the Supreme Court were whether California or Illinois law was to be applied, and, secondly, whether under that law the motion for class certification was appropriate. The court answered the first question by holding that Illinois law governs the liability and damages issues; and the second by holding that the action could not proceed as a class action.

As to the first issue, the court examined several sections of the Restatement (Second) of Conflict of Laws in

determining which state law governed. The court pointed out that, while plaintiffs suit implicated consumer fraud laws and class members of all 50 states and the District of Columbia, plaintiffs sought relief only under Illinois or California law. This, according to the opinion, simplified the courts analysis because, under *Avery*, no relief may be had under Illinois law for transactions occurring outside the state. Therefore, the courts analysis was narrowed to include only Illinois and California under conflict of laws principles.

The Court rejected plaintiffs argument that Sec. 6 of the Restatement (Second) of Conflict of Laws controlled in determining the issue of which law was to be applied. The Introduction to the Restatement, the court said, enunciated the broad principle that the rights and liabilities of the parties are to be governed by the jurisdiction which retains the most significant relationship to the occurrence and to the parties. (slip op. at 12).

While the record showed that both states had significant relationships to the action, the court concluded that it should be guided by Sec. 148 of the Restatement, which sets forth a secondary statement in black letter setting forth the choice of law to be applied. That choice was Illinois, the forum in which the suit was filed. The Court pointed out that Illinois courts should not be burdened with applying foreign law absent strong policy reasons and a strong connection to the case (slip op. at 14), citing *Gridley v. State Farm Mutual Automobile Insurance Co.*, 217 Ill. 2d 158. The court noted that most of the plaintiffs (eight out of eleven) were Illinois residents who had purchased the Intel product in Illinois and had received Intels representations in Illinois. Although Californias consumer protection law was consumer-friendly, there was no reason to believe that either California or its residents would suffer by the application of Illinois law, since California had no interest in applying its laws to non-citizens or to occurrences taking place outside its borders. (slip op. at 15). The court also found that Sec. 148 of the Restatement was more specific in its application to claims of false representations (as were alleged in the complaint) than was Sec. 145, relied upon by plaintiff, which dealt basically with claims based on false advertising. Consulting Comment j to Sec. 148, the Court said that the general approach of Sec. 148 favored the application of Illinois law. For example, plaintiffs had received and relied on Intels alleged representations in their home states, again favoring the application of Illinois law. Since more than two of the relevant contacts (as set out in Sec. 148) of each plaintiff occurred in either Illinois or Missouri, the laws of their state will ordinarily govern. Considering all of the circumstances, the court determined that Illinois, rather than California, substantive law controlled.

Was class certification proper? There remained for consideration the question of class certification. The court briefly reviewed the requirements of the Code of Civil Procedure for maintenance of the class action (numerosity, common questions of fact or law, adequacy of representation, and appropriateness), but concluded that it was unnecessary to determine whether the requirements were met because, as a threshold matter, the representation identified by plaintiffs did not form the basis of an actionable claim under the Consumer Fraud and Deceptive Business Practices Act.

Plaintiffs contended that Intels representation regarding the name Pentium 4--that this processor was the best and fastest on the market was sufficient to afford recovery under the Consumer Fraud Act. The Court disagreed. Such representations constituted nothing more than puffery and therefore did not amount to a deceptive act within the meaning of the Consumer Fraud and Deceptive Business Practices Act.

As in *Avery*, where the court said a statement that the product was a quality replacement part was puffing, the court concluded here that words such as best were puffery and not actionable. Likewise, the implicit representation inherent in the name Pentium 4 (or that, in plaintiffs words, 4 is better than 3) was also mere puffery and therefore not actionable. The court said that a reasonable customer would not rely on such statements because there is nothing specific or explicit about the name Pentium 4 or even its alleged implicit meaning of 4 is better than 3 or best.

Accordingly, the court overturned the circuit courts decision regarding class certification and held that the lawsuit as presently constituted should not proceed as a class action.

Tips for Practitioners. Under this decision and the Supreme Courts earlier opinions in *Avery* and *Gridley*, it is

apparent that plaintiffs who file class action suits in Illinois carry a heavy burden if they seek to incorporate a class which includes non-resident consumers. The attractiveness of the Consumer Fraud Act as a vehicle for prosecuting class actions is the provision for attorneys fees to the prevailing party. The Act will be unavailing, however, where transactions occurred outside the state of Illinois. In addition, plaintiffs must be careful to distinguish between statements (whether in advertising or from other sources attributable to defendant) that are representations of fact as opposed to puffing of the defendants product. Finally, where most of the representative plaintiffs are Illinois residents and the bulk of the contacts occurred in Illinois, plaintiffs will be hard-pressed to convince trial courts that, under conflict-of-laws principles, the law of any state other than Illinois should be applied.

Cross References

1-7 Illinois Civil Procedure § 7.08 (§ 7.08 Special Joinder Devices, Class Action).

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Susan M. Brazas on Bauer v. Memorial Hospital

2008 Emerging Issues 1653

Susan M. Brazas on Bauer v. Memorial Hospital

By Susan M. Brazas

December 20, 2007

SUMMARY: Susan M. Brazas on Jury Instructions for Increased Risk of Decreased Life Expectancy and Special-Parental-Help in a Catastrophic Injury Case: Applying the Dillon Holding. Non-pattern jury instruction identifying damages for increased risk of decreased life expectancy and for special-parental-help may be given, held the Fifth District Appellate Court's decision in *Bauer v. Memorial Hospital*. The court affirmed in part and vacated in part a \$7.15 million jury verdict for severe injuries sustained by a newborn not promptly treated for hypoglycemia. Among the dramatic issues confronted are claims of improper ex parte communications between counsel and the court and claims of error in allowing the plaintiffs' attorney to call the defendants' attorney as a fact witness. This commentary, written by Susan M. Brazas, frequent author and lecturer on civil practice matters, discusses the significance and implications of this opinion addressing numerous rulings of the trial court.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: *Bauer & New Damages.* The Fifth District Appellate Court in *Bauer v. Memorial Hospital*, 2007 Ill. App. LEXIS 1262 (Ill. App. Ct. 2007) has recognized two new categories of damages: (1) increased risk of decreased future life expectancy; and (2) special-parental-help. The first such category is an extension of the principle which has evolved in Illinois over the past several years that increased risk of future harm or lost chance of recovery damages are compensable. This principle was first clarified by the Illinois Supreme Court in *Dillon v. Evanston Hospital*, where the Court held that compensation for such damages may be awarded if it is shown, to a reasonable degree of certainty, that the defendants wrongdoing created the increased risk. *Dillon v. Evanston Hosp.*, 199 Ill. 2d 483, 771 N.E.2d 357 (2002). Currently, the IPI pattern instructions include IPI 30.04.04, Increased Risk of Harm--Calculation. The *Bauer* court agreed that this and other IPI pattern instructions could be modified to describe increased risk of future decreased life expectancy, and held that it was proper to have given these modified instructions to the jury.

The *Bauer* court also upheld the use of the plaintiffs specially crafted instruction identifying a new category of damages: special-parental-help. This category is meant to define the value of the parents services in providing care for the special needs of the severely disabled child.

Strategic Considerations. Attorneys should be willing to tailor pattern jury instructions in creative ways, but with great care to follow the case law of the pertinent issues and, when possible, using a pattern instruction as the framework. The *Bauer* court seemed to stretch the bounds of the familiar with their approval of the non-pattern instructions given.

Where, for example, multiple instructions reference categories of damages, then counsel should carefully review all pattern instructions and make the appropriate modifications as needed. In particular, the requirements set forth in the key case of *Dillon v. Evanston Hosp.*, 199 Ill. 2d 483 (Ill. 2002) should be strictly followed.

Jury Instruction Argument. The *Bauer* court cited, on several occasions, to the Notes on Use to the IPI Instructions. Although technically these Notes on Use are not precedential or binding, they are often helpful leverage for bolstering an argument as to whether or not a particular instruction should be given. Additionally, when the topics are novel, citation to practices in other states can be helpful. The *Bauer* court cited to the trend in other states of awarding future damages in reaching its decision as to the compensability of future damages for reduced life expectancy. Where no Illinois court has directly addressed a particular topic, case law or even jury instructions from other jurisdictions can provide guidance to the trial court.

Discovery Implications. Counsel are well advised to incorporate, into written discovery requests and depositions, specifically drafted inquiries to address the areas covered in these two new categories of damages.

The *Bauer* court expressed disbelief that the defendant could not identify several nurse witnesses. This can serve as a warning to attorneys that explanations for why a witness is not called to testify will be closely scrutinized. Otherwise, the penalty, as for the defendants in *Bauer*, may be the giving of the missing witness instruction, IPI (Civ.) 5.01 (2007)(1-2 Illinois Forms of Jury Instruction § 2.50).

Thus, counsel should be persistent in exhausting all sources of information to identify witnesses who could potentially provide useful testimony. When the search is not fruitful, counsel should thoroughly document efforts made to identify or locate a witness, in the hope of minimizing the risk that the missing witness instruction will be given.

The trend in recent case law appears to be to give the missing witness instruction, so long as even a modicum of the elements set forth in IPI 5.01 are present. *Kersey v. Rush Trucking, Inc.*, 344 Ill. App. 3d 690, 702, 800 N.E.2d 847, 858 (2003). However, if a previously-disclosed retained expert is not called at trial, the missing witness instruction need not be given. *Montgomery v. Blas*, 359 Ill. App. 3d 83, 88, 833 N.E.2d 931, 935 (2005).

Strategy for Expert Testimony and Disclosure. The *Bauer* court identified a broad range of adequate expert disclosures in affirming the testimony of experts. Whereas some attorneys might strive to describe in painstaking detail all opinions of experts, the *Bauer* court called it sufficient where the experts opinions had been set forth in a variety of means: through reports, depositions, and even the experts own medical records. Thus, more than just the partys Answers to Ill. Sup. Ct., R 213 Interrogatories will be viewed as providing notice of the experts opinions. Even so, court decisions on the admissibility of expert opinion vary greatly and are highly fact-specific. Recent court decisions on Rule 213 include *Boyd v. City of Chicago*, 2007 Ill. App. LEXIS 1270 (Ill. App. Ct. 2007), *Pancoe v. Singh*, 876 N.E.2d 288 (1st Dist. 2007), and *Lopez v. Northwestern*, 375 Ill. App. 3d 637, 873 N.E.2d 420 (1st Dist. 2007). Best practice dictates that Rule 213 disclosures be reviewed for completeness shortly before the 60-day-prior-to-trial date, and supplemented as needed. Disclosures should be broad enough to encompass all opinions known on the subject, including deposition testimony, reports, and medical record entries.

Cross References: LexisNexis Illinois Forms and Illinois Checklists (Civil; pleadings and motions); Ill. Sup. Ct., R 213; IPI (Civil) 5.01 (1-2 Illinois Forms of Jury Instruction § 2.50), 30.04.04 (2007).

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Bar. Ms. Brazas is a frequent lecturer at ISBA seminars on civil practice topics such as jury instructions and case law developments.



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Joseph B. McDonnell on Babich v. River Oaks Toyota and Flair Design, Ltd.

2008 Emerging Issues 1655

Joseph B. McDonnell on Babich v. River Oaks Toyota and Flair Design, Ltd.

By Joseph B. McDonnell

December 20, 2007

SUMMARY: Where a product-liability count is barred by the statute of limitations, is a second count, alleging spoliation of evidence, also barred? This commentary, written by Joseph B. McDonnell, an experienced Illinois litigator, examines considerations for the practitioner on spoliation of evidence claims in light of *Babich v. River Oaks Toyota and Flair Design, Ltd.*

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Spoliation of evidence has been a fairly fertile field of litigation since the Illinois Supreme Court, in *Boyd v. Travelers Insurance Company*, 166 Ill. 2d 188 (1995), recognized the concept as a valid theory under existing principles of negligence law. This case presents the issue of whether a spoliation claim may be maintained when the action to which it relates is barred by the Statute of Limitations.

Background. Matthew Babich filed a product liability action (Count I) and a negligent spoliation action (Count II) based upon injuries allegedly sustained by him on July 16, 2001 when he fell from an allegedly defective chair manufactured by Flair Design, Ltd. He settled his product liability claim with Flair Design. River Oaks, the Toyota dealership which owned the chair at the time of the accident, then moved for summary judgment on the spoliation claim. Discovery established that the dealership had purchased the chair no later than 1990. The pertinent statute of limitations provided in substance that no product liability action shall be commenced except within the applicable limitations period and, in any event, within 12 years from the date of first sale, lease or delivery of possession by a seller or 10 years from the date of first sale, lease or delivery of possession to its initial user, consumer, or other non-seller, whichever period expires earlier 735 ILCS 5/13-213(b).

Shorter or Longer? Since a seller and a consumer were involved, the First District applied the 10-year limitations period because it expired earlier. (Citing *Garza v. Navistar International Transportation Corp.*, 172 Ill. 2d 373 (1996) (in cases involving manufacturers and distributors-lessors, two categories of sellers with two different limitations periods, the earlier of the 10- or 12-year repose period is to be applied in determining whether the product liability claim was timely filed)).

The Holding. The court accordingly determined that the statute of limitations (more appropriately, the statute of repose with respect to paragraph (b)) had expired. The chair had come into the dealerships possession no later than

1990, and the statute would then have run in 2000. Since the suit was not filed until July 12, 2002, any product liability action was barred.

What Next? It remained to consider the effect of the holding as to Count I on the negligent spoliation count. Plaintiff claimed that Toyota had improperly disposed of the chair that had caused his injury. The court pointed out that *Boyd* had established that an action for negligent spoliation of evidence is not recognized as an independent cause of action, but can be stated under existing negligence principles. (Citing *Boyd* 166 Ill. 2d, 188, 193 (1995)). This means that it is a derivative cause of action, depending for its validity on the successful maintenance of the primary action to which it relates, in this case the product liability claim against Flair Design. Inasmuch as that claim (notwithstanding the settlement made by plaintiff) was barred by limitations, the spoliation claim, being derivative, must suffer the same fate.

The Holding. An action for spoliation of evidence, being derivative in nature, has the same period of limitations, and once the product liability action expired there was no pending action in which the chair could be introduced as evidence. See *Antler v. Classic Residence Management, Ltd. Partnership*, 315 Ill.App.3d 259, 269 (2000). Therefore, the trial court was correct in granting defendants motion for summary judgment and its judgment was affirmed.

Tips for Practitioners. It is well established in Illinois that, in legal malpractice cases generally, the plaintiff must prove that he had a valid underlying claim which was lost as a proximate result of his attorneys negligence. This entails proof of the case-within-a-case, as it is commonly called. *Babich* appears to require that a spoliation action is subject to the same requirement; that the action is derivative of the principle claim and therefore intimately tied to it. Thus, where the principle action for one reason or another cannot be maintained, the spoliation claim will also fail.

In addition, the spoliation claim should be filed in the same suit as the principle action, as is commonly done in loss-of-consortium claims, which are also derivative. See *Brown v. Metzger*, 104 Ill.2d 30 (1984).

Although the *Babich* opinion does not discuss the subject, it is well to remember the distinction between a statute of limitations and a statute of repose. A statute of repose differs from a statute of limitations in that a statute of limitations governs the time within which lawsuits may be commenced after a cause of action has accrued, while a statute of repose extinguishes the action itself after a fixed period of time, regardless of when the action accrued. *DeLuna v. Burciaga*, 223 Ill.2d 49 (Ill.2006). The difference was not discussed in *Babich* because it made no difference. The two-year statute of limitations applicable to personal injury actions generally had obviously run, and the only issue was the application of the 10-year or 12-year statute of repose. 735 ILCS 5/13-213(b).

Cross References. 1-1 Illinois Civil Procedure § 1.07 (Timing Requirements for Civil Actions in the Illinois Circuit Courts: Statutes of Limitations and Repose, Mandated Notices and the Like). 1-19 Illinois Tort Law 19.syn (Chapter 19 Products Liability).

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James J. Walsh on Governmental Immunity

2008 Emerging Issues 1658

James J. Walsh on Governmental Immunity

By James J. Walsh

December 20, 2007

SUMMARY: This commentary, written by James J. Walsh, an experienced litigator, discusses the significance and implications of *Frohriep v. Flanagan* on governmental immunity from tort liability in Michigan.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: In *Frohriep v. Flanagan*, 739 N.W.2d 645; 275 Mich. App. 456 (2007), a unanimous three-judge panel of the Court of Appeals affirmed the trial courts grant of summary disposition in favor of three officers of the Michigan Department of Education. The plaintiffs in *Frohriep* were schoolteachers wrongly identified by the Department of Education as having criminal convictions on their records. The plaintiff schoolteachers sought damages resulting from having inaccurate information disseminated to various school districts. The identifications had occurred during the Departments effort to implement new legislation related to school safety. The plaintiffs attempted to bring numerous tort claims against three defendants, all Department of Education officials.

The Court of Appeals affirmed the grant of summary disposition on the grounds that all three defendants were immune from suit under Michigans governmental tort liability act, MCLS § 691.1401, *et seq.*, because there were no allegations that they had been acting outside the scope of their authority when they allegedly committed the torts, and because there were no allegations of gross negligence.

Seven months after the Court of Appeals issued its opinion, the Michigan Supreme Court on December 5, 2007 issued an order partially reversing the Court of Appeals decision. *See Frohriep v. Flanagan*, 2007 Mich. LEXIS 3160. The court held that the plaintiffs could bring their claims against the two lower-ranking officials, the chief academic officer/deputy superintendent and the supervisor of client services, but it agreed with the Court of Appeals that the superintendent was immune from liability under the governmental tort liability act. In its succinct decision, the Michigan Supreme Court offered the following brief analysis: MCLS § 691.1407(2) does not apply to these defendants because they are individual government employees who are not provided immunity under MCLS § 691.1407(5), and because the plaintiffs alleged intentional torts for which liability was imposed before July 7, 1986.

Governmental Immunity From Tort Liability in Michigan. In 1964, the Michigan legislature codified common-law sovereign immunity to liability and put all then-existing legislative exceptions in one place by enacting the states governmental tort liability act. MCLS § 691.1401, *et seq.*; *Ballard v. Ypsilanti Township*, 577 N.W.2d 890, 893;

457 Mich. 564 (1998). Certain sections of the act grant immunity to government departments or agencies, and two sections extend immunity to individual governmental employees. MCLS § 691.1407(5) governs immunity from tort liability for judges, legislators and the elective or highest appointive executive official[s] of all levels of government, and MCLS § 691.1407(2) governs immunity for all other individual government officers and employees. To receive immunity from liability for personal injury and property damage claims resulting from their alleged tortious conduct, judges, legislators and elective or highest appointive executive official[s] must have been acting within the scope of their authority when the alleged tort occurred. MCLS § 691.1407(5).

In comparison, other governmental employees enjoy tort immunity only if a three-prong statutory test is met. See MCLS § 691.1407(2); see also *May v. Greiner*, 2006 Mich. App. LEXIS 3089. Firstly, the employee must either have acted within the scope of his authority, or at least must have acted reasonably believing that his actions were within the scope of his authority. Secondly, the governmental agency or department that employs the employee must be engaged in the exercise or discharge of a governmental function. Lastly, to receive immunity the employee must not have acted in a grossly negligent fashion.

Exceptions to Governmental Immunity, and Considerations for Plaintiffs Counsel. Practitioners should realize that while the immunity extended to governmental employees is powerful, it is far from absolute. Although the immunity does extend beyond negligence claims to also cover other types of torts, such as a claim of trespass-nuisance made against a governmental employee, see *Pohutski v. City of Allen Park*, 641 N.W.2d 219 ; 465 Mich. 675 (2001), the act neither immunizes an employee from liability for every type of tort nor protects an employee from liability in every instance. Thus, practitioners representing plaintiffs are advised not to dismiss the possibility of bringing a claim against a governmental employee without first analyzing whether the potential claim falls under a recognized exception that will allow a court to hold a governmental employee liable for his tortious conduct.

Some exceptions are in the statute itself. As stated in the three-prong test under section MCLS § 691.1407(2), a plaintiff can bring claims based on ultra vires acts of the employee in certain circumstances, MCLS § 691.1407(2)(a), or claims alleging gross negligence in every circumstance, MCLS § 691.1407(2)(c). Besides those found in the three-prong test, other limitations exist. As the Michigan Supreme Court noted in its order in *Frohriep*, section 1407(2) immunity does not prevent a plaintiff from bringing claims for intentional torts. See *Frohriep*, 2007 Mich. LEXIS 3160 (citing MCLS § 691.1407(3) and *Sudul v. Hamtramck*, 562 N.W.2d 478; 221 Mich. App. 455 (1997)); see also *Lavey v. Mills*, 639 N.W.2d 261, 268; 248 Mich. App. 244 (2001). Following the Michigan Supreme Courts order in *Frohriep*, it appears that a plaintiff may be allowed to bring claims for intentional torts committed within the scope of employment. Finally, governmental immunity cannot protect a government employee from liability for a violation of constitutional right. *Smith v. State Dept of Public Health*, 410 N.W.2d 749, 751; 428 Mich. 540 (1987) (Where it is alleged that the state, by virtue of custom or policy, has violated a right conferred by the Michigan Constitution, government immunity is not available in a state court action.); see also *Burdette v. State*, 421 N.W.2d 185, 187; 166 Mich. App. 406 (1988) (Constitutional rights serve to restrict government conduct. These rights would never serve this purpose if the state could use governmental immunity to avoid constitutional restrictions.).

Practitioners should also be aware of several procedural issues. It is important to appreciate the fact that governmental immunity works differently depending on whether the potential defendant is a governmental entity or a governmental employee. As it relates to governmental entities, immunity is considered a characteristic of those entities, and not an affirmative defense. Therefore, when bringing a claim against a governmental entity, a plaintiff must plead his claims in a way as to avoid having his claims barred. *Meadows v. City of Detroit*, 418 N.W.2d 100, 106; 164 Mich. App. 418 (1987). Contrastingly, because immunity is not considered to be a characteristic of an individual government employee, under the Michigan Rules of Court defendants who are individual governmental employees must plead immunity as an affirmative defense in their responsive pleadings. MCR 2.111(F) (2), (3) (a); *Meadows*, 418 N.W.2d at 106. Practitioners should also note that statutes of limitation may come into play to bar stale tort claims brought against governmental employees just as they bar stale claims brought against any other defendant. See MCLS § 691.1411.

For additional information on governmental immunity in Michigan, see Michigan Law & Practice 2d State § 104 (M.L.P. STATE § 104); MCLS § 691.1407.

ABOUT THE AUTHOR(S):

James J. Walsh is a partner in the Ann Arbor office of Bodman LLP, a Detroit based firm. Mr. Walsh is a 1975 graduate of Louisiana State University Law School and clerked for two judges on the Michigan Court of Appeals before joining Bodman in 1977. His litigation experience is quite broad, with numerous jury and bench trials and appeals in federal and state courts. He was primary litigation counsel for Michigans Commissioner of Financial and Insurance Services in the rehabilitation of the U.S. branch of Confederation Life Insurance Company, the largest and most successful insurance insolvency in North American history. He has extensive experience in class actions and also specializes in the constitutional aspects of sign regulations as counsel to the Outdoor Advertising Association of Michigan.



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Langsdorf on Kilroy v. Northeast Sunspaces, Inc.

2008 Emerging Issues 1659

Langsdorf on Kilroy v. Northeast Sunspaces, Inc.

By Stephen E. F. Langsdorf

December 20, 2007

SUMMARY: This commentary, written by Stephen E. F. Langsdorf, an experienced litigator, discusses the significance and implications of *Kilroy v. Northeast Sunspaces, Inc.* on the Maine Unfair Trade Practices Act and the recovery of attorneys fees.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Attorneys Fees Denied as Remedy for Lack of Notice for UTPA Claim. The Maine Unfair Trade Practices Act (UTPA), 5 M.R.S.A. §§205-A 214 (2006), requires that 30 days prior to the filing of an action for damages, a written demand for relief be served, identifying the claimant, reasonably describing the unfair and deceptive act or practice relied upon, and stating the injuries suffered. There is no provision in the UTPA that specifies a penalty for failure to provide the notice. In *Kilroy v. Northeast Sunspaces, Inc.*, the Supreme Judicial Court of Maine held that it was not an abuse of discretion for the court to consider lack of notice in exercising its discretion regarding a request for attorneys fees and upheld the denial of a motion for an award of fees.

Fact Pattern of Kilroy. Kilroy sued Northeast Sunspaces, Inc. and Four Seasons Solar Products, LLC for breach of contract, breach of express warranty, and violation of the UTPA because of injuries he sustained when, in May 2002, he slipped and fell while removing water from a leaking sunroom which he had purchased in 1997 and which had started leaking almost immediately. Kilroy had communicated his concerns to Northeast, the franchisee/installer, and Four Seasons, the manufacturer, and sent letters to both companies describing the problem prior to March 2001. As a result of his fall, Kilroy was hospitalized for a month and did not recover from his injuries. His attorney sent a letter to Four Seasons on November 20, 2002, stating that Kilroy seriously injured himself when attempting to deal with leaks caused by negligent installation and/or design of the Four Seasons sunroom that was installed at his home in December 1997. The letter also stated that Kilroy intended to pursue a claim against Four Seasons for damages for personal injury.

In 2004, Kilroy filed a complaint against Northeast and Four Seasons which included the UTPA claim and a demand for attorneys fees. The Defendants did not raise the issue of inadequate statutory notice as an affirmative defense. Northeast made an offer of judgment pursuant to Me. R. Civ. P. 68 on August 22, 2005 for \$150,000.00, which was rejected, and a second offer of judgment on December 29, 2005, for \$200,000.00, which was also rejected. After an eleven day jury trial in January 2006, the jury found for Kilroy for breach of contract, breach of express warranty and unfair trade practices and awarded him \$75,000.00 in damages.

After trial, Kilroy moved for an award of attorneys fees on the UTPA claim pursuant to 5 M.R.S.A. §213 (2). The Defendants, for the first time, raised adequacy of the pre-litigation notice as a defense to the attorneys fee claim.

What Notice Was Provided. The Superior Court denied Kilroys motion for attorneys fees finding that the letter written by Kilroys lawyer in November 2002, was not sufficient notice that he was asserting a UTPA claim because it only alleged that the leaks were caused by negligent construction or design. The Court also found that Northeast and Four Seasons had not waived the defense of lack of notice because the defense did not go to the substantive claim, but only to the attorneys fees claim and thus there was not an occasion for the Defendants to assert [the] issue previously.

Despite the fact that the November 2002 letter was a written demand for relief which identified negligent construction and/or design as the conduct leading to personal injuries, the Supreme Judicial Court affirmed the ruling that the judge did not abuse his discretion by determining that it did not sufficiently describe the unfair and deceptive act.

Background of the ruling. Even though there is no provision in the UTPA which specifies a penalty for failure to provide the notice, the Court previously held in the case of *Oceanside at Pine Point Condominium Owners Association v. Peachtree Doors, Inc.*, 659 A.2d 267, 273 (Me. 1995) that failure to award attorneys fees when appropriate notice had not been provided was one potential remedy. Accordingly, the Court in *Kilroy* ruled that it was not an abuse of discretion to deny a claim for attorneys fees.

The Plaintiff in *Kilroy* noted that in *Oceanside* the lack of pre-litigation notice in a UTPA case was an affirmative defense and cited case law, *e.g.*, *Inniss v. Methot Buick-Opel, Inc.*, 506 A.2d 212 (Me. 1986), that affirmative defenses are waived unless timely raised. Plaintiff argued that by not raising the affirmative defense of lack of notice in the answer, Defendants had waived the affirmative defense. However, the Court noted, remarkably, that since failure of notice was an affirmative defense only to the claim for attorneys fees it was not a defense that had to be raised in the initial answer. The Court stated if Defendant is going to raise a lack of notice in response to an attorneys fees request, the appropriate time to do so is when the fee request is actually made. In so doing, the Court ignored the fact that the attorneys fees request was made in the Complaint.

Why this case is curious. The UTPA is a consumer protection statute which allows victims of unfair trade practices to recover attorneys fees if they prevail. For decades, Maine case law has embodied the public policy that the purpose of providing notice in advance of litigation is to put a party on reasonable notice of a claim, to allow the parties an opportunity to settle. Here, both Defendants were provided with notice describing in detail the nature of the claim and had the opportunity to settle. Even though the Court held that the notice did not reasonably describe the unfair conduct, negligent design and/or construction are considered to be unfair trade practices under appropriate circumstances (as the jury found here).

The conclusion that an affirmative defense of failure of pre-litigation notice for UTPA claim need not be made until the attorneys fees request is made is certainly unprecedented under Maine law. The reason that Courts normally require affirmative defenses to be raised at the time of initial pleading is to allow those legal issues to be aired and remedied, if necessary, at the beginning of the lawsuit, not at the conclusion of the case.

What to do now. Despite the holding in *Kilroy*, defense counsel is not well advised to wait until after trial to first raise a failure of pre-litigation notice as a defense.

In order to avoid the problem in this case and the odd result that a winner of a UTPA case after a jury trial is denied attorneys fees, counsel for the plaintiff needs to be certain to fully describe the unfair conduct, identify it as unfair, and cite the statute in a notice to the defendant(s) more than 30 days prior to filing suit.

ABOUT THE AUTHOR(S):

Stephen E. F. Langsdorf specializes in civil litigation and employment law before administrative agencies, in arbitrations and in court. He has been lead counsel in more than twenty jury trials and has argued twenty or more cases before the Maine Supreme Judicial Court. He is currently Corporation Counsel for the City of Augusta and attends Council, Planning Board and committee meetings. He graduated from Texas A & M University with a degree in philosophy and history and in 1986 earned his law degree from the University of Texas. He joined Preti Flaherty in 1986, became a Member in 1996 and an Equity Member in 1997.



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Susan M. Brazas on Case v. Galesburg Cottage Hospital

2008 Emerging Issues 1625

Susan M. Brazas on Case v. Galesburg Cottage Hospital

By Susan M. Brazas

December 19, 2007

SUMMARY: Susan M. Brazas on Defining Diligence of Service: The Illinois Supreme Court Clarifies the Time Factor in a Motion to Dismiss for Lack of Diligence in Service. The clock stops running when no complaint is pending, in the gap between a voluntary dismissal and re-filing, for the purpose of a Rule 103(b) motion to dismiss for lack of diligence in service of process. This is the holding in the Illinois Supreme Court's reversal of the circuit court and the Third District Appellate Court in Case v. Galesburg Cottage Hospital. This commentary, written by Susan M. Brazas, frequent author and lecturer on civil practice matters, discusses the impact and implications of the Supreme Court's first examination of this issue since its 1977 opinion in Aranda v. Hobart Mfg. Corp.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Illinois Supreme Court Clarifies the Time Factor For Motions to Dismiss Based on Lack of Diligence of Service. In *Case v. Galesburg Cottage Hospital*, 2007 Ill. LEXIS 1707, the Illinois Supreme Court addressed the interplay of the voluntary dismissal statute and the Supreme Court Rule on dismissal for lack of diligence. In this reversal of both the trial court and the appellate court (via its Ill. Sup. Ct., R 23 unpublished opinion), the Supreme Court recognized the practical realities of diligence of service when a plaintiff has voluntarily dismissed a complaint.

Ill. Sup. Ct., R 103(b), as amended in 1997, reads:

Dismissal for Lack of Diligence. If the plaintiff fails to exercise reasonable diligence to obtain service on a defendant, the action as to that defendant may be dismissed without prejudice, with the right to refile if the statute of limitation has not run. The dismissal may be made on the application of any defendant or on the courts own motion.

In *Case*, the Illinois Supreme Court re-visited the factors to be considered in a Ill. Sup. Ct., R 103(b) motion to dismiss in the factual context of a medical malpractice action naming several defendants. The plaintiff had not attached a Section 622 reviewing physicians report to the complaint, but instead filed an attorneys affidavit requesting an additional 90 days to do so. The key facts were that:

- . summons was not issued as to the initial complaint;
- . a voluntary dismissal was taken one month later;

- . the complaint was re-filed eleven months later; and
- . a summons was issued and served within 14 days after the re-filing.

Although both the trial court and the appellate court found that the plaintiff had not been diligent in service, the Supreme Court disagreed. They noted that the one-year window of time in which a voluntarily dismissed complaint may be re-filed is an absolute right, which must be protected. The Court noted that when considering a claim of non-diligence, to include the time between voluntary dismissal and re-filing toward the time which it took for plaintiff to obtain service would infringe upon the one-year right to re-file. This was a confirmation of the Courts opinion on a similar factual scenario upholding the absolute right to re-file, according to the predecessor to 735 ILCS 5/13-217 in *Aranda v. Hobart Mfg. Corp.*, 66 Ill. 2d 616, 620 (1977).

Practical Implications. Excerpts from the circuit courts letter opinion cast aspersions on the decision of the plaintiffs attorney to withhold issuance of the summons, as he specifically instructed the clerks office to do. This appears to be without basis in the Supreme Court Rules or in the Code of Civil Procedure. Indeed, Rule 103(b) provides a penalty only for lack of reasonable diligence to obtain *service* on a defendant, and *not* for lack of reasonable diligence to obtain *issuance of summons*.

Even so, the *Case* court did not rally to the defense of the plaintiffs right to seek issuance of summons at leisure. Instead, the opinion affirms the validity of the several factors to be considered when lack of diligence is claimed. These factors are enumerated in *Segal v. Sacco*, 136 Ill. 2d 282, 287, 555 N.E.2d 719, 720 (1990). They include the length of time used to obtain service of process, and the ease of locating the defendant. The *Case* court cautioned that in some instances, a lack of diligence could be found where the delay in service was even shorter than in the present situation, if there were unnecessary delay in order to circumvent the statute of limitations.

Strategic Considerations. Counsel are cautioned against stretching too far the limits of delay in either the issuance of summons or the service of summons upon any defendant. Unlike some other states, in Illinois the statutes, Supreme Court Rules, and case law are devoid of any absolute deadline by which service of process must be had upon a defendant, or by which summons must be issued. The *Segal* factors identified by the Supreme Court remain intact, and are general enough to give courts wide discretion in scrutinizing any delay in service, regardless of whether voluntary dismissal has occurred.

However, in certain cases where procedural hoops cannot be timely completed (as in medical malpractice cases where a Section 622 report cannot be timely filed), it may be the most prudent course to voluntarily dismiss and, *promptly* after re-filing, obtain service. To maximize the diligence determination, attorneys are well advised to attempt to locate the whereabouts of all defendants *in advance* of re-filing the complaint.

Cautions Upon Re-Filing. The harsh reality of holding back on service is that once a defendant has filed a Rule 103(b) motion to dismiss for lack of diligence, that motion must be ruled upon before any ruling upon a plaintiffs motion to voluntarily dismiss. *OConnell v. St. Francis Hosp.*, 112 Ill. 2d 273, 283 (1986). The *Case* court distinguished *OConnell* as a case involving the non-diligent delay of a *pending* case. Where a case is, essentially, non-existent because it has been voluntarily dismissed and not yet re-filed, the *Case* court noted, there is no pending case, and to expect diligence in service during that time is groundless.

What the timing predicament of *OConnell* does mean for the practitioner, however, is that even the appearance of non-diligence should be avoided so that the tool of voluntary dismissal will remain readily available. If a voluntary dismissal is had, the *later* of one year *or* the remaining period of the statute of limitations is available. However, if dismissal occurs pursuant to Rule 103(b), then the remaining statute of limitations, *if any*, is all that is available for a window of time in which to re-file the complaint. This remains a great risk for the practitioner which should be considered in any decision to delay the issuance of summons or the service of process.

Cross References: 735 ILCS 5/2-1009; 735 ILCS 5/13-217; Ill. Sup. Ct., R 103; LexisNexis Illinois Forms and

Illinois Checklists (Civil; pleadings and motions); C. Lizak, Dismissal for Lack of Diligence in Serving Process: The Failure of Rule 103(b), *94 Ill. Bar J.* 372 (2006).

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Jean-Claude Labady on Internet Communication and Long-Arm Jurisdiction

2008 Emerging Issues 1629

Jean-Claude Labady on Internet Communication and Long-Arm Jurisdiction

By Jean-Claude Labady

December 19, 2007

SUMMARY: Issues surrounding the establishment of jurisdiction through internet postings and communications present new challenges. This commentary, written by Jean Claude Labady, an experienced New Jersey litigator, examines considerations for the practitioner in determining if long-arm jurisdiction exists in New Jersey light of *Goldhaber v. Kohlenberg*.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Internet Postings & Jurisdiction -- A Daunting Defendant. In *Goldhaber v. Kohlenberg*, 395 N.J. Super. 380, 928 A.2d. 948 (App. Div. 2007) a father and daughter who resided in New Jersey joined an internet newsgroup about cruises. The defendant was also a subscriber to the same group. The plaintiffs filed a complaint alleging that the defendant, a California resident, who had no contacts with New Jersey, posted extremely derogatory statements about them on the newsgroup site. The Appellate Division found the statements to be so vile in nature that it did not relay them in the body of the opinion.

Internet Postings & Jurisdiction -- A Defaulting Defendant. A single-count complaint was served on the defendant. He consulted with a lawyer in California who told him that New Jersey had no jurisdiction over him. Accordingly, he failed to file an answer to the complaint and default judgment was entered against him. Normally, it takes merely the filing of a simple request for default form with a certification stating that service was effected and no responsive pleading filed for a plaintiff to be permitted to have a proof hearing for the entry of a judgment in a sum certain against a defaulting defendant.

Whether by this mechanism or another, judgment was entered against the California defendant in a small amount.

Blakey: The New Jersey Supreme Court Opts for the Basics. The Appellate Division first explored the propositions offered in the New Jersey Supreme Court opinion in *Blakey v. Continental Airlines*, 164 N.J. 38, 751 A.2d 538 (2000). In this case, airline pilots posted derogatory comments on an online bulletin board against a female employee who had filed a lawsuit alleging discrimination against the airline. The bulletin board, although powered by CompuServe, was part of a Continental company-wide network. The plaintiff filed libel actions against the pilots in

New Jersey in addition to her discrimination claims. The pilots moved to dismiss her claims on the basis that they had no contacts with New Jersey. The Supreme Court remanded the suit for further discovery on the ground that there was no evidence that the pilots knew that she had filed her discrimination lawsuit in New Jersey and knew that their messages would be disseminated in the state. Importantly, the Court declined to adopt new jurisdiction propositions for the internet communications field. It placed its comments in the context of the traditional precepts of due process based on minimum contacts and traditional notions of fair play and substantial justice. The basic inquiry remains whether the offending party expects to be haled into court in New Jersey. Furthermore, an intentional act will give rise to jurisdiction. *Goldhaber*, 395 N.J.Super. at 386 .

Blakey Not Followed by the Appellate Division. The Appellate Division declined to follow *Blakey* for an important reason, which a practitioner seeking jurisdiction for an alleged internet offender should heed. The court made a distinction between the Continental site that is accessible only to Continental employees as a closed network and the newsgroup site in *Goldhaber*, which was not monitored by a moderator. The Court examined precedents from other states. One approach is that the mere fact of posting messages on a newsgroup site, which can be read all over the world, does not convey jurisdiction. Another approach is to uphold jurisdiction where there exists any form of contact, technical or otherwise with the state (e.g., a server in Virginia where the message passed through or soliciting business there).

The *Goldhaber* court observed that the courts that espouse the view that the mere posting of messages is not sufficient evidence for jurisdiction search for messages that *direct* or *focus* the offensive messages on the forum state. This is called by commentators a targeting-based analysis. Closer to this view is the effects approach adopted in *Blakey* by the New Jersey Supreme Court, which in turn relied on the United States Supreme Courts opinion in *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984). Under this approach, jurisdiction may be posited based upon where the effects of the harassment were expected or intended to be felt. . . *Goldhaber*, 395 N.J.Super. at 389. Here, the offending message cannot be what is described as interactive or passive; it must both target and be intended to have effects in New Jersey as the forum state. Accordingly, the court found that Kohlenberg did target New Jersey since he knew that the plaintiffs lived in New Jersey; replied to some of the plaintiffs comments; made derogatory comments about the municipality and its police department; and referred to plaintiffs neighbors in the apartment complex where they resided and even posted the plaintiffs address in one of the postings. The court stated that [c]onduct of that nature and its connection to New Jersey are such that [defendant] should reasonably [have] anticipate[d] being haled into court here. . . Indeed, we would deem it against the policy of our courts to deny these plaintiffs a forum in which to seek redress. *Goldhaber*, 395 N.J.Super. at 390 .

Defendants Service of Process Argument Rejected. The court next addressed the defendants service of process challenges. It rejected his position that the plaintiffs did not file an affidavit of diligent inquiry stating that he could not be served personally in California. The Court based the rejection essentially on the proposition that [d]efault judgments will not be vacated for minor flaws in the service of process. *Goldhaber*, 395 N.J.Super. at 391. The court also rejected the defendants argument that when process was served in California he was away in Nevada, and the person receiving the summons and complaint did not match his description. The court remarked that service of process is proper when someone receiving process at a defendants address promptly transmits the papers to the defendant. *Goldhaber*, 395 N.J.Super. at 391.

Reversing the Default Judgment. Another important procedural aspect of the case is the reversal of the default judgment against the defendant. The case law here is typical in New Jersey: the defendant has to show excusable neglect for not having filed an answer to the complaint in a timely fashion and has to have a meritorious defense to the

plaintiffs claims. In this case, the trial court found no excusable neglect, but the Appellate Division did since the defendant relied on the advice of his California attorney in failing to file a responsive pleading to the complaint. It also found a meritorious defense because the defendant asserted in a certification that he had filed a prior suit against the plaintiffs in his home state on the basis that the plaintiffs had accused him falsely of posting defamatory comments about them. *Golhaber*, 395 N.J.Super. at 392.

Lessons From *Goldhaber*

Long Arm Jurisdiction & New Jersey. The California lawyer in *Goldhaber* had not paid attention to the fact that New Jersey stays closely to the traditional long-arm precepts and goes just a little farther.

Be Liberal on Minimum Contacts. New Jersey does not go as far as the jurisdictions who find any contact sufficient. However, New Jersey does not like to turn away plaintiffs with valid claims, as demonstrated by the Appellate Divisions statement of the states policy to provide a forum for plaintiffs to seek redress. Therefore, foreign clients should be advised to respond to suits in New Jersey where there exist the slightest indicia that the statements complained of targeted New Jersey so that *any* effect can be felt in New Jersey by a plaintiff or by others.

When In Doubt a Responsive Pleading Should be Filed. It is more advisable for a practitioner to file a motion to dismiss in lieu of an answer under Rule_4:6-2 of the *Rules Governing the Courts of the State of New Jersey* than to do nothing. If the practitioner believes that his client truly has no minimum contacts with the State, the motion should be simple and can be based on a certification, along with a simple brief. (The formality of a brief often is ignored but this is not the proper practice.)

When Does Jurisdiction Not Exist? The rare instance in which jurisdiction truly does not exist in New Jersey, and when a practitioner may advise a client to ignore the complaint, is when the comments are general in nature, with no connection with New Jersey, and are out there for the world to see. Note, however, that eventually a default judgment may be entered in New Jersey against the client, and some form of defense will be required in the clients home state to vacate the judgment based on lack of jurisdiction. The calculus yet may be in favor of the clients litigating in his home instead of New Jersey.

A Word on Default Judgments. Default judgments are routinely vacated in New Jersey. The Appellate Division stated the Supreme Courts policy of having them stand only in rare circumstances. Practitioners in the communications or internet fields, however, should be cognizant of the fact that clients from other states often will come to them with default judgments considering the topsy-turvy ways in which process may take place in other states once it leaves New Jersey. Notwithstanding, clients should be advised not to despair: much more likely than not, they will be given their days in the New Jersey courts.

Cross References. 1-1 LexisNexis Practice Guide NJ Pleadings § 1.11 (determining whether New Jersey courts can obtain jurisdiction over defendant); 1-4 LexisNexis Practice Guide NJ Pleadings § 4.03 (checklist: satisfying requirements for obtaining jurisdiction); 1-2 LexisNexis Practice Guide NJ Pretrial Practice § 2.11 (checklist for entry of Default Judgment).

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Convenience Transfer: Vairo on In re Volkswagen of Am. Inc.

2008 Emerging Issues 1604

Convenience Transfer: Vairo on In re Volkswagen of Am. Inc.

By Georgene Vairo

December 18, 2007

SUMMARY: The plaintiffs choice is given significant weight even when a defendant seeks to transfer a case under 28 U.S.C. § 1404(a). The Fifth Circuit in *In re Volkswagen of America*, addressed the weight the district court must accord to the plaintiffs choice of forum. This commentary, written by Georgene Vairo, Professor and author and editor of several books, including several chapters in *Moores Federal Practice*, discusses this issue and also the use of mandamus to review a district courts convenience transfer order.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: *In re Volkswagen of Am. Inc.*, 506 F.3d 376, 2007 U.S. App. LEXIS 24931 (5th Cir. 2007) (decided Oct. 24, 2007), involves the standard the district court must employ when deciding a convenience transfer motion under 28 U.S.C. § 1404(a). Specifically, the court addressed the weight that the district court must accord to the plaintiffs choice of forum. Additionally, as a threshold matter, the court discussed the use of mandamus to review a district courts convenience transfer order.

Procedural Facts. *Volkswagen* involved an automobile collision in which one person was seriously injured and another killed. The injured person and the survivors of the decedent brought suit against the automobile manufacturer, alleging that a design defect caused their injuries. They filed in the Marshall Division of the Eastern District of Texas, and the defendant sought a convenience transfer to the Dallas Division of the Northern District of Texas, where the car was purchased, where the collision and the injuries occurred. None of the parties or witnesses, nor any element of the claims, resided or took place in the Marshall Division. Nonetheless, the district court denied transfer, holding that the defendant had not satisfied its burden of showing that the balance of convenience and justice weighed substantially in favor of transfer. The defendant then sought a writ of mandamus to compel the district court to transfer.

Availability of Mandamus. Because the district court order was not a final appealable order under 28 U.S.C. § 1291, the defendant sought mandamus. The Fifth Circuit first noted that mandamus is an extraordinary writ that may be issued only in the absence of other adequate remedies when the trial court has exceeded its jurisdiction or has declined to exercise it, or when the trial court has so clearly and indisputably abused its discretion as to compel prompt intervention by the appellate court. Nevertheless, the Fifth Circuit recognizes that it has allowed the use of mandamus as

a limited means to test the district court's discretion in issuing transfer orders. For mandamus to issue, the Fifth Circuit decision in *Ex parte Chas. Pfizer & Co.*, 225 F.2d 720, 723 (5th Cir. 1955), is controlling: When determining the propriety of a district court's ruling on a motion to transfer under the convenience transfer statute, 28 U.S.C. § 1404(a), the court of appeals must ask (1) whether the district court correctly construed and applied the relevant statutes; (2) whether the district court considered the relevant factors incident to ruling on a motion to transfer; and (3) whether the district court abused its discretion in deciding the motion to transfer. These standards require a careful review of the circumstances presented to and the decision-making process used by the district court. Further, the reviewing court may not replace the district court's exercise of discretion with its own.

The Fifth Circuit is not alone in permitting the use of mandamus in limited circumstances. For example, in *Lemon v. Druffel*, 253 F.2d 680 (6th Cir. 1958), a case decided shortly after Congress codified § 1404(a), the Sixth Circuit ruled that mandamus was an appropriate remedy to test a district court's discretion on a motion to transfer. That court looked to the Supreme Court decision in *Norwood v. Kirkpatrick*, 349 U.S. 29 (1955), in which the Court made clear that the convenience transfer statute and the *forum non conveniens* doctrine were quite different, and that § 1404(a) accorded district judges considerably more discretion: Congress, in writing § 1404 (a), which was an entirely new section, was revising as well as codifying. The harshest result of the application of the old doctrine of *forum non conveniens*, dismissal of the action, was eliminated by the provision in § 1404 (a) for transfer. When the harshest part of the doctrine is excised by statute, it can hardly be called mere codification. As a consequence, we believe that Congress, by the term "for the convenience of parties and witnesses, in the interest of justice," intended to permit courts to grant transfers upon a lesser showing of inconvenience. This is not to say that the relevant factors have changed or that the plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader. Because it was so clear in *Norwood* that the district court correctly construed § 1404(a), the *Norwood* Court specifically declined to decide whether mandamus was an appropriate remedy. That question was answered indirectly in the affirmative by the Court in *Van Dusen v. Barrack*, 376 U.S. 612, 615 n. 3; 84 S. Ct. 805, 809 n. 3; 11 L. Ed. 2d 945, 949 n. 3; 1964 U.S. LEXIS 1537 (1964). See also 17-111 *Moore's Federal Practice -- Civil* § 111.61.

Application of Convenience Transfer Statute. Under 28 U.S.C. § 1404, a district court with proper venue may transfer to another district or division 1) where the action might have been brought here, because the accident took place in the Northern District of Texas; 2) for the convenience of the parties and witnesses; and 3) in the interest of justice. In making a transfer decision, the district court must consider various private and public interest factors. The private interest factors are: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive. The public interest factors are: (1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws or in the application of foreign law.

Weight Given to Plaintiff's Choice of Forum. In addition to the public and private interest factors, the court must also consider the plaintiffs' choice of forum. The district court had given the plaintiffs' choice an elevated status, stating that the moving party must show that the balance of convenience and justice substantially weighs in favor of transfer. This standard, the Fifth Circuit said, reflects the much stricter *forum non conveniens* dismissal standard, and is inappropriately applied in the 28 U.S.C. § 1404 context.

The Fifth Circuit recognized that its earlier decisions were not a model of clarity in terms of the role of the plaintiff's choice of forum in the venue transfer analysis. Nonetheless, its earlier cases indicate that the plaintiff's choice of forum is to be treated as a burden of proof question rather than one of a presumption." Moreover, it noted that the heavy burden traditionally imposed on defendants by the *forum non conveniens* doctrine that is dismissal permitted only in favor of a *substantially* more convenient alternative was eliminated in the § 1404 context. Accordingly, the district court applied the wrong standard on the weight of the plaintiffs choice and its relationship to the other factors.

Rather, according to the Fifth Circuit, the plaintiff's choice of forum was entitled to deference: this deference establishes the burden that a moving party must meet in seeking a 28 U.S.C. § 1404 transfer. The party seeking transfer must show good cause," meaning that the moving party must demonstrate that the transfer is for the convenience of the parties and witnesses and in the interest of justice as required by § 1404. When the transferee forum is no more convenient than the chosen forum, the plaintiff's choice should not be disturbed. When the transferee forum is clearly more convenient, a transfer should be ordered.

This standard, the Fifth Circuit said, is consistent with the language and with the intended purpose and effect of § 1404, which provides that a district court may transfer any civil action [f]or the convenience of parties and witnesses, in the interest of justice." Other language that has appeared in some decisions, such as that the plaintiff's choice is highly esteemed" or strongly favored," the Fifth Circuit criticized as vague and unworkable. These formulations were derived primarily from *forum non conveniens* cases, and § 1404 was intended to be a departure from that standard.

Balance of Factors. Additionally, while the Fifth Circuit ruled that the district court erroneously applied the stricter *forum non conveniens* dismissal standard and did not give the proper weight to the plaintiffs' choice of forum, it also ruled that the district court abused its discretion in failing to properly consider and apply some of the private and public interest factors.

One of these factors requires the court to consider the relative ease of access to sources of proof. The district court observed that all the documents and physical evidence relating to the accident were located in the Dallas Division. The district court found, however, that this factor did not weigh in favor of transfer as this factor has become less significant because of advances in copying technology and information storage. The Fifth Circuit agreed that advances in technology affect the access to sources of proof, and that district courts should consider the actual convenience or inconvenience of accessing sources of proof. However, this factor has not become superfluous. The district court erred in not considering this factor, which clearly weighed in favor of transfer, although its precise weight might be subject to debate. The district court also failed to give sufficient consideration to other private and public interest factors that favored transfer, including the availability of compulsory process to secure the attendance of witnesses, the cost of attendance for willing witnesses, and the local interest in having localized interests decided at home.

Under a proper application of the factors, no relevant factor favored the chosen forum. Accordingly, the district court abused its discretion by failing to order transfer. The Fifth Circuit granted the petition for mandamus to correct this abuse of discretion.

Conclusion. Even when a defendant seeks to transfer a case under 28 U.S.C. § 1404(a), as opposed to making a motion to dismiss under the *forum non conveniens* doctrine, as a general rule, the plaintiffs choice is given significant weight. However, even so, the plaintiffs choice must be weighed against the relevant public and private factors. See 17-111 *Moore's Federal Practice -- Civil* § 111.13 [1][c][i]. Moreover, the plaintiffs choice is given more or less weight, depending on whether the plaintiff resides in the chosen forum, and on whether the operative events took place in the chosen forum. See 17-111 *Moore's Federal Practice -- Civil* § 111.13[1][c][i-iii]. Accordingly, the Fifth Circuit was correct to grant mandamus and remand for further consideration.

A reading of the Fifth Circuits opinion may prompt the question whether venue was proper in the Marshall Division of the Eastern District in the first place. This is an important question because it determines whether the defendant could have moved to dismiss or transfer under 28 U.S.C. § 1406, rather than 1404(a). Had the motion been made under § 1406, the plaintiff could have lost the benefit of favorable law that otherwise would have been retained in a diversity case under *Van Dusen v. Barrack*. Since both districts in this case were in Texas, it is not likely that the distinction would have mattered. But, had the transferee district been in another state, it might have.

In any event, venue was proper in the Eastern District of Texas. As the district court pointed out, in a diversity action, such as this, venue is proper in a judicial district in which "any defendant resides." 28 U.S.C. § 1391(a)(1). When the defendant is a corporation, the corporation is "deemed to reside in any district in that State within which its

contacts would be sufficient to be subject it to personal jurisdiction." 28 U.S.C. § 1391(c). Venue was proper in the Eastern District of Texas because there was no question that Volkswagen, a corporation licensed to do business in the State of Texas, was subject to personal jurisdiction in the Eastern District. Furthermore, venue was proper in any division in that District.

References: 17-111 *Moore's Federal Practice -- Civil* § 111.13 [1][c]; 17-111 *Moore's Federal Practice -- Civil* § 111.61.

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Work-Product & Attorney-Client Privilege Doctrines in Compton v. Safeway, Inc.

2008 Emerging Issues 1612

Best on Work-Product and Attorney-Client Privilege Doctrines in Compton v. Safeway, Inc.

By Arthur Best

December 18, 2007

SUMMARY: In a case involving an injury at the defendants premises, the Colorado Supreme Court considered whether attorney-client privilege or the work product doctrine can protect statements made by two of the defendants workers to the defendants own risk management and loss control department. It held that the statements were discoverable. In this commentary, Prof. Arthur Best discusses the implications of this decision on companies, noting that they might want to structure their responses to accidents in ways that might make application of these privileges more likely.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Factual Background of *Compton v. Safeway, Inc.*, 169 P.3d 135 (Colo. 2007). Attempting to bring boxes of Pepperidge Farm food products into the basement of a Safeway store, a delivery worker named Stephen Compton tripped on something and was injured. He was employed by Pepperidge Farm and not by Safeway. About two months after he was hurt, Compton hired a lawyer. The lawyer wrote to Safeway asserting that Safeway was responsible for Comptons injury and asking it to inform its insurer of the claim. Safeway is self-insured and maintains its own risk management and loss control department. After receiving the letter from Comptons lawyer, a Safeway claims adjuster obtained statements from two Safeway employees who had witnessed the injury. Safeway determined that it was not at fault and refused Comptons claim. Compton then filed suit against Safeway and requested copies of the employees statements. Safeway objecting on grounds of attorney work product and attorney-client privileges, and the trial court refused to compel discovery. The Supreme Court issued a rule to show cause.

Pertinent Legal Principles

Work-Product, in General. Discovery under the Colorado Rules of Civil Procedure is limited by the work-product doctrine under Rule 26, to the extent that documents or information sought were obtained by a party or a partys representative in anticipation of litigation. See C.R.C.P. 26(b)(3). With regard to the concept of "anticipation of litigation," *Hawkins v. Dist. Ct.*, 638 P.2d 1372 (Colo. 1982) held that to obtain the protection of Rule 26, the party resisting discovery must demonstrate that the document was prepared or obtained in contemplation of specific litigation. The rule does not protect materials prepared in the ordinary course of business, whether litigation had already commenced or not.

See 6-26 Moore's Federal Practice Civil for a comprehensive overview of work-product doctrines.

Work-Product and Insurance Companies. *Hawkins* also held, in the specific context of an insurance company's discovery obligations, that when an insurance company compiles statements by witnesses to injuries, there is a presumption that those statements are prepared in the normal course of business because those materials are ordinary business records rather than trial preparation materials.

Distinguishing Normal Insurance Company Business from Litigation-Related Activity. The presumption that statements gathered by an insurer are collected in the ordinary course of business can be overcome if the statements are collected after a specific claim has arisen for the purpose of defending that claim, if a claim has already been filed or if there is a substantial probability of imminent litigation. *Hawkins*, 638 P.2d 1372, 1379.

Attorney-Client Privilege in the Corporate Setting. For attorney-client privilege to protect communications made in the corporate setting, there must be a showing that the confidential statements were made in the course of obtaining counsel, advice, or direction with respect to the business entity's obligations.

Colorado Evidence Courtroom Manual, Chapter 501 and Colorado Evidentiary Foundations § 7.F analyze Colorado cases on attorney-client privilege.

The Colorado Supreme Court's Decision

Equivalence of Insurers and Self-Insurers. The Colorado Supreme Court held first that a self-insurer should be treated identically to an independent insurance company with regard to issues such as a description of its ordinary business. Even though the insurance aspect of its operations is only a part of the overall enterprise's activities, when a company decides to become self-insured, discovery obligations related to its self-insurance function should be treated under *Hawkins*.

Anticipation of Litigation. The crucial issue for resolving the work-product issue was whether the statements had been obtained in anticipation of litigation. The defendant's risk management personnel collected the statements after the company received a letter indicating that the potential claimant was represented by counsel. Representation indicated that litigation was possible, but in the view of the Court, litigation is possible in every insurance claim and that fact alone did not satisfy the *Hawkins* requirement of substantial probability of imminent litigation.

Investigation Precedes Imminence of Litigation. The Court noted that the statements were obtained more than a month before the defendant concluded its investigation and decided to deny the claim. In the Court's analysis, litigation did not become imminent until the claim was denied, so statements gathered prior to the claim denial could not be protected by the work-product privilege. The defendant had obtained a very brief accident report shortly after the plaintiff's injury occurred. It did not obtain statements from witnesses until after the plaintiff's lawyer contacted the defendant. This chronology failed to support an argument by the defendant that its first accident report constituted a general investigation of the claim and that the more detailed work by its claims department was done because the company anticipated litigation.

Attorney-Client Privilege. The statements were outside the protection of attorney-client privilege because there was no evidence that any Safeway lawyer had any involvement in the investigation of the claim. To be covered by the privilege, the statements would have to have been made to Safeway in the course of obtaining counsel, advice, or direction with respect to the company's rights or obligations. See *People v. Trujillo*, 144 P.3d 539 (Colo. 2006).

Discovery Allowed. The Supreme Court ordered the trial court to compel discovery of the statements.

Comments

Narrow Application of Work-Product Privilege. This opinion reinforces the Court's general position on the

limited application of work-product protection to information compiled by insurers and self-insuring companies in response to claims. Particularly where an inquiry by counsel does not threaten litigation, it is highly unlikely that investigations conducted in response to such inquiries will be treated as having been made where there is a substantial probability of imminent litigation.

Practice Tip: Counsel representing claimants should be aware of this trend in drafting initial inquiry letters and in conducting discovery in cases that do eventuate in litigation.

Practice Tip: The Courts persistence in allowing only the narrowest scope of work-product protection to insurance and insurance-like investigations of claims suggests that a similar approach would apply to parallel circumstances in large non-self-insuring enterprises that collect accident reports and investigate accidents.

Attorney-Client Privilege. The Courts treatment of this issue was extremely brief. The lack of any involvement by lawyers in the claims department work related to this incident made it impossible for the defendant to obtain protection of that privilege. The Courts reference to *Trujillo* indicates that it intends to restrict the privilege to instances in which a business entitys lawyers have a genuine role in the gathering of the information sought to be protected by privilege.

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Best on Confrontation Clause & Crime Lab Reports in Hinojos-Mendoza v. People

2008 Emerging Issues 1614

Best on the Confrontation Clause and Crime Lab Reports in Hinojos-Mendoza v. People

By Arthur Best

December 18, 2007

SUMMARY: Is a police crime lab report testimonial hearsay and therefore covered by the Confrontation Clause? Since these reports are a lot like typical business records, should they be exempt from the testimonial category? States have varied in their treatment of this issue, but the Colorado Supreme Court has analyzed the United States Supreme Courts recent Confrontation Clause cases and concluded that crime lab reports are the type of hearsay that should be defined as testimonial. In this commentary, Prof. Arthur Best discusses Hinojos-Mendoza, the Confrontation Clause, hearsay, and a state statute governing introduction of evidence from police crime labs.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Overview

Is a police crime lab report testimonial hearsay and therefore covered by the Confrontation Clause? Since these reports are a lot like typical business records, should they be exempt from the testimonial category? States have varied in their treatment of this issue, but the Colorado Supreme Court has analyzed the United States Supreme Courts recent Confrontation Clause cases and concluded that crime lab reports are the type of hearsay that should be defined as testimonial. For that reason their use is subject to significant restrictions. However, the states statute that requires a defendant to request testimony by a lab employee at least ten days prior to trial does not violate the Confrontation Clause.

Summary of the Case

Hinojos-Mendoza was convicted of possession with intent to distribute more than one thousand grams of cocaine. At trial, the state introduced a lab report from the Colorado Bureau of Investigation stating that a tan taped wrapped block of compressed powder contained 1004.5 grams of cocaine. There was possibly some ambiguity about whether the 1004.5 grams statement referred only to the cocaine or referred to the cocaine and its packaging. This ambiguity was important to the defendant. The maximum sentence for possession with intent to distribute less than one thousand grams of cocaine is significantly shorter than the maximum sentence for a crime involving one thousand or more grams.

Defense counsel made a hearsay objection to introduction of the report. The trial court overruled the objection because the defendant had failed to request testimony by the lab employee who performed the analysis prior to ten days

before the date of the trial. Colo. Rev. Stat. § 16-3-309(5) imposes this requirement:

Any report or copy thereof . . . of the criminalistics laboratory shall be received in evidence in any court . . . in the same manner and with the same force and effect as if the employee or technician of the criminalistics laboratory who accomplished the requested analysis, comparison, or identification had testified in person. Any party may request that such employee or technician testify in person at a criminal trial on behalf of the state before a jury or to the court, by notifying the witness and other party at least ten days before the date of such criminal trial.

Following his conviction, while Hinojos-Mendozas direct appeal was pending, the United States Supreme Court decided *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Based on that decision, Hinojos-Mendoza argued that section 16-3-309(5) was both facially unconstitutional and unconstitutional as applied in his case.

The Court of Appeals held that the lab report was nontestimonial hearsay and therefore outside the coverage of the Confrontation Clause. It did not consider the challenges to the statute because those issues had not been raised at trial.

Pertinent Legal Principles

Hearsay and the Confrontation Clause. In *Crawford* and subsequently in *Davis v. Washington*, 547 U.S. 813; 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) the Supreme Court held that the Confrontation Clause applies only to testimonial hearsay. The Colorado Supreme Court has adopted the *Crawford* analysis for treatment of hearsay under the state constitutions Confrontation Clause. See *Compan v. People*, 121 P.3d 876, 884 (Colo. 2005). Under that test, a statement is testimonial if its primary purpose is to establish or prove past events potentially relevant to a criminal prosecution or if an objective witness would reasonably believe that the statement would be available for use at a trial.

Waiver of Constitutional Rights. With regard to waiver of constitutional rights, *People v. Mojica-Simental*, 73 P.3d 15 (Colo. 2003) held that waiver of the right to testify must be voluntary, knowing and intentional. It stated in dictum that the same requirements apply to waiver of confrontation rights.

The Colorado Supreme Courts Decision. The Court found that crime lab reports are testimonial hearsay. It also found that the notice statute is constitutional and permits waiver by a defendants counsel. The Court did not consider whether the defendants counsel provided adequate assistance.

Crime Lab Reports Are Testimonial. The Supreme Court noted that the lab report listed Hinojos-Mendoza as suspect and listed an offense as cocaine sell. It was prepared at the direction of the police and a copy of it was transmitted to the district attorneys office. Interestingly, the Court of Appeals had found that the lab report was not prepared at the express direction of the prosecutor for litigation and that it contained no directly accusatory statements about the defendant. The Supreme Court took a less technical and more common-sense approach to characterizing the report. Its view of the purpose and likely use of the report led it to characterize the report as testimonial. The Court went so far as to refer to it as having all the characteristics of an ex parte affidavit.

In some other states, courts have treated crime lab reports as business records and concluded that so long as the requirements for the business record exception are met, the Confrontation Clause cannot bar their admission. The Colorado Supreme Court dealt with that analysis explicitly, and correctly rejected it. Reliability, which is the basis for the business records exception, has no logical connection with the current constitutional analysis of hearsay and the Confrontation Clause.

Detailed analysis of the new Confrontation Clause jurisprudence is found in Criminal Evidentiary Foundations § 10.01, and Weinstein's Evidence Manual § 14.03.

Demand Requirement for Testimony by Lab Technician Is Constitutional. Unfortunately for the defendant, the Court found that admission of the report did not violate his Confrontation Clause rights because his attorney had waived

the opportunity to require testimony from the crime lab employee who tested the seized material. If the dictum in *Mojica-Simental* had properly described the law, there could not have been a waiver of the Confrontation Clause right.

The Court in the current case held that the *Mojica-Simental* dictum failed to describe the law properly. Relinquishing the right to testify (the right at stake in *Mojica-Simental*) must be done personally by the defendant and must be voluntary, knowing, and intentional. However, determining what procedures are required for waiver depends on the right at stake. The rights to counsel, to testify, and to trial by jury are so personal and fundamental that they require personal waiver by the defendant. In contrast, the confrontation right is in the class of rights that defense counsel can waive through strategic decisions, such as choosing whether and how to conduct cross-examination or by stipulating to the admission of evidence.

Comments & Practice Tips

Divided Court. Counsel should be aware that two justices dissented with regard to the waiver issue. The dissenting opinion suggests that the majority treated the passage of the ten-day period in the waiver statute as equivalent to a showing that the defendant and the defendant's attorney knew the law and chose to make a voluntary and intentional waiver. The dissenting opinion contends that an irrebuttable presumption should not be used to effect the waiver of a fundamental right.

Practice Tip: Since one justice did not participate, the Courts holding with regard to the constitutionality of the waiver statute had the support of only four justices. This suggests that the issue might reasonably be considered afresh in an appropriate case.

Decisions Value to Defendants. Application of the Confrontation Clause to lab reports will mean that in cases where the lab technician who conducted an original test is not available to testify, introduction of the test results will be forbidden. The prosecution in such an instance will have to forego use of the test results or will have to commission a new test.

Practice Tip: Where a technician does testify, defense counsel should take the opportunity to probe techniques used in the analysis and any deficiencies in the records the technician made at the time of the test. For example, in this case ambiguity about whether the drugs wrappings were included in the stated weight would be an important topic for cross-examination.

Application Beyond Crime Lab Reports. The Courts recognition that the lab report should be considered testimonial makes it clear that the Court will not attempt to avoid the impact of the new Confrontation Clause jurisprudence adopted by the United States Supreme Court in *Crawford* and *Davis*. This direction is likely to continue as the Court considers related Confrontation Clause issues, particularly related to statements made by declarants in settings that do not directly involve police or prosecutors. See *People v. Vigil*, 127 P.3d 916 (Colo. 2006) (to determine whether questioning by someone outside of law enforcement is the functional equivalent of police questioning, a court should consider the extent of involvement by government officials in producing the statement and whether their purpose was to develop testimony for use at a trial).

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Ferstendig on Summary Judgments in Serious Injury, No-Fault Threshold Cases

2008 Emerging Issues 1544

David L. Ferstendig on Summary Judgments in Serious Injury, No-Fault Threshold Cases

By David L. Ferstendig

December 17, 2007

SUMMARY: Defendants who are prepared to concede the liability phase of a case subject to the no-fault threshold are well-advised to reserve expressly their right to litigate the serious injury issue. There is a divergence of opinion in the Appellate Division as to whether a finding of liability necessarily determines the serious injury issue. This Emerging Issues Analysis, analyzes the Department split regarding this issue.

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ARTICLE: Defendants who are prepared to concede the liability phase of a case subject to the no-fault threshold are well-advised to reserve expressly their right to litigate the serious injury issue. There is a divergence of opinion in the Appellate Division as to whether a finding of liability necessarily determines the serious injury issue. The Fourth Department treats the grant of summary judgment on liability as including a determination of serious injury. The remaining departments, taking a more efficient approach, allow the parties to resolve the liability issue by summary judgment and litigate the serious injury issue in the damages phase of the case. Until the Court of Appeals rules, however, defendants in all departments should protect their interests in an excess of caution.

Fourth Department: Grant of summary judgment on liability necessarily decides serious injury issue. The Fourth Department of the Appellate Division concludes that the grant of summary judgment on liability necessarily includes the issue of serious injury. The reasoning behind this position is that the serious injury issue is a threshold determination and is a required element of plaintiff's prima facie case that must be pleaded. *Ruzycki v. Baker*, 301 A.D.2d 48, 52, 750 N.Y.S.2d 680, 683 (4th Dep't 2002) (the finding of Liability in a motor vehicle accident case includes serious injury issue). See also *Leahey v. Fitzgerald*, 1 A.D.3d 924, 926, 768 N.Y.S.2d 55, 57 (4th Dep't 2003) ([P]laintiffs failed to establish that plaintiff sustained a serious injury as a matter of law, a necessary element of a finding of liability).

Interestingly, the Fourth Department distinguishes between a finding of liability and negligence. Thus, the relief sought by the plaintiff who moves for summary judgment on the liability issue without raising the serious injury issue, is more accurately described as a determination of the issue of negligence' rather than liability'. *Ruzycki v. Baker*, 301 A.D.2d 48, 51, 750 N.Y.S.2d 680, 683. However, parties who concede liability waive their right to contest the serious

injury issue. See *Simone v. City of Niagara Falls*, 281 A.D.2d 923, 721 N.Y.S.2d 892 (4th Dep't 2001) (defendants conceded serious injury case as part of stipulation on liability and trial was limited to damages).

Although the First Department was in accord (see *Maldonado v. DePalo*, 227 A.D.2d 21, 715 N.Y.S.2d 245 (1st Dep't 2000)), it has since reversed itself. See *Shinn v. Catanzaro*, 1 A.D.3d 195, 199, 767 N.Y.S.2d 88, 92 (1st Dep't 2003), citing *Reid v. Brown*, 308 A.D.2d 331, 764 N.Y.S.2d 260 (1st Dep't 2003).

Remaining Departments: Determination of liability does not decide serious injury issue. The remaining departments are concerned that allowing summary judgment on liability to establish serious injury would be contrary to the intent of the No-Fault Law. The plaintiff has the burden to prove, and the court has the obligation to determine, that the plaintiff sustained a serious injury. The courts reasoned that they would be shirking their duty if they permitted the plaintiff to recover merely because the defendant conceded liability.

In *Zecca v. Riccardelli*, 293 A.D.2d 31, 742 N.Y.S.2d 76 (2d Dep't 2002), the plaintiffs in two separate actions asserted that the orders granting their summary judgment motions on the issue of liability, necessarily decided the serious injury issue in their favor. The court held, however, that to rule the issue of serious injury as being necessarily resolved in favor of a plaintiff, even where no evidence of such injury is presented, was directly contradictory to the purpose of the No-Fault law:

[B]y holding that the issue of serious injury is "necessarily" resolved in favor of the plaintiff even when no evidence of such injury is presented, the courts may be authorizing recovery for minor injuries, which is contrary to the purpose of the No-Fault Law as set forth above. It is the plaintiff's burden to establish that he or she has sustained a serious injury within the definition of NY CLS Ins § 5102(d). Further, the court is charged with the duty of determining, as a threshold matter, whether the plaintiff has presented proof of such an injury. Accordingly, the court would be abdicating its duty by allowing a plaintiff to recover for minor injuries, merely because the defendant failed to, or chose not to, respond to a motion for summary judgment on liability. Lack of opposition to a motion for summary judgment on the issue of liability, be it negligent or purposeful, is not justification to relieve the plaintiff of his or her burden to submit adequate evidence of his or her injury.

293 A.D.2d at 35, 742 N.Y.S.2d at 79.

The recent case of *Abbas v. Cole*, 44 A.D.3d 31, 840 N.Y.S.2d 388 (2d Dept 2007), applied the reasoning of *Zecca* in determining an opposed motion for leave to enter a default judgment:

[B]y requiring the plaintiff, even upon the default of the defendant, to nevertheless submit proof that he or she has sustained a serious injury, we are comporting with the original legislative intent of the "No-Fault" Law, which was "to eliminate recovery in a common-law tort action for minor personal injuries" (*Zecca v. Riccardelli*, 293 A.D.2d 31, 33 [2002]).

44 A.D.3d at 34, 840 N.Y.S.2d at 391. Significantly, in *Abbas*, (i) the complaint did not allege that the plaintiff had sustained a serious injury, and (ii) it was unclear whether the plaintiff had alleged serious injury in the motion to enter the default judgment. Compare *Beresford v. Waheed*, 302 A.D.2d 342, 343, 754 N.Y.S.2d 350, 352 (2d Dep't 2003), decided on procedural grounds, in which the Court held that the defendant was precluded under the law of the case doctrine from raising the serious injury issue at a second inquest because the defaulting defendant had conceded the serious injury issue pleaded and raised by the plaintiff:

In contrast to *Zecca*, the instant case did not involve an unopposed motion for summary judgment. Here, the defendant opposed the plaintiff's motion for leave to enter a default judgment by cross moving to compel service of his proposed answer. The defendant, in his cross motion, raised the issue of a meritorious defense without addressing the issue of serious injury. In this case, the issue of whether the defendant set forth a meritorious defense, including the

issue of serious injury, was fully litigated on the merits.

302 A.D.2d at 343. See also Van Nostrand v. Froehlich, 44 A.D.3d 54, 55, 844 N.Y.S.2d 293 (2d Dep't 2007) (majority finds prejudgment interest should run from date of liability determination, either by default, summary judgment, or bifurcated liability trial, even though the plaintiff has yet to establish the existence of a serious injury).

Conclusion

As has been noted,

the peculiar nature of a "serious injury" claim crosses the boundaries of both the liability and the damages spheres of a lawsuit. While the injuries sustained by a plaintiff in an action arising from a motor vehicle accident constitute the measure of his or her damages, it is the "serious" nature of those injuries which must be established before any recovery for pain and suffering can be obtained (*see* NY CLS Ins § 5104).

Abbas v. Cole, 44 A.D.3d at 33-34, 840 N.Y.S.2d at 390.

The Fourth Department ruling in *Ruzycki* not only directly contradicts the purpose of the No-Fault Law, but it also relies on a First Department case which was later expressly overruled by the same department.

We are now left with three of four departments agreeing that a finding of liability does not necessarily determine the serious injury issue. We await a final determination of the Court of Appeals. Until then, defendants should be careful not to concede the serious injury issue, by failing to address it, whether in a stipulation conceding liability, or in opposition to a summary judgment motion or a motion for a default judgment.

Cross References. Weinstein, Korn & Miller, *New York Civil Practice: CPLR P 3212.03: Summary Judgment Available in All Actions*; LexisNexis AnswerGuide New York Civil Litigation § 7.09: Moving for Summary Judgment; Weinstein, Korn & Miller *CPLR Manual § 21.07: Motion for Summary Judgment*; Bender's Forms for the Civil Practice CPLR 3212 et seq.: Motion for Summary Judgment.

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William C. Bochet on Impink v. Reynes

2008 Emerging Issues 1504

William C. Bochet on Impink v. Reynes, 2007 N.J. Super. LEXIS 351 (App. Div. 2007)

By William C. Bochet

December 14, 2007

SUMMARY: Ancient concepts as to the sanctity of contracts were held to trump the best interests of a child in *Impink v. Reynes*, 2007 N.J. Super. LEXIS 351 (App. Div. 2007). The case involved whether or not a trial court could compel a liability insurance carrier to use settlement proceeds to purchase a structured settlement annuity on behalf of an infant plaintiff in a personal injury case.

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ARTICLE: Appellate Division Bars Forced Structured Settlement

Contracts Beat Children. Ancient concepts as to the sanctity of contracts were held to trump the best interests of a child in *Impink v. Reynes*, 2007 N.J. Super. LEXIS 351 (App. Div. 2007). The case involved whether or not a trial court could compel a liability insurance carrier to use settlement proceeds to purchase a structured settlement annuity on behalf of an infant plaintiff in a personal injury case. The insurer offered its entire policy proceeds to the plaintiff to settle the claims against its insured arising from a child who became legally blind in one eye. The injury occurred when the infant plaintiff was accidentally shot in the eye with a paint ball.

The guardian of the injured child was willing to accept the policy limit (\$300,000), but wanted a portion of the funds used to purchase an annuity that would pay tax-free money over a period of time. The defendants' insurer insisted upon a cash payment unless it received a discount. Ultimately, the case was settled for a cash payment of \$300,000.

Not So Friendly. A parent does not have the right to enter into a binding settlement of a child's personal injury case without approval of the court. Such approval is sought in proceedings brought under N.J. Ct. R. 4:44, either as part of a pending case or in a separate action. Evidence is presented as to the terms of a proposed settlement and its reasonableness in light of issues of liability and damages. The disposition of the proceeds is also considered, including attorneys' fees and costs. The hearing is commonly referred to as a "Friendly."

Although the parties in *Impink* agreed to a lump sum payment, the plaintiff moved for an order to have the defendants' carrier use a portion of the settlement monies to purchase a deferred payment annuity. The trial court granted the motion, finding that the best interests of the child were served by a structured settlement and that the insurer was not prejudiced. The carrier appealed.

The Importance of the Insurer's Purchase of the Annuity. A structured settlement is an arrangement that allows for payment of funds over a period of time. These could be periodic payments, lump-sum payments at various stages, or both. Typically, the liability insurer purchases an annuity or assigns the obligation to make payment to a third party via a qualified assignment.

The advantage of a structure is that the future payments are not subject to income tax under the Income Tax Code (26 U.S.C. § 104 and § 130). For this to happen, however, the payments must be payable by a party to the action or a qualified assignee under the Act. A claimant does not have the right to purchase an annuity and have the payments qualify for tax-free status. Thus, the trial judge ordered the insurer to act.

Courts Cannot Alter the Terms. The Appellate Division reversed the trial judge's order. It held that the parties had entered into a settlement for a lump-sum payment, not a structured settlement. The court had no authority to change the settlement terms. Its power to approve an infant's settlement was an up-or-down process.

The opinion by the Honorable Thomas M. Lyons, J.A.D. gently condemned the trial court's order on traditional contract grounds. Absent ambiguity, courts should enforce contracts as they are made. *Karl's Sales & Serv., Inc., v. Gimbel Bros., Inc.*, 249 N.J. Super. 487, 493, 592 A.2d 647 (App. Div. 1991) certif. denied 127 N.J. 548 (1991). A settlement is such a contract, *Jennings v. Reed*, 381 N.J. Super. 217, 227, 885 A.2d 482 (App. Div. 2005).

The inviolability of the settlement terms may not be breached by the court, even in the name of the best interests of a child. Citing *Kinsella v. Kinsella*, 150 N.J. 276, 696 A.2d 556 (1997) and other cases asserting a court's role *in parens patriae* for children, the appellate panel made it clear that equity powers do not extend to changing the terms of a settlement.

Back in the Future. The Appellate Division sent the case back for consideration of the appropriateness of the settlement terms by the trial court. This gives rise to the intriguing possibility that the court will not approve a lump-sum payment. The defendants' carrier would then be in a position where it may risk acting in bad faith by refusing to offer a structured settlement without a discount from the policy limit. The insurer has an affirmative duty to protect its insured by settling the case without exposing them to excess liability *Rova Farms Resort, Inc., v. Investors Ins. Co. of Am.*, 64 N.J. 474, 323 A.2d 495 (1974). The carrier may have no choice but to ultimately accede to a structured settlement.

Cross References. LexisNexis Practice Guide NJ Trial & Post-Trial § 11.19: Participating in Civil Appeal Settlement Program.

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Burton on Presumption of Validity of Trademark

2008 Emerging Issues 1517

Burton on Presumption of Validity of Trademark

By Don Burton

December 14, 2007

SUMMARY: A registered trademark that is entitled to a statutory presumption of validity may still be deemed "weak" and unprotectable. The presumption is rebuttable, and, where there was evidence in the record suggesting the presumption could be rebutted, the Sixth Circuit held in *Leelanau Wine Cellars* that the trial court should assess such evidence.

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ARTICLE: A registered trademark that is entitled to a statutory presumption of validity may still be deemed "weak" and unprotectable. The presumption is rebuttable, and, where there was evidence in the record suggesting the presumption could be rebutted, the Sixth Circuit held in *Leelanau Wine Cellars* that the trial court should assess such evidence.

A trademark registered on the Principal Register of the United States Patent and Trademark Office is entitled to use the symbol (15 U.S.C. § 1111), and the layperson entitled to use a registered mark surely assumes that such a mark would be viewed as valid and entitled to protection in the federal courts. That assumption, however, is not necessarily correct, as illustrated in *Leelanau Wine Cellars, Ltd. v. Black & Red, Inc.*, 502 F.3d 504, 2007 U.S. App. LEXIS 22409 (6th Cir. 2007).

Strength of trademark under caselaw.

Leelanau involved a trademark -- "Leelanau Cellars" -- that the court deemed to be merely descriptive. Marks are classified on a spectrum that includes "arbitrary" or "fanciful," "suggestive," "descriptive," and "generic." *Id.* at 512-513. Classic examples of each type of mark are listed in *A&H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 237 F.3d 198, 221 (3d Cir. 2000):

Arbitrary or fanciful: "KODAK" (a made up word and thus fanciful; "APPLE" as used by a computer company is an arbitrary mark);

Suggestive: "COPPERTONE";

Descriptive: "SECURITY CENTER";

Generic: "DIET CHOCOLATE FUDGE SODA."

"Only those marks that are 'distinctive' as a matter of law are accorded trademark protection." Id. at 512. Marks classified as arbitrary, fanciful, or suggestive are considered "inherently distinctive" and entitled to protection, while generic marks "never qualify for trademark protection." Id. at 513. Marks in the category in between, descriptive, can qualify for protection, but only if they acquire "secondary meaning," which means that in the mind of the public the mark identifies the source of the product. Id. For example, marks that are merely surnames are considered descriptive, but some have clearly acquired secondary meaning, like McDonald's. In general, though, the secondary meaning requirement presents a significant hurdle for a trademark litigant; in many of the litigated cases, evidence of secondary meaning was found wanting (e.g., *Eagle Snacks, Inc. v. Nabisco Brands, Inc.*, 625 F. Supp. 571 (D. N.J. 1985) ("HONEY ROASTED"); *Ralston Purina Co. v. Thomas J. Lipton, Inc.*, 341 F. Supp. 129 (S.D. N.Y. 1972) ("TENDER VITTLES"); but cf. *The Committee for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814, 823 (9th Cir. 1996) ("COMMITTEE FOR IDAHO'S HIGH DESERT" had acquired secondary meaning)).

THE STATUTORY PRESUMPTION.

Overlaying this classification system is the principle, enacted in § 15 U.S.C. § 1115(a), that the fact of registration on the Principal Register "shall be prima facie evidence of the validity of the registered mark." This rule means that, if the mark is descriptive, yet also registered, then it is presumed to have acquired distinctiveness, i.e., it has secondary meaning. *Leelanau* at 514.

The presumption is rebuttable, however. In an infringement action on a descriptive, registered mark, "[t]he effect of the statutory presumption contained in § 1115(a) is to shift the burden of proof to the alleged infringer . . . to prove the absence of secondary meaning." Id.

APPLYING THE PRESUMPTION IN A CASE INVOLVING A MARK THAT IS NOT INHERENTLY DISTINCTIVE.

In *Leelanau*, the mark "Leelanau Cellars" was deemed descriptive for a brand of wine because it referred to a geographic place of origin, which is a common example of a merely descriptive mark ("Leelanau" signifies Michigan's Leelanau Peninsula, an "Approved American Viticultural Area" under federal regulations, Id. at *2). "LEELANAU CELLARS" was, however, a registered mark. As a descriptive yet registered mark, it was entitled to the statutory presumption of validity, which as to a descriptive mark means a statutory presumption of secondary meaning, but the defendant "was . . . free to attempt to rebut the § 1115 presumption." *Leelanau* at 514. The appellate court did not expressly rule as to whether the presumption of secondary meaning was rebutted on the evidence before it, since it disposed of the appeal on the ground that Leelanau Wine Cellars failed to prove a likelihood of confusion. (The finding of no likelihood of confusion was predicated mainly on the different marketing channels used by the parties -- the defendant's "Chateau de Leelanau" wines were sold primarily through its own tasting rooms.) The court nevertheless "note[d] that there is strong evidence in the record tending to undermine LWC's claim of secondary meaning," and that the district court "failed to assess the evidence in the record to determine whether the presumption had been rebutted," Id.; further, the court alluded to the weakness of LWC's mark in the discussion of likelihood of confusion, in particular, to the evidence of lack of secondary meaning, Id. at 516.

CONCLUSION AND PRACTICE TIPS:

For the alleged infringer, *Leelanau* suggests that, even if that evidence introduced to rebut secondary meaning does

not result in an express finding of a lack of secondary meaning, the evidence can nevertheless pay dividends when the court considers the strength of the mark as a factor in its analysis of the likelihood of confusion. In *Leelanau*, while the appellate court declined to rule expressly on the issue of secondary meaning, it did hold that the mark was not strong, in part because there was a "substantially decreased . . . possibility" that a consumer confronted with the name LEELANAU CELLARS would "necessarily think of LWC's product," rather than the geographic area, *Id.* at 516, which is essentially a finding that the mark lacked secondary meaning.

In light of that discussion in *Leelanau*, the practitioner representing the owner of the registered mark should not rely solely on the presumption deriving from the fact of registration to prove distinctiveness, if there is a chance the court will deem the registered mark descriptive. The plaintiff should of course argue the presumption, but it also should introduce evidence tending to show a secondary meaning for the mark; typical ways of showing secondary meaning include consumer surveys and direct consumer testimony. *Abercrombie & Fitch Stores, Inc. v. American Eagle Outfitters, Inc.*, 280 F.3d 619, 640 n.14 (6th Cir. 2002).

The plaintiff should also argue that the registered mark is "suggestive" rather than descriptive, so as to avoid the issue of secondary meaning altogether. The line between suggestive and descriptive is difficult to draw in practice ("admittedly hazy," *Tumblebus, Inc. v. Cranmer*, 399 F.3d 754, 763 (6th Cir. 2005)), so there may be a chance of proving suggestiveness even in the face of a strong argument that the mark is merely descriptive. E.g., *Playtex Products, Inc. v. Georgia-Pacific Corp.*, 390 F.3d 158, 163-64 (2nd Cir. 2004) ("WET ONES" is suggestive, not descriptive).

The owner of the mark should also take steps to make the mark incontestable. A mark is deemed incontestable under 15 U.S.C. § 1065 if certain conditions are met, the primary one being that an affidavit is filed to show that the mark was in continuous use for five consecutive years after registration. A descriptive mark that has become incontestable is not subject to a rebuttal of the presumption of secondary meaning, as the court noted in *Leelanau* at 516. (citing *Wynn Oil Co. v. Am. Way Serv. Corp.*, 943 F.2d 595, 600 (6th Cir. 1991) ("[W]hen a mark is incontestable, then it is presumed to be at least descriptive with secondary meaning, and therefore a relatively strong mark.") (internal quotations omitted)).

Leelanau's mark did not qualify as incontestable under § 1065. *Id.* Yet, the mark had been registered in 1997, and liability in the case was tried in 2006, *Id.* at 510, 512. Assuming use of the mark had been continuous for five years after 1997, LWC may have been able to have made its mark incontestable and thus own an unassailably "strong mark."

For a discussion of proving secondary meaning, see 1-2 Gilson on Trademarks § 2.09 (2007 Matthew Bender).

For information on filing an affidavit of incontestability, see Trademark Manual of Examining Procedure (TMEP) §§ 1605 ("Affidavit of Incontestability Under § 15") and 1605.02 ("Form for Filing Affidavit of Incontestability").

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Labady on Offers of Judgment

2008 Emerging Issues 1492

Labady on Offers of Judgment

By Jean-Claude Labady

December 14, 2007

SUMMARY: New Jersey attorneys are generally aware of the necessary procedures for filing an offer of judgment. Jean-Claude Labady, an experienced New Jersey litigator, examines important strategic considerations for the practitioner in effectively using offers of judgment in light of *Wiese v. Dedhia*, 188 N.J. 587, 911 A.2d 479 (2006).

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ARTICLE: Internet Postings & Jurisdiction -- A Daunting Defendant. In *Goldhaber v. Kohlenberg*, 395 N.J. Super. 380, 928 A.2d. 948 (App. Div. 2007) a father and daughter who resided in New Jersey joined an internet newsgroup about cruises. The defendant was also a subscriber to the same group. The plaintiffs filed a complaint alleging that the defendant, a California resident, who had no contacts with New Jersey, posted extremely derogatory statements about them on the newsgroup site. The Appellate Division found the statements to be so vile in nature that it did not relay them in the body of the opinion.

Internet Postings & Jurisdiction -- A Defaulting Defendant. A single-count complaint was served on the defendant. He consulted with a lawyer in California who told him that New Jersey had no jurisdiction over him. Accordingly, he failed to file an answer to the complaint and default judgment was entered against him. Normally, it takes merely the filing of a simple request for default form with a certification stating that service was effected and no responsive pleading filed for a plaintiff to be permitted to have a proof hearing for the entry of a judgment in a sum certain against a defaulting defendant. Whether by this mechanism or another, judgment was entered against the California defendant in a small amount.

Blakey: The New Jersey Supreme Court Opts for the Basics. The Appellate Division first explored the propositions offered in the New Jersey Supreme Court opinion in *Blakey v. Continental Airlines*, 164 N.J. 38, 751 A.2d 538 (2000). In this case, airline pilots posted derogatory comments on an online bulletin board against a female employee who had filed a lawsuit alleging discrimination against the airline. The bulletin board, although powered by CompuServe, was part of a Continental company-wide network. The plaintiff filed libel actions against the pilots in New Jersey in addition to her discrimination claims. The pilots moved to dismiss her claims on the basis that they had no contacts with New Jersey. The Supreme Court remanded the suit for further discovery on the ground that there was no evidence that the pilots knew that she had filed her discrimination lawsuit in New Jersey and knew that their messages would be disseminated in the state. Importantly, the Court declined to adopt new jurisdiction propositions for

the internet communications field. It placed its comments in the context of the traditional precepts of due process based on "minimum contacts" and "traditional notions of fair play and substantial justice." The basic inquiry remains whether the offending party expects to be haled into court in New Jersey. Furthermore, an intentional act will give rise to jurisdiction. *Goldhaber*, 395 N.J.Super. at 386 .

Blakey Not Followed by the Appellate Division. The Appellate Division declined to follow *Blakey* for an important reason, which a practitioner seeking jurisdiction for an alleged internet offender should heed. The court made a distinction between the Continental site that is accessible only to Continental employees as a "closed" network and the newsgroup site in *Goldhaber*, which was not monitored by a moderator. The Court examined precedents from other states. One approach is that the mere fact of posting messages on a newsgroup site, which can be read all over the world, does not convey jurisdiction. Another approach is to uphold jurisdiction where there exists any form of contact, technical or otherwise with the state (e.g., a server in Virginia where the message passed through or soliciting business there).

The *Goldhaber* court observed that the courts that espouse the view that the mere posting of messages is not sufficient evidence for jurisdiction search for messages that *direct* or *focus* the offensive messages on the forum state. This is called by commentators a "targeting-based" analysis. Closer to this view is the "effects" approach adopted in *Blakey* by the New Jersey Supreme Court, which in turn relied on the United States Supreme Court's opinion in *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984). Under this approach, "jurisdiction may be posited based upon where the effects of the harassment were expected or intended to be felt. . ." *Goldhaber*, 395 N.J.Super. at 389. Here, the offending message cannot be what is described as "interactive" or "passive;" it must both target and be intended to have "effects" in New Jersey as the forum state. Accordingly, the court found that Kohlenberg did target New Jersey since he knew that the plaintiffs lived in New Jersey; replied to some of the plaintiffs' comments; made derogatory comments about the municipality and its police department; and referred to plaintiffs' neighbors in the apartment complex where they resided and even posted the plaintiffs' address in one of the postings. The court stated that "[c]onduct of that nature and its connection to New Jersey are such that [defendant] should reasonably [have] anticipate[d] being haled into court' here. . . Indeed, we would deem it against the policy of our courts to deny these plaintiffs a forum in which to seek redress." *Goldhaber*, 395 N.J.Super. at 390 .

Defendant's Service of Process Argument Rejected. The court next addressed the defendant's service of process challenges. It rejected his position that the plaintiffs did not file an affidavit of diligent inquiry stating that he could not be served personally in California. The Court based the rejection essentially on the proposition that " [d]efault judgments will not be vacated for minor flaws in the service of process." " *Goldhaber*, 395 N.J.Super. at 391. The court also rejected the defendant's argument that when process was served in California he was away in Nevada, and the person receiving the summons and complaint did not match his description. The court remarked that service of process is proper when someone receiving process at a defendant's address promptly transmits the papers to the defendant. *Goldhaber*, 395 N.J.Super. at 391.

Reversing the Default Judgment. Another important procedural aspect of the case is the reversal of the default judgment against the defendant. The case law here is typical in New Jersey: the defendant has to show "excusable neglect" for not having filed an answer to the complaint in a timely fashion and has to have a "meritorious defense" to the plaintiff's claims. In this case, the trial court found no excusable neglect, but the Appellate Division did since the defendant relied on the advice of his California attorney in failing to file a responsive pleading to the complaint. It also found a meritorious defense because the defendant asserted in a certification that he had filed a prior suit against the plaintiffs in his home state on the basis that the plaintiffs had accused him falsely of posting defamatory comments about them. *Golhaber*, 395 N.J.Super. at 392.

Lessons From *Goldhaber*:

Long Arm Jurisdiction & New Jersey. The California lawyer in *Goldhaber* had not paid attention to the fact that New Jersey stays closely to the traditional long-arm precepts and goes just a little farther.

Be Liberal on "Minimum Contacts". New Jersey does not go as far as the jurisdictions who find any contact sufficient. However, New Jersey does not like to turn away plaintiffs with valid claims, as demonstrated by the Appellate Division's statement of the state's policy to provide a forum for plaintiffs to seek redress. Therefore, foreign clients should be advised to respond to suits in New Jersey where there exist the slightest indicia that the statements complained of targeted New Jersey so that *any* effect can be felt in New Jersey by a plaintiff or by others.

When In Doubt a Responsive Pleading Should be Filed. It is more advisable for a practitioner to file a motion to dismiss in lieu of an answer under Rule_4:6-2 of the *Rules Governing the Courts of the State of New Jersey* than to do nothing. If the practitioner believes that his client truly has no minimum contacts with the State, the motion should be simple and can be based on a certification, along with a simple brief. (The formality of a brief often is ignored but this is not the proper practice.)

When Does Jurisdiction Not Exist? The rare instance in which jurisdiction truly does not exist in New Jersey, and when a practitioner may advise a client to ignore the complaint, is when the comments are general in nature, with no connection with New Jersey, and are out there for the world to see. Note, however, that eventually a default judgment may be entered in New Jersey against the client, and some form of defense will be required in the client's home state to vacate the judgment based on lack of jurisdiction. The calculus yet may be in favor of the client's litigating in his home instead of New Jersey.

A Word on Default Judgments. Default judgments are routinely vacated in New Jersey. The Appellate Division stated the Supreme Court's policy of having them stand only in rare circumstances. Practitioners in the communications or internet fields, however, should be cognizant of the fact that clients from other states often will come to them with default judgments considering the topsy-turvy ways in which process may take place in other states once it leaves New Jersey. Notwithstanding, clients should be advised not to despair: much more likely than not, they will be given their days in the New Jersey courts.

Cross References: 1-1 LexisNexis Practice Guide NJ Pleadings § 1.11 (determining whether New Jersey courts can obtain jurisdiction over defendant); 1-4 LexisNexis Practice Guide NJ Pleadings § 4.03 (checklist: satisfying requirements for obtaining jurisdiction); 1-2 LexisNexis Practice Guide NJ Pretrial Practice § 2.11 (checklist for entry of Default Judgment)..

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David Fish on Nedzvekas v. Fung, 374 Ill.App.3d 618, 622 (1st Dist. 2007)

2008 Emerging Issues 1465

David Fish on Nedzvekas v. Fung, 374 Ill.App.3d 618, 622 (1st Dist. 2007)

By David Fish

December 13, 2007

SUMMARY: In *Nedzvekas v. Fung, 374 Ill.App.3d 618, 622 (1st Dist. 2007)*, the First District Court of Appeals set an important precedent by solidifying the broad discretion that trial court judges possess regarding discovery sanctions. This Emerging Issues Analysis, written by David Fish, discusses the important implications of this decision.

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ARTICLE: The Abyss of Untimely Witness Disclosure Under Rule 213 (f)--Dont commit malpractice in trying to prove that someone else committed malpractice!

Many litigators are averse to confronting their own shortcomings, and by extension, their inability to meet certain court deadlines. This is ironic because, as described herein, candor may be all that is necessary to avoid harsh discovery sanctions. Examples of such sanctions are orders barring use of untimely disclosed witnesses at trial, and even an entry of summary judgment. Ill. Sup. Ct., R 219(c).

By Illinois Supreme Court rule, trial witnesses are divided into three categories: lay witnesses, independent experts, and control experts. Ill. Sup. Ct., R 213(f). Beyond the nomenclature, with each witness category comes an increased disclosure requirement. For lay witnesses, only the subjects on which they will testify must be disclosed. Ill. Sup. Ct., R 213(f)(1). As for independent expert witnesses, e.g., treating physicians, a partys disclosure must include the subjects on which they will testify and the opinions they will likely provide. Ill. Sup. Ct., R 213(f)(2). Finally, and by far the most onerous, a partys disclosure for each controlled expert must include: (i) the subject matter on which the witness will testify; (ii) the conclusions and opinions of the witness and the bases therefore; the qualifications of the witness; and (iv) any reports prepared by the witness about the case. Ill. Sup. Ct., R 213(f)(3).

In *Nedzvekas v. Fung, 374 Ill.App.3d 618, 622 (1st Dist. 2007)*, the First District Court of Appeals set an important precedent by solidifying the broad discretion that trial court judges possess regarding discovery sanctions. *Nedzvekas* held that the trial court was within its discretion when it barred a medical malpractice plaintiff from using yet undisclosed Ill. Sup. Ct., R 213(f)(2) and (3) independent and controlled expert witnesses as a sanction for violating three separate court orders setting deadlines for witness disclosure. *Nedzvekas v. Fung, 374 Ill.App.3d 618, 622 (1st*

Dist. 2007). Specifically, *Nedzvekas* counsel obtained an extension of a discovery deadline after not complying with it. *Nedzvekas* counsel then failed to comply with the new deadline. The trial court set a third deadline for Plaintiff to complete discovery and also set a new court date. When the Plaintiff did not comply with the new deadline, and failed to show up to Court, the trial judge entered an order barring Ill. Sup. Ct., R 213(f)(2) and (3) witnesses. *Nedzvekas v. Fung*, 374 Ill.App.3d 618, 622 (1st Dist. 2007).

Instead of creating a bright-line rule however, the *Nedzvekas* court went out of its way to clarify that no three-strike rule was in play. *Nedzvekas*, 374 Ill.App.3d at 621. Rather, an appropriate discovery sanction, if any, must be tailored on a case by case basis according to the following factors: (1) the surprise to the adverse party; (2) the prejudicial effect of the witness testimony; (3) the nature of the testimony; (4) the diligence of the adverse party; (5) the timeliness of the objection; and (6) the good faith of the party seeking to offer the testimony. *Nedzvekas*, 374 Ill.App.3d at 621 citing *Boatmens National Bank of Belleville v. Martin*, 155 Ill.2d 305, 314 (1993).

Although the *Nedzvekas* plaintiff narrowly escaped summary judgment, without a controlled expert, trial counsel was undoubtedly handicapped. It is imperative that the prudent practitioner timely meet Ill. Sup. Ct., R 213(f)s graduated disclosure requirements. *Nedzvekas*, 374 Ill.App.3d at 620-21. However, in the growing world of multi-tasking, delays in the discovery process are inevitable. From a facial reading of *Nedzvekas*, the prudent practitioner will note that the way in which one deals with those inevitable delays is absolutely critical. In fact, although the *Nedzvekas* court articulated six factors for courts to consider on similar discovery sanctions motions, its analysis focused almost exclusively on the lack of diligence of the party opposing sanctions.

Practical Solution. The most important thing a party having difficulty meeting a courts discovery deadline can do is to come to court and request a continuance. Candor-- prior to missing a deadline--is critical because once the deadline passes, counsel may find themselves at the mercy of the trial court. This may seem obvious, but too often busy practitioners watch the deadline go by and just hope no one files a motion to bar evidence or witnesses. If such a motion is filed, counsel will then request a continuance and subsequently provide the required disclosures. As *Nedzvekas* demonstrates, a continuance request made after a motion to bar is filed may be too late. Moreover, without key expert witnesses, it is difficult to imagine how the *Nedzvekas* medical malpractice plaintiff could prevail at trial. What is not difficult to imagine however, is an attorney malpractice action presuming the *Nedzvekas* plaintiff would have recovered damages at trial but for the imposition of discovery sanctions.

Cross References. Illinois Litigation Forms and Checklists Checklist 51.01: Identifying Witnesses Expected to Testify and their Testimony.

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David is also a frequent lecturer and author in the areas in which he practices. Based upon his civil litigation experience, David recently was selected by LexisNexis to serve as one of the authors of its Illinois Civil Procedure Forms.

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David Fish on Thompson v. Gordon, 221 Ill.2d 414, 429 (2006).

2008 Emerging Issues 1466

David Fish on Thompson v. Gordon, 221 Ill.2d 414, 429 (2006).

By David Fish

December 13, 2007

SUMMARY: The Illinois Supreme Court recently demonstrated its commitment to providing juries with helpful and relevant expert testimony. In *Thompson v. Gordon, 221 Ill.2d 414, 429 (2006)*, the court held that even unlicensed professionals may testify as experts when the testimony itself constitutes statutorily proscribed unlicensed practice of a profession. This Emerging Issues Analysis discusses the implications of this important decision.

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ARTICLE: The Illinois Supreme Court recently demonstrated its commitment to providing juries with helpful and relevant expert testimony. In *Thompson v. Gordon, 221 Ill.2d 414, 429 (2006)*, the court held that even *unlicensed* professionals may testify as experts when the testimony itself constitutes statutorily proscribed unlicensed practice of a profession.

Contrary to what many practitioners may expect, in Illinois, a witness may qualify and testify as an Ill. Sup. Ct., R 213 expert and simultaneously become criminally culpable for the unlicensed practice of a regulated profession. In *Thompson*, the Illinois Supreme Court held that a professional license was not a prerequisite to providing competent expert testimony. *Thompson v. Gordon, 221 Ill.2d 414, 429 (2006)*. Rather, it is within the trial courts discretion to determine the admissibility of an Ill. Sup. Ct., R 213 expert based on his knowledge, skill, experience, training, education, and licensing. *Thompson, 221 Ill.2d at 428-29* (ruling based on Illinois common law regarding expert admissibility and not Ill. Sup. Ct., R 213 itself, which focuses on expert disclosure). However, licensure is but one factor to be considered in judging an experts admissibility and it is an abuse of discretion for a court to per se disqualify an expert because he is unlicensed. *Thompson, 221 Ill.2d at 429*.

The *Thompson* case involved a plaintiffs retained forensic engineering expert that was to testify regarding the defendant road designers duty to construct a type of safety median that might have limited plaintiffs injuries. *Thompson, 221 Ill.2d at 417*. Defendants moved to strike the expert because he was not licensed as an engineer in Illinois as required by the Engineering Act (225 ILCS 325/39(b)(4)). *Thompson, 221 Ill.2d at 418*. In other words, the challenge was to the experts qualifications (and thus competence as an expert) as opposed to just the substance of the experts testimony. Moreover, the proffered expert was ordered by the Illinois Department of Professional Regulation to cease and desist from testifying, which it held amounted to the unlicensed practice of professional engineering. *Thompson, 221 Ill.2d at 420*. Notwithstanding this order and the potential for the expert to be held criminally responsible for his

testimony, the court held that Ill. Sup. Ct., R 213 did not require licensure as a prerequisite to admissibility as an expert witness. *Thompson*, 221 Ill.2d at 429.

General Applicability. The *Thompson* rule applies generally to Ill. Sup. Ct., R 213 experts, not just engineers. At least three parts of the *Thompson* decision support this broad interpretation. First, the decision was predicated on Illinois common law involving expert witnesses, not the Engineering Act. *Thompson*, 221 Ill.2d at 428-29. Second, the court expressly overruled an Illinois Appellate case: *People v. West*, 264 Ill.App.3d 176 (1994), a case that involved a non-engineer expert. *Thompson*, 221 Ill.2d at 431-33. Finally, the court stated that the outcome in this case was beside the point, and implied it was concerned about clarifying Ill. Sup. Ct., R 213. *Thompson*, 221 Ill.2d at 430. Therefore, an argument attempting to limit the *Thompson* holding to cases involving engineering experts will likely prove unsuccessful. Instead, the policy reasoning behind *Thompson* appears to be predicated on the broad discretion of trial judges to allow opinion witnesses who will assist the fact finder

Strategies for opposing unlicensed experts. A party seeking to exclude an unlicensed expert should argue that the relevant licensing statute specifically mandates the expert be licensed as a precondition to his admissibility. That is not to say a party opposing the expert should rehash a fight already finished in *Thompson*, but the court did recognize one important exception. In medical malpractice actions, *Thompson* stated, the Code of Civil Procedure specifically requires the trial court in assessing the admissibility of an expert to consider whether the witness is licensed. *Thompson*, 221 Ill.2d at 433 citing 735 ILCS 5/8-2501(c); see *Sullivan v. Edward Hosp.*, 209 Ill.2d 100, 115-16 (2004) (expert witnesses in medical malpractice actions must be licensed). If such a statute is applicable, an effective strategy may be to wait until trial before objecting to the proffered experts admissibility.

Out of the box solutions. What lawyer would ever want a criminal as an expert witness? The most obvious strategy is to stress to a jury on cross-examination that the expert is unlicensed and committing a crime. However, the easiest way to oppose an unlicensed expert after *Thompson* may be out of the courtroom. A prudent practitioner can save his client time, money, and frustration by informing the opposing unlicensed expert that his or her testimony constitutes illegal conduct. When an expert learns about this (through deposition or otherwise) he or she may retreat from their testifying role.

Cross References. Illinois Litigation Forms and Checklists Checklist 51.01: Identifying Witnesses Expected to Testify and their Testimony.

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Robins on Use of Outside Vendors for E-Discovery

2008 Emerging Issues 1458

Robins on Use of Outside Vendors for E-Discovery

By Martin Robins

December 12, 2007

SUMMARY: While there has been no shortage of commentary on the changes in discovery practice wrought by the adoption of FRCP 26(f) to deal with discovery of electronically stored materials, the same can not be said for the mechanics of compliance with the new rule. This is particularly important in intellectual property cases where information can be stored in a multitude of ways. It is an area where practitioners are just waiting to get stung.

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ARTICLE: *Twenty-seven year transactional practitioner, adjunct law school professor and frequently published author, Martin Robins, discusses how to use contracts with third party vendors to facilitate client compliance with new e-discovery obligations and to avoid sanctions.*

Discovery in intellectual property cases has the same purposes as discovery in any other type of case; however, even straightforward IP cases are technically complex and many involve advanced technologies. The mechanics of compliance with the discovery rules can be particularly difficult in intellectual property cases due to the complexity of the technology, and especially with discovery of electronically stored materials. As a large portion of intellectual property matters are stored as electronic documents, there is an important issue of dealing with storing and maintaining the information to avoid charges of spoliation of evidence. However, issues with electronically stored materials are not unique to intellectual property cases.

While there has been no shortage of commentary on the changes in discovery practice wrought by the adoption of FRCP 26(f) in 2006 to deal with discovery of electronically stored materials (ESM), e.g., *Arkfelds Best Practices Guide for Electronic Discovery and Evidence*, 07-08 Ed., the same can not be said for the mechanics of compliance with the new rule. That is, litigators need to provide some guidance to their clients as to the mechanical steps which need to be taken in order to maintain and access the ESM covered by the Rule. It is preferable that this guidance be provided by litigators having an ongoing relationship with their clients as part of an ongoing compliance program encompassing third party vendor support, rather than used to deal with a discovery order in a specific matter. Nevertheless, if counsel is engaged on a one-off basis, they should still advise their clients to take these steps at the earliest practicable date.

Why a Vendor? Which Vendor? Many companies by choice or necessity will involve an outside vendor in this process either to utilize the specialized technical expertise of such vendor (i.e. get the best in the business) or simply because they have no relevant expertise of any kind in house. This note is intended to address the contractual considerations which companies should address when engaging a third party to assist or perform a material portion of its storage or retrieval of ESM in connection with litigation.

Prior to entering into any contract with a vendor, companies and counsel must perform meaningful due diligence in order to satisfy themselves that the vendor possesses the claimed expertise as well the integrity and financial wherewithal to make meaningful its contractual commitments. Even the strongest contract will be of limited value if the vendor is unwilling or unable to perform its obligations. It must be emphasized that preservation and production obligations under Rule 26(f) and related cases such as the *Zubulake* series, e.g. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (SDNY 2003), are those of the litigant and can not be delegated in the event of non-compliance, a court will sanction the litigant (and possibly its counsel) and not its vendor. It is not enough for a litigant and its counsel to say that we engaged XYZ Inc. and this is what they did when there has been spoliation or non-production of evidence. Counsel must provide guidance that a vendors failure to deliver what is required by the Rule or a court order may have dire consequences for all concerned.

When to Address the Topic? Litigators must provide guidance to their clients before the beginning of litigation involving e-discovery as to how to evaluate and engage vendors for this purpose.

What to Put in the Contract? Best practices dictate that a litigator needs be involve herself in her clients vendor contract negotiations to ensure that the contract contains the following:

- . A business-level statement of the vendors obligation. For example, if a vendor is being engaged to assist in retrieval of relevant documents and e-mails from the customers logs on ten servers in response to a document request dated March 15, 2008 in the ABC v. XYZ case then pending in the Northern District of Illinois, the contract should say so. Vendor efforts to substitute technobabble must be resisted.

- . A firm commitment to deliver such result in an accurate manner. Vendors will often couch their commitments in terms like best efforts or commercially reasonable efforts. Needless to say, the new FRCP and discovery requests do not contain such qualification.

- . A commitment to maintain and retrieve (upon customer request) relevant metadata about the materials at issue. Literally speaking, metadata is data about data, such as its author, date of creation, date of modification, number of modifications and the like. Such information may have significant legal relevance in connections with issues such as notice or knowledge.

- . A firm date (or time frame) by which the vendors obligations will be performed. Such date should reflect or incorporate applicable requirements of the court and FRCP. Payment of the vendor should be, at least in part, tied to timely delivery.

- . A commitment to perform the tasks in the customers actual hardware and software environment. For example, if a customer is still running an old version of Microsoft Outlook such as the 1997 or 2000 versions it is critical that the vendor be apprised of this and commit to perform in this environment. The same is true with other non-standard programs such as a Linux operating system or Apple hardware. In many cases, vendors will use a particular technical approach which is incompatible with many other technical environments.

- . A commitment to deliver output in the format required by local rule and applicable orders in the particular case

e.g. CD, mag tape, paper, etc.

. A commitment to perform at the customers actual scale. Many vendors will do well with smaller and midsize companies but lack the technical infrastructure to properly service larger, international companies. If a customer requires retrieval of 5 terabytes of data located on 5 continents, this must be stated in the contract.

. Meaningful remedies for failure to perform, starting with payment of any amounts awarded by a court as sanctions for non-compliance. In many sectors of the information technology world, vendors seek to limit their liability to the fees they are paid. Maintenance of error and omission insurance, similar to legal malpractice insurance is often an essential part of a customers remedies.

. The ability to tailor searches to reflect customer or counsel tactical preferences and legal requirements e.g. sorted by author, size, time sent, topic, etc.

. Security mechanisms to ensure the preservation and integrity of the materials at issue in light of the threat of internal and external hacking and virus (malicious code) dissemination.

Inclusion of such language will probably require counsel to work with the clients information technology staff. In view of frequent industry practice by service providers, failure to include enumerated language in vendor contracts or obtain qualified vendors may result in sanctions to litigants and counsel and prejudice to underlying claims and will result in wasted time and money.

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Jeffrey P. Michalowski on Wagner Construction Co. v. Pacific Mechanical Corp.

2008 Emerging Issues 1448

Jeffrey P. Michalowski on Wagner Construction Co. v. Pacific Mechanical Corp.

By Jeffrey P. Michalowski

December 11, 2007

SUMMARY: Wagner Construction Co. v. Pacific Mechanical Corp. further entrenched California's public policy supporting enforcement of arbitration agreements, but in so doing provides plaintiffs a potential escape-hatch for pursuing time-barred claims. This Emerging Issues Analysis analyzes this opinion and explains how cautious counsel can foreclose such uncertainty only through careful drafting of arbitration agreements.

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ARTICLE: *Wagner Construction Co. v. Pacific Mechanical Corp. (2007) 41 Cal. 4th 19, 157 P.3d 1029, 58 Cal. Rptr. 3d 434* further narrows the role of the California courts in resolving disputes covered by arbitration agreements, holding that questions of statutes of limitations are for the arbitrator to decide, rather than the court.

Background. In 1997, defendant Pacific hired plaintiff Wagner as a subcontractor to perform installation work. The parties signed an agreement that provided for arbitration of disputes arising from the contract. The agreement did not set a time limit for demanding arbitration.

A dispute arose between the parties and, in 1999, Wagner brought suit in California Superior Court, alleging breach of contract and other causes of action. Wagner voluntarily dismissed the suit without prejudice when both Wagner and Pacific were sued for personal injuries related to the construction project. In 2004, after the personal injury action was resolved, Wagner brought a new lawsuit in Superior Court, bringing the same contract cause of action alongside new claims. Shortly thereafter, Wagner filed a petition to compel arbitration.

The Superior Court denied the petition on the grounds that the underlying claims were time-barred by the three-year statute of limitations under *Code Civ. Proc.* §§ 337, 338. The Court of Appeals court upheld the denial, but on different grounds, finding that Wagner had waived its contractual right to demand arbitration under *Code Civ. Proc.* § 1281.2 by failing to seek arbitration in a timely manner. Wagner then sought review in the California Supreme Court.

Result. The California Supreme Court reversed the lower courts and indicated that the role of the courts in disputes covered by arbitration agreements is not to move toward resolution of the underlying dispute, but is instead the more

modest project of determining the enforceability of the contractual agreement to arbitrate. Accordingly, the Supreme Court holds that a court may not deny a petition to compel arbitration on the ground that the statute of limitations has run on the claims the parties agreed to arbitrate. While a court may deny a petition to compel on the grounds of unreasonable delay in demanding arbitration, unreasonable delay is to be determined in accordance with a number of rules unrelated to the statutes of limitations for the underlying claims.

Statutes of Limitation. As indicated by *Code Civ. Proc. § 1281*, California has a strong public policy in favor of enforcing arbitration agreements. It refuses to enforce such agreements only upon such grounds as exist for the revocation of any contract. As the contract merely serves to select the forum in which a dispute is to be resolved (an arbitral rather than judicial forum), the fact that the underlying claim may be time-barred does not constitute a ground for non-enforcement of the contract.

Waiver. A court may deny a petition to compel arbitration on the grounds that the demanding party has waived its contractual right to arbitrate. Delay in bringing such a demand can constitute a waiver, but a determination of when delay amounts to a waiver has nothing to do with the statutes of limitation; instead, the court must look to specific rules regarding the timing of arbitration demands. Under these rules, the party must act timely with respect to both the *demand* for arbitration and the *petition to compel* arbitration.

Timing of the Demand. A time limit for issuing a demand for arbitration may be provided by statute or by contract, and when a party fails to comply with such limits, a judge will be justified in finding waiver. Where both statute and contract are silent, general contract principles require that a party still must demand arbitration within a reasonable time [see *Civ. Code § 1657*]. What constitutes a reasonable time under *Civ. Code § 1657* is a question of fact, and depends upon the facts of the particular case [see *Sawday v. Vista Irrigation Dist.* (1966) 64 Cal. 2d 833, 836, 415 P.2d 816, 52 Cal. Rptr. 1].

Timing of the Petition to Compel. As parties seeking arbitration are essentially demanding specific performance of a contractual agreement to arbitrate, they are subject to the four-year statute of limitations for actions founded upon written contracts, regardless of the limitations period for the underlying claim. They must attempt to enforce this contractual right (which occurs with the filing of a petition to compel) within four years of the time when the opposing party refuses to arbitrate the controversy [*Spear v. Cal. State Automobile Ass'n* (1992) 2 Cal. 4th 1035, 1040, 831 P.2d 821, 9 Cal. Rptr. 2d 381].

The Significance of the Case. Counsel should consider the significance of *Wagner* on the following issues:

The Decision-Maker Matters. A court determines the facts upon the weight of the evidence, and applies the law as it is laid down by the authorities. Arbitrators have considerably more leeway: they may base their decision upon broader principles of justice and equity, and in doing so may be more inclined to stray from legal authority. In this sense, *Wagner* provides parties a possible escape-hatch for time-barred claims.

Appeal. While Superior Court judges enjoy a presumption of correctness, arbitrators' decisions are much more insulated from review. Aside from the narrow grounds for vacating or correcting arbitration awards specifically enumerated by statute [see *Code Civ. Proc. §§ 1286.2, 1286.6*], arbitration awards are immune from judicial review [*Moncharsh v. Heily & Blase* (1992) 3 Cal. 4th 1, 12, 13, 832 P.2d 899, 10 Cal. Rptr. 2d 183].

Expansion to Other Affirmative Defenses. While the Supreme Court addressed only who is the proper decision maker for statutes of limitation defenses, the Courts' reasoning that a court's role on a petition to compel arbitration is limited to determining the enforceability of the agreement to arbitrate applies to affirmative defenses generally. Accordingly, it is likely that the lower courts will expand the reach of *Wagner* to other affirmative defenses, such as failure to exhaust administrative remedies.

The Practitioners Perspective. The practitioner also should consider the following consequences of *Wagner* :

Drafting Arbitration Agreements. An attorney can avoid the *Wagner* escape-hatch by providing time limits for demanding arbitration in the text of the arbitration agreement itself. However, in the context of statutory employment claims, the legally applicable limitations period should be followed [see *Armendariz v. Found. Health Psychcare Servs.* (2000) 24 Cal. 4th 83, 6 P.3d 669, 99 Cal. Rptr. 2d 745 (requiring heightened safeguards for pre-dispute arbitration agreements as to certain claims in employment context)]. Alternatively, an attorney can include language indicating that arbitrators must act in conformity with all applicable rules of law, with respect to both all causes of action and all affirmative defenses.

Do Not Over-Reach. Unless a contrary approach is justified by business necessity, the best practice is for any time limits in an arbitration agreement to apply identically to both parties; to do otherwise invites non-enforcement of the contract as unconscionable.

Beware of Context. Attorneys serving clients in the employment context should be particularly wary. Driven by *Armendariz*, California courts have been quick to find unconscionable provisions in arbitration agreements between employees and employers and refuse to enforce the agreements on those grounds. Non-mutual time-limits may be evidence supporting such a finding.

For further analysis of the issues in *Wagner*, see California Forms of Pleading and Practice, Ch. 32, Contractual Arbitration: Arbitration Agreements and Compelling Arbitration, § 32.40 (LexisNexis Matthew Bender).

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Kevin V. DeSantis on Moran v. Murtaugh Miller Meyer & Nelson

2008 Emerging Issues 1449

Kevin V. DeSantis on Moran v. Murtaugh Miller Meyer & Nelson

By Kevin V. DeSantis

December 11, 2007

SUMMARY: The California Supreme Court establishes that trial courts must weigh the evidence when determining whether a vexatious litigant has no reasonable probability of success in his or her claim and is therefore required to post security. The decision disapproves a prior appellate decision that prohibited weighing the evidence and had the effect of applying the standard for a demurrer. This Emerging Issues Analysis analyzes this opinion.

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ARTICLE: Standard of Reviewing Evidence on a Vexatious Litigant Motion.

Issue: *Moran v. Murtaugh Miller Meyer & Nelson LLP*, involves the evidentiary standard to determine whether a vexatious litigant has no reasonable probability of success and is therefore required to post security. The decision addresses whether the trial court may weigh the evidence presented by both parties or if it must assume the truth of a plaintiffs alleged facts and determine if the claim is foreclosed as a matter of law.

Californias Vexatious Litigant Statute. In recognition of the unreasonable burden placed upon the courts by vexatious litigants, the California Legislature, in 1963, enacted *Code Civ. Proc. § 391* et seq. The Vexatious Litigant Statutes were enacted to require a person qualifying as a vexatious litigant to post security for the reasonable expenses of a defendant who becomes the target of one of these obsessive and persistent litigants [*Holcomb v. U.S. Bank Nat. Assn.* (2005) 129 Cal. App. 4th 1494, 29 Cal. Rptr. 3d 578].

Section 391 provides several definitions of a vexatious litigation [see *Code Civ. Proc. § 391(b)(1)-(4)*]. In *Moran*, the plaintiff qualified as a vexatious litigant under *Code Civ. Proc. § 391(b)(1)(i)* because in the immediately preceding seven year period he had commenced, prosecuted, or maintained in propria persona at least five litigations that were determined adversely.

Once the plaintiff qualifies as a vexatious litigant, a defendant may then bring a motion seeking an order requiring the plaintiff to furnish security. The defendant must demonstrate the defendant qualifies as a vexatious litigant and there

is no reasonable probability that the plaintiff will prevail in the litigation [*Code Civ. Proc.* § 391.1]. The court must consider such evidence, written or oral, by witness or affidavit, as may be material to the ground of the motion [*Code Civ. Proc.* § 391.2]. If the Court concludes that there is no reasonable probability that the plaintiff will prevail in the litigation, then the court must order the plaintiff to furnish, for the benefit of the moving defendant, security in such amount and within such time as the court shall fix [*Code Civ. Proc.* § 391.3]. If the security is not furnished then the litigation must be dismissed as to the moving defendant [*Code Civ. Proc.* § 391.4]. Finally, upon filing the motion, the litigation is stayed until 10 days after the motion is denied or 10 days after the required security is furnished [*Code Civ. Proc.* § 391.6].

Pre-Moran Standard for Determining Reasonable Probability of Prevailing. Under *Code Civ. Proc.* § 391.2 it is clear that the court is to receive evidence, written or oral by witness or affidavit, in connection with determining whether there is a reasonable probability of prevailing. The issue in *Moran* focused on whether the court may evaluate or weigh that evidence.

The only previous case addressing the standard for reviewing evidence was *Devereaux v. Latham & Watkins* (1995) 32 Cal. App. 4th 1571, 38 Cal. Rptr. 2d 849. In *Devereaux*, the Second District Court of Appeal held that the defendant must show that the plaintiffs recovery is foreclosed as a matter of law or that there are insufficient facts to support recovery by plaintiff. *Devereaux*, 32 Cal. App. 4th 1782-1783. This standard was utilized by plaintiff to argue that the Court could not evaluate or weigh the evidence. Instead, plaintiff argued that the court was required to disregard any contradicted evidence submitted by the moving party. In essence plaintiff was arguing that a demurrer standard must be applied and all pleadings and evidence submitted by plaintiff accepted as true.

Obviously the standard established in *Devereaux* and as advanced by the plaintiff in *Moran* severely limited the effectiveness of the Vexatious Litigant Statute. Any plaintiff that could plead the elements of a claim or draft a declaration setting out the facts of the claim could, conceivably, overcome a motion.

The Moran Decision: In *Moran*, the California Supreme Court granted review specifically to address the evidentiary standard. In making its decision, the Court considered the statutory language of *Code Civ. Proc.* § 391.2 and reviewed the history of the Vexatious Litigant Statute. In particular the Court found persuasive that the Vexatious Litigant Statute was modeled in part on former section 834 of the California Corporations Code addressing security provisions applicable to shareholders derivative suits [*Moran*, 40 Cal. 4th at 784]. Under former section 834, the Court previously held that the trial court was permitted to weigh evidence in connection with determining probability of success [*Moran*, 40 Cal. 4th at 784 , citing *Beyerbach v. Juno Oil Co.* (1954) 42 Cal. 2d 11, 265 P.2d 1].

Based on this analysis, the Court in *Moran* disapproved of the holding in *Devereaux* [*Moran*, 40 Cal. 4th at 785 n. 7]. Instead, the Court found that the trial court performs an evaluative function in a Section 391.1 hearing. The Court concluded that the trial court is, therefore, permitted to weigh the evidence in considering whether there is a reasonable probability of prevailing.

The Court also upheld the constitutionality of *Code Civ. Proc.* § 391.1 because the vexatious litigant motion does not terminate the action and merely requires the posting of security, and does not deprive the vexatious litigant of the right to a jury trial under Article I, section 16 of the California constitution; nor does the motion violate due process given the plaintiffs ability to file opposing declarations [*Moran*, 40 Cal. 4th at 786].

Import of the Moran Decision. The decision in *Moran* is significant in a number of respects. It serves to clarify the apparent disparity between the plain language of *Code Civ. Proc.* § 391.2 that provides for the Court to **consider** the evidence, and *Devereaux* which appeared to restrain the Courts role. The standard is now clear: The trial court may weigh and evaluate the evidence. Further, in confirming that the trial court serves in an evaluative capacity, the Court has given strength to the Vexatious Litigant Statute. This should result in the increased use of the procedure established

in the statute. Whereas a demurrer standard is likely easily overcome by adept pleading, allowing the trial court to consider and weigh the evidence allows for judicial scrutiny at an early stage in the litigation.

Practice Tips--Plaintiffs. The Court rejected a due process challenge by noting the plaintiff had ample opportunity to augment the record by filing a nine-page declaration opposing the motion in addition to the complaints allegations. Plaintiffs should be prepared to submit any and all declarations and to produce witnesses to comply with the language of *Code Civ. Proc.* § 391.2 requiring the court to [c]onsider such evidence, written or oral, by witnesses or affidavit, as may be material to the ground of the motion. Plaintiffs may need to lay out a complete case as though facing a motion for summary judgment since losing the motion may well be the same as a dismissal should the amount of security be fiscally prohibitive.

Practice Tips--Defendants. Anyone who has been the target of a vexatious litigant understands the financial and often times emotional toll that can be exacted by one of these individuals. For a defendant faced with a lawsuit by a vexatious litigant, a motion to require posting of security can be a very effective litigation tactic.

Because the litigation is stayed immediately upon filing the motion, the defendant should consider filing the motion as soon as possible. Typically, the defendant will have access to the documentary evidence and witnesses necessary to demonstrate no reasonable probability of prevailing. Counsel should consider the motion as similar in substance to a motion for summary judgment [*see Code Civ. Proc.* § 437c] or an anti-SLAPP motion [*see Code Civ. Proc.* § 425.16 et seq.].

However, defense counsel and clients should be aware that a motion to post security is not intended to serve as a dispositive motion. If the motion is granted, the plaintiff will be ordered to post security. If security is posted, the matter proceeds. Should the matter proceed, defense counsel will still gain valuable insight on the plaintiffs evidence and theory of the case. Additionally, because the plaintiff may essentially present an entire case at the outset of litigation to oppose the motion, the plaintiffs declarations and arguments may be subject to later contradiction as litigation and discovery unfolds. Defense counsel should carefully review the declarations opposing the motion and be prepared to identify for the court any contradictions that may arise during subsequent procedures in light of restrictions on amending a complaint that directly contradicts a prior version, asserting contradictory facts on a motion for reconsideration, or attempts to create a triable issue on a motion for summary judgment. These contradictions are also valuable for impeachment should the matter proceed to trial.

References: For forms to move for a plaintiff to furnish security as a vexatious litigant, see California Forms of Pleading and Practice, Ch. 174, Costs and Attorney's Fees §§ 174.290 (notice of motion and motion for order requiring plaintiff to furnish security), 174.291 (declarations), 174.293 (order granting motion and fixing amount), 174.294 (motion to dismiss for failing to furnish security).

For additional analysis of vexatious litigants, see California Forms of Pleading and Practice, Ch. 573, Vexatious Litigants (LexisNexis Matthew Bender), and MB Practice Guide: CA Pretrial Civil Procedure, § 35.15A et seq. (LexisNexis Matthew Bender).

For analysis of motions for summary judgment, see California Forms of Pleading and Practice, Ch. 537, Summary Judgment (LexisNexis Matthew Bender) and Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 38, Summary Judgment (LexisNexis Matthew Bender).

For analysis of anti-SLAPP motions to strike, see California Forms of Pleading and Practice, Ch. 376, Motions to Strike: Anti-SLAPP and Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 13, Anti-SLAPP Motions (LexisNexis Matthew Bender).

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Dorsaneo on Tony Gullo Motors I, L.P. v. Chapa

2008 Emerging Issues 1427

Dorsaneo on Tony Gullo Motors I, L.P. v. Chapa

By William V. Dorsaneo III

December 11, 2007

SUMMARY: In *Tony Gullo Motors I, L.P. v. Chapa*, the TX Supreme Court modified the standards for the recoverability of attorney's fees in cases involving tort and contract theories of liability. No longer can parties rely on the argument that the causes of action in a suit are dependent upon the same set of facts and thus the fees allocated towards each of them are inseparable.

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ARTICLE: In December 2006, the Texas Supreme Court modified the standards for the recoverability of attorney's fees by recasting the "intertwined claims" exception frequently used by claimants in cases involving claims that will support recovery of fees and claims that will not do so. In the same opinion, the Court clarified the operation of the "one satisfaction" or "one recovery" rule and the relationship between statutory and constitutional limits on the recoverability of exemplary damages [*Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299 (Tex 2006)].

Duty to Segregate Attorney's Fees. In *Gullo*, the Court made significant changes in Texas law concerning the recovery of attorney's fees in cases involving multiple theories of liability. These changes require the presentation of specific evidence segregating recoverable fees from fees that are not recoverable. In Texas the ability of a prevailing party to recover attorney's fees depends on the type of claim. As a general rule, Texas allows for the recovery of attorney's fees in breach of contract cases [See Dorsaneo, Texas Litigation Guide, Ch. 21, *Damages in Contract*, § 21.20 (Matthew Bender); see also Ch. 22, *Attorney's Fees* (Matthew Bender)]. But, absent specific statutory authority, Texas law does not allow for recovery of attorney's fees in tort cases [See Dorsaneo, Texas Litigation Guide, Ch. 20, *Damages in Tort* (Matthew Bender); see, e.g., *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 304 (Tex. 2006) (no award of attorney's fees in action for fraud); cf. *King v. Acker*, 725 S.W.2d 750, 757 (Tex. App.-Houston [1st Dist.] 1987, no writ) (plaintiff's attorney's fees were factor to consider in setting exemplary damages at common law)].

Accordingly, for some time parties have been required to segregate recoverable fees from nonrecoverable fees in cases involving both breach of contract and tort claims. However, in 1991 an exception to the segregation requirement was recognized by the Texas Supreme Court [see *Stewart Title Guaranty Co. v. Sterling*, 822 S.W.2d 1 (Tex. 1991)].

This exception applies if attorney's fees are incurred in connection with multiple claims arising out of the same transaction, that are so interrelated that their prosecution or defense entails proof or denial of essentially the same set of

facts [see *Stewart Title Guaranty Co. v. Sterling*, 822 S.W.2d 1, 11 (Tex. 1991); *Sonterra Capital Partners, Ltd. v. Sonterra Property Owners Association, Inc.* 216 S.W.3d 417, 424 (Tex. App.-San Antonio, pet. denied); *Girdner v. Rose*, 213 S.W.3d 438, 447 (Tex. App.-Eastland 2006, no pet.)]. In this situation, the party suing for attorney's fees may recover the entire amount of fees incurred in connection with all of the claims [see e.g., *French v. Moore*, 169 S.W.3d 1, 16-18 (Tex. App.-Houston [1st Dist.] 2004, no pet.); *Texas Cookie Co. v. Hendricks & Peralta*, 747 S.W.2d 873, 880 (Tex. App.-Corpus Christi 1988, den.)].

Gullo Redefines the Exception. Because all attorney's fees can arguably be made recoverable under the original segregation exception, more and more claimants have invoked it [see *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 312 (Tex. 2006)]. As a result, the courts of appeals have been flooded with claims that recoverable and unrecoverable fees are inextricably intertwined [see *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 312 (Tex. 2006)].

Therefore, to ease the volume of appeals and to prevent the rule of segregation from being swallowed by the exception, the Court modified the exception by holding that intertwined facts, do not make unrecoverable fees recoverable; parties must segregate attorney's fees except when discrete legal services advance both recoverable and unrecoverable claims. It is only when discrete legal services advance both a recoverable and an unrecoverable claim that they are so intertwined that they need not be segregated [see *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 312-314 (Tex. 2006)].

Failure to segregate when attorney's fees are capable of segregation requires a remand to the trial court so that evidence of segregated attorney's fees may be presented [*Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 11 (Tex. 1991) (disapproving of cases awarding no fees for failure to segregate)]. Under this construction of the exception to the duty to segregate, counsel must be prepared to give an opinion about the amount or percentage of time that was applied to the claims that support the attorney's fee award, so that the trier of fact can decide the matter [*Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 312-314 (Tex. 2006)]. Similarly, in a case involving multiple defendants, when one or more of those defendants have made settlements, the plaintiff must segregate the fees owed by the remaining defendants [*Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 10-11 (Tex. 1991); *Main Place Custom Homes, Inc. v. Honaker*, 192 S.W.3d 604, 621-623 (Tex. App.-Fort Worth 2006, pet. denied)]. If no objection is made to the failure to segregate attorney's fees, either at the time evidence of fees is presented or at the time of the charge, the error is waived [*Apache Corp. v. Dynegy Midstream Services*, 214 S.W.3d 554, 566 (Tex. App.-Houston [14th Dist.] 2006, no pet.); *Holmes v. Concord Homes, Ltd.*, 115 S.W.3d 310, 313 (Tex. App.-Texarkana 2003, no pet.) (objection did not ask trial court to either segregate or divide the claims for attorneys' fees among the parties, so error was not preserved for appellate review; moreover, although several defendants were brought into the case, all claims against defendants were based on the same wrongful acts alleged against the main defendant, so segregation was not required in absence of effort to raise issue at trial)].

In light of the Texas Supreme Court decision in *Tony Gullo Motors I, L.P. v. Chapa*, practitioners should pay closer attention to whether attorney's fees are recoverable under each claim they plead, and if they are not recoverable under all claims, should pay close attention to how much time is allocated towards each claim.

Refining the One Satisfaction Rule. Texas law has long recognized the "one satisfaction" or "one recovery" rule [see *Dorsaneo*, Texas Litigation Guide, Ch. 21, *Damages in Contract*, § 21.50 (Matthew Bender)]. Under the "one satisfaction" rule, a party who alleges a single legal injury is permitted only one recovery for that injury [*Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 303 (Tex. 2006)]. However, that party has a right to a judgment on the theory that affords him the greatest or most favorable relief [*Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 303-304 (Tex. 2006)]. In *Gullo*, [*Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 308-310 (Tex. 2006)], the plaintiff sued a

car dealership over the sale of a vehicle, and argued liability theories of: (1) breach of the sales contract; (2) fraud in the inducement to enter the contract; and (3) the Deceptive Trade Practices Act. The jury found for the plaintiff, and awarded economic damages, mental anguish damages, exemplary damages, and attorney's fees. The trial court set most of these awards aside, on the ground that the plaintiff could recover only for breach of the sales contract. The court of appeals reversed, reinstating all the categories of recovery, though reducing the exemplary damages as excessive.

The Texas Supreme Court reversed in turn, holding that permitting recovery of all the damages violated the "one satisfaction" rule. The Court noted that because the plaintiff alleged a single legal injury, she was permitted only one recovery for that injury [*Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 303-304 (Tex. 2006)]. At the same time, however, that injury could be redressed through any available liability theory supported by the evidence and the jury's findings.

Therefore, the trial court also had erred in finding that recovery was restricted to a breach of contract theory, because the plaintiff submitted evidence of fraud in the inducement to enter the contract, and the jury found for the plaintiff on that issue. Thus, the plaintiff was entitled to recover under the liability theory that would produce the greatest recovery [*Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 304 (Tex. 2006)]. By requiring the claimant to choose among available theories of recovery, the Court's opinion strongly suggests that a claimant cannot mix and match contract and tort claims to increase the amount of recovery. For example, the choice of a fraud theory over a breach of contract claim would allow the claimant to recover economic damages, mental anguish damages, possibly exemplary damages, but not attorney's fees.

Recoverability of Exemplary Damages. While the excessiveness of damages as a factual matter is final in the Texas courts of appeals, the constitutionality of exemplary damages is a legal question within the jurisdiction of the Texas Supreme Court. Furthermore, exemplary damages on a fraud claim are subject to the generally applicable statutory cap on those damages, which limits recovery to the greater of (1) noneconomic damages of no more than \$750,000, plus two times economic damages, or (2) \$200,000 [Tex. Civ. Prac. & Rem. Code § 41.008(b); see *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 307, n.28 (2006) (because of limited compensatory damage recovery, exemplary damages for fraud limited by statute to \$200,000); Dorsaneo, Texas Litigation Guide, Ch. 20, Damages in Tort, §20.201 (Matthew Bender)]. Significantly, however, even if the amount of exemplary damages awarded is permissible under this cap, it may still be constitutionally excessive, particularly if the award exceeds four times the amount of exemplary damages [*Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 308 (2006) (constitutionality of exemplary damages award determined under three "guideposts:" (1) nature of defendant's conduct, (2) ratio between exemplary and compensatory damages, and (3) size of civil penalties in comparable cases; when defendant's fraudulent conduct was not reprehensible, and exemplary damages award far exceeded available civil penalties, ratio of 4.33 to 1 was constitutionally excessive and required remand to court of appeal for appropriate remittitur)].

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Professor Dorsaneo served as the Reporter to the Combined Committee appointed by the Texas Supreme Court, the Court of Criminal Appeals and the Texas Legislature to draft the Texas Rules of Appellate Procedure and for the

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Joseph B. McDonnell on Nickon v. City of Princeton

2008 Emerging Issues 1405

Joseph B. McDonnell on Nickon v. City of Princeton, 2007 Ill. App. LEXIS 1137 (Ill. App. Ct. 2007)

By Joseph B. McDonnell

December 10, 2007

SUMMARY: Where a plaintiff's medical bills are discounted and paid by Medicare and Medicaid, and the payment is accepted in full satisfaction by the medical providers, is the plaintiff nevertheless entitled to submit to the jury and to recover as damages the initial billed amount? *Nickon v. City of Princeton*, 2007 Ill. App. LEXIS 1137 (Ill. App. Ct. 2007) provides an answer to this vexing question. This commentary, written by Joseph McDonnell, discusses the important implications of this decision.

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ARTICLE: The collateral source rule, recently considered anew by the Illinois Supreme Court in *Arthur v. Catour*, 216 Ill.2d 72 (2005), was presented to the Third District Appellate Court after a jury in Bureau County, Illinois returned a verdict in favor of plaintiff. This case and the Fourth District case of *Wills v. Foster*, 372 Ill.App.3d 670 (2007) reach opposite conclusions on the application of the collateral source rule where Medicare and Medicaid benefits result in a reduction of the amounts billed for medical services. Since the Supreme Court has allowed leave to appeal in *Wills*, it is likely that further clarification of the rule will be forthcoming.

Statement of the Rule. The collateral source rule is of common-law origin and is supported by substantial case authority in Illinois. The rule is that payments made to or on behalf of a plaintiff pursuant to a contract or other relationship between the plaintiff and the third party payor will not reduce the amount of the bill submitted by plaintiff; and that evidence of such collateral source payments is inadmissible. The rule is based on the proposition that a defendant tortfeasor may not take advantage of a relationship between the plaintiff and the third party payor (such as a medical insurer) to which the defendant is not a party. The allowance of such evidence would constitute a windfall to the defendant.

Exception to the Rule. In 1979, the Illinois Supreme Court recognized an exception to the collateral source rule. In *Peterson v. Lou Bachrodt Chevrolet Co.*, 76 Ill. 2d 353 (1979), the minor plaintiff had been hospitalized and treated at a Shriners Hospital for Children, which for many years has provided medical care for children free of charge to the

family. The court held that because there was no bill and no expectation of payment on the part of the medical provider, evidence of the reasonable value of the services so provided by the Shriners Hospital was inadmissible.

Peterson Revisited. In *Arthur v. Catour*, 216 Ill. 2d 72 (2005), the Illinois Supreme Court reexamined the collateral source rule and the exception to the rule carved out in *Peterson*. The initial bill of the medical provider had been discounted and the bill as discounted was paid by the plaintiffs medical insurer and accepted by the provider as payment in full. Noting that, at the time of the initial billing the medical provider expected payment of the billed amount, the court concluded that plaintiff could present to the jury the amount initially billed for the services rendered, notwithstanding the fact that the bill was later compromised for a lesser amount.

The Third Districts Approach. In the case under consideration, the medical charges that plaintiff was allowed to submit to the jury totaled \$119,000. Plaintiff, however, was Medicare-eligible and his bills for treatment were submitted to Medicare. Defendant attempted to produce evidence that the medical providers discounted the \$119,000 in charges and accepted a drastically reduced amount, \$34,888.61, as payment in full for services rendered. The trial court, citing the collateral source rule, disallowed the evidence of the reduction in charges, and, following a verdict for the plaintiff in the amount of \$180,000, denied defendants post-trial motion seeking a set-off or reduction of the verdict in the amount of the discount.

The Third District affirmed both actions of the trial judge, declining defendants invitation to expand the *Peterson* exception to services initially billed but subsequently discounted by Medicare as the third party payor. The court emphasized that the collateral source rule does not allow a wrongdoer to take advantage of contracts or other relations that may exist between the injured party and third person[,] citing *Wilson v. Hoffman Group, Inc.*, 131 Ill. 2d 308, 320 (2005) (courts emphasis). The relationship between the plaintiff and Medicare was one of the other relations which, according to the court, qualifies for application of the collateral source rule. The court said that the myriad of problems associated with making further exceptions to the rule speak strongly in favor of limiting the exception to that established by the Supreme Court in *Peterson*. Moreover, the court pointed out, if the third party payor, whether a government agency or an insurance company, fails for one reason or other to pay the bill, the entire amount as initially billed becomes the plaintiffs responsibility. Such liability, said the court, is not relieved until payment is received from some source. The court concluded that is the reason for the application of the collateral resource rule.

An Apparent Conflict. In *Wills v. Foster*, 372 Ill.App.3d 670 (2007), the Fourth District Appellate Court reached the opposite conclusion. Plaintiffs medical bills as submitted amounted to \$80,163.47, but the amount paid by Medicare and Medicaid was \$19,005.50. The trial judge, after considering arguments by both parties, denied defendants motion to limit the medical bills to the amount actually paid and permitted plaintiff to submit the billed amount. At trial, defendant stipulated to plaintiffs exhibit that demonstrated plaintiffs total medical bills as \$80,163.47. The jury returned an itemized verdict for plaintiff for the full amount of the medical bills as submitted and an additional \$7,500 for pain and suffering. Pursuant to defendants post-trial motion, the trial court (a different judge), granted defendants motion for a set-off equal to the discounted amount and entered judgment on the verdict as so reduced, but gave plaintiff leave to petition for revision of its order in the event that plaintiffs medical providers sought to recover from him the difference between the amount billed and that paid Medicare and Medicaid. Plaintiff appealed.

In affirming the trial courts order, the Fourth District employed a different approach than that utilized by the Third District in *Nickon*. It emphasized that, unlike the plaintiff in *Arthur v. Catour* who had paid a premium for private insurance and who then had received the benefit of her bargain when her insurance company negotiated a lesser amount in payment, Medicare and Medicaid beneficiaries pay no premium and do not bargain for their coverage. In addition,

said the court, the plaintiff incurs no liability for the initial charges because the medical providers have agreed to accept the discounted sums as full payment for services. Thus, the court (although acknowledging a split of authority among the states that have considered the issue) held that the plaintiff who receives Medicare and Medicaid benefits in reduction of his medical bills is precluded from recovering the full amount of those bills and may recover only the amount actually paid.

Tips for Practitioners. The reach of the exception recognized in *Peterson* and reexamined most recently in *Arthur* may yet be extended when the Illinois Supreme Court rules on *Wills v. Foster*. Leave to appeal was allowed on September 26, 2007 and a decision is not likely before mid-2008. Until such clarification, plaintiffs should continue to submit the initially-billed amounts of medical bills and resist attempts by defense counsel to limit the evidence to the amounts actually paid and oppose motions or reduction of the verdict by the amount of the discount. Defense counsel, on the other hand, should continue to press for admission of evidence regarding the discount accepted by the medical care provider (whether due to insurance coverage or Medicare/ Medicaid) and, if unsuccessful, to move post-trial for a set-off in the amount of the discount.

Cross References. Illinois Litigation Forms and Checklists Checklist 73.01: Bringing a Motion to Strike

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Manning and Libowsky on the Proposed Arbitration Fairness Act of 2007

2008 Emerging Issues 1406

Manning and Libowsky on the Proposed Arbitration Fairness Act of 2007

By Diana C. Manning and David J. Libowsky

December 10, 2007

SUMMARY: Identical bills have been introduced in both the United States Senate and House of Representatives that would void and bar enforcement of pre-dispute arbitration provisions contained in consumer, employment, and franchise contracts. This broadly drafted legislation would encompass pre-dispute arbitration provisions contained in agreements between securities broker-dealers and their customers.

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ARTICLE: Introduction. Identical bills have been introduced in both the United States Senate and House of Representatives that would void and bar enforcement of pre-dispute arbitration provisions contained in consumer, employment, and franchise contracts. This broadly drafted legislation would encompass pre-dispute arbitration provisions contained in agreements between securities broker-dealers and their customers. Under the proposed legislation, which is known as the Arbitration Fairness Act of 2007, customers would no longer be required to submit claims against broker-dealers and their registered representatives to arbitration, but instead would have the option of suing in a judicial forum.

This commentary analyzes the Arbitration Fairness Act in connection with securities arbitrations; the scope of this commentary does not extend to other "consumer," franchise, or employment dispute arbitrations. As detailed herein, the Arbitration Fairness Act is premised on findings which are legally and/or factually erroneous as far as securities arbitrations are concerned. In my opinion, such flawed findings do not justify the drastic measure of invalidating pre-dispute arbitration provisions in securities brokerage agreements as Congress is now considering.

The Proposed Legislation. On July 12, 2007, Senator Russ Feingold (D-WI) and Representative Henry C. "Hank" Johnson, Jr. (D-GA) introduced identical bills in the Senate and House of Representatives (*2007 S. 1782* and *2007 H.R. 3010*, respectively) that would invalidate and bar enforcement of pre-dispute arbitration provisions contained in consumer, employment, and franchise contracts. Entitled the Arbitration Fairness Act of 2007 ("Arbitration Fairness Act"), the proposed legislation would amend the Federal Arbitration Act ("FAA"), 9 U.S.C.A. § 2 (2007), by adding *inter alia* the following subpart to Section 2 thereof:

(b) No predispute arbitration agreement shall be valid or enforceable if it requires arbitration of --

- (1) an employment, consumer, or franchise dispute; or
- (2) a dispute arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power.

2007 S. 1782 and 2007 H.R. 3010, 110th Cong., 1st Sess. § 2 (2007).

The term "consumer dispute" is defined as meaning "a dispute between a person other than an organization who seeks or acquires real or personal property, services, money, or credit for personal, family or household purposes and the seller or provider of such property, services, money or credit." *2007 S. 1782 and 2007 H.R. 3010, 110th Cong., 1st Sess. at § 3.* Such definition may be broad enough to encompass claims brought by individuals against securities broker-dealers arising out of transactions in such person's securities brokerage accounts. As drafted, plaintiffs could argue that the proposed legislation voids and bars enforcement of arbitration provisions in contracts between broker-dealers and customers. Some courts may agree. The Arbitration Fairness Act, as proposed, would take effect on the date of its enactment, and would apply to any dispute or claim that arises on or after that date. *2007 S. 1782 and 2007 H.R. 3010, 110th Cong., 1st Sess. at § 5.*

The Arbitration Fairness Act recites a number of findings that purportedly justify the legislation:

- (1) The Federal Arbitration Act (now enacted as chapter 1 of title 9 of the United States Code) was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power.
- (2) A series of United States Supreme Court decisions have changed the meaning of the Act so that it now extends to disputes between parties of greatly disparate economic power, such as consumer disputes and employment disputes. As a result, a large and rapidly growing number of corporations are requiring millions of consumers and employees to give up their right to have disputes resolved by a judge or jury, and instead submit their claims to binding arbitration.
- (3) Most consumers and employees have little or no meaningful option whether to submit their claims to arbitration. Few people realize, or understand, the importance of the deliberately fine print that strips them of rights; and because entire industries are adopting these clauses, people increasingly have no choice but to accept them. They must often give up their rights as a condition of having a job, getting necessary medical care, buying a car, opening a bank account, getting a credit card, and the like. Often times, they are not even aware that they have given up their rights.
- (4) Private arbitration companies are sometimes under great pressure to devise systems that favor the corporate repeat players who decide whether those companies will receive their lucrative business.
- (5) Mandatory arbitration undermines the development of public law for civil rights and consumer rights because there is no meaningful judicial review of arbitrators' decisions. With the knowledge that their rulings will not be seriously examined by a court applying current law, arbitrators enjoy near complete freedom to ignore the law and even their own rules.
- (6) Mandatory arbitration is a poor system for protecting civil rights and consumer rights because it is not transparent. While the American civil justice system features publicly accountable decision makers who generally issue written decisions that are widely available to the public, arbitration offers none of these features.
- (7) Many corporations add to their arbitration clauses unfair provisions that deliberately tilt the systems against individuals, including provisions that strip individuals of substantive statutory rights, ban class actions, and force people to arbitrate their claims hundreds of miles from their homes. While some courts have been protective of individuals, too many courts have upheld even egregiously unfair mandatory arbitration clauses in deference to a supposed Federal policy favoring arbitration over the constitutional rights of individuals.

2007 S. 1782 and 2007 H.R. 3010, 110th Cong., 1st Sess. § 2 (2007).

2007 H.R. 3010 was referred to the House Judiciary Committee's Subcommittee on Commercial and Administrative Law on August 10, 2007. That subcommittee held a hearing on the bill on October 25, 2007. *2007 S. 1782* has been referred to the Senate Judiciary Committee; no hearings have been scheduled to date on the Senate bill.

Analysis. The findings cited by *2007 H.R. 3010* and *2007 S. 1782* as the basis for the Arbitration Fairness Act with respect to securities arbitrations are flawed in a number of critical respects both legally and factually. As such, those findings lend little, if any, credible support to the abrogation of arbitration provisions in securities brokerage agreements that the House and Senate bills seek to accomplish.

First, the finding that the FAA was "intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power" is not based on the legislative history of the FAA. To the contrary, that legislative history demonstrates that the primary purpose of the FAA was to insure enforcement of arbitration agreements. As set forth in the House Report on the FAA:

The purpose of this bill is to make valid and enforceable agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction or admiralty, or which may be the subject of litigation in the Federal courts.

H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924). The FAA sought to "overcome the rule of equity, that equity will not specifically enforce any arbitration agreement." Hearing on S. 4214 Before a Subcomm. of the Senate Comm. on the Judiciary, 67th Cong., 4th Sess. 6 (1923) (remarks of Senator Walsh). The House Report accompanying the bill further provided:

The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticized the rule and recognized its illogical nature and the injustice which results from it. This bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.

H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924). The stated secondary purpose of the FAA was to promote the expedited resolution of disputes. As the House Report observed:

It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.

H.R. Rep. No. 96, 68th Cong., 1st Sess. at 2. There is nothing in the FAA's legislative history indicating that the statute was only intended to apply to disputes between "commercial entities of generally similar sophistication and bargaining power." *See also, Southland Corporation v. Keating*, 465 U.S. 1, 12-14, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984) and *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-221, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985).

Second, given the stated purpose of the FAA, the finding that a "series of United States Supreme Court decisions have changed the meaning of the [FAA] so that it now extends to disputes between parties of greatly disparate economic power, such as consumer disputes and employment disputes" is incorrect. Since the FAA's purpose was, and has always been, to insure enforcement of arbitration agreements, the statute's scope has always included disputes between "parties of greatly disparate economic power," as well as disputes between "commercial entities of generally similar sophistication and bargaining power." The fact that the courts are enforcing agreements requiring the arbitration of disputes between "parties of greatly disparate economic power" merely shows that the courts are interpreting the FAA exactly as Congress intended.

Third, the finding that "with the knowledge that their rulings will not be seriously examined by a court applying current law, arbitrators enjoy near complete freedom to ignore the law and even their own rules" materially misstates the legal standards by which arbitrations (both securities and non-securities) are subject. Under Section § 10(a) of the FAA, an arbitration award is subject to vacatur on a number of grounds when the integrity of the arbitration process has been undermined or the fundamental due process rights of one of the parties has been violated. Such grounds include: (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption by the arbitrators; (3) where the arbitrators are guilty of misconduct; and (4) where the arbitrators have exceeded their powers. *9 USCS § 10(a)* (2007).

Arbitrators do not "enjoy near complete freedom to ignore the law." Rather, as cases decided under the FAA have held, an arbitration award is subject to vacatur under the manifest disregard of the law doctrine where "a governing legal principle is well defined, explicit, and clearly applicable to the case, and where the arbitrator ignored it after it was brought to the arbitrator's attention in a way that assures that the arbitrator knew its controlling nature." *See, e.g., Westerbeke Corp. v. Daihatsu Motor Co., Ltd.*, 304 F. 3d 200, 217 (2d Cir. 2002).

Further, the finding that "private arbitration companies are sometimes under great pressure to devise systems that favor the corporate repeat players who decide whether those companies will receive their lucrative business" does not apply to securities arbitrations. Securities arbitrations are governed by a single body, the Financial Industry Regulatory Authority ("FINRA"). FINRA is a self-regulatory organization ("SRO") subject to oversight by the Securities and Exchange Commission ("SEC"). Any proposed rules or amendments to existing rules for the arbitration of claims before FINRA Dispute Resolution are subject to notice and comment, allowing both members of the public and industry members to effectively participate in the rule making process. Any such proposed rules or amendments to existing rules are then approved by the SEC.

No empirical evidence was presented that FINRA has been pressured to devise a system favoring the securities industry. Indeed, if anything, in recent years, the amendments to the FINRA Code of Arbitration Procedure, and its pronouncements and actions evidence a clear trend in favor of claimants. *See, e.g.*, NASD Notice to Members 99-90 (establishing a Discovery Guide pursuant to which various categories of documents are deemed to be presumptively discoverable and are to be turned over without a formal request for production of said documents); NASD Notice to Members 03-70 (reminding member firms and associated persons of their duty to cooperate in the exchange of documents requested by parties or listed on applicable document production lists within the specified timeframe); NASD Notice dated July 19, 2004 (FINRA imposing a total of \$750,000 in fines on a number of member firms for failing to comply with discovery obligations); NASD Notice to Members 06-64 (amending arbitrator classification criteria to ensure that individuals with significant ties to the securities industry may not serve as public arbitrators in FINRA arbitrations).

Equally inapplicable is the criticism that there are unfair provisions that "deliberately tilt the systems against individuals, including provisions that strip individuals of substantive statutory rights, ban class actions, and force people to arbitrate their claims hundreds of miles from their homes." Arbitrating claims before FINRA Dispute Resolution merely changes the forum for the resolution of claims without altering the statutory and common law rights and obligations that otherwise apply. Investors can bring claims for violation of the federal securities laws along with claims for violation of other applicable federal and state statutory and common law. The FINRA Code of Arbitration Procedure does not take away the protections of applicable federal or state statute or common law. Indeed, the law and the practice is to the contrary. For example, the United States Supreme Court has confirmed that investors may pursue claims for punitive damages in arbitration. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 56, 115 S. Ct. 1212, 131 L. Ed. 76 (1995).

Further, unlike federal courts which will adjudicate and frequently grant motions to dismiss for failure to state a claim and for summary judgment, arbitrators in FINRA Dispute Resolution arbitrations rarely grant pre-hearing motions

to dismiss a statement of claim, thereby almost always allowing the claim to proceed to a hearing. In that regard, FINRA is currently considering an amendment to the Code of Arbitration Procedure that would further restrict the already limited ability of member firms and associated persons to file dispositive motions. Such motions would be limited to the following circumstances: (1) where the parties previously had settled their dispute in writing; (2) "factual impossibility," meaning the party could not have been associated with the conduct at issue; or (3) the existing six-year time limitation on the submission of claims to arbitration. Under the proposed amendment, a respondent who files a pre-hearing motion to dismiss that is denied would be subject to the imposition of attorneys' fees if the motion is deemed by the panel to be frivolous. See SR-FINRA-2007-021 (Nov. 2, 2007) (hyperlink at: http://www.finra.org/web/groups/rules_regs/documents/rule_filing/p037391.pdf).

Moreover, arbitration provisions in securities brokerage agreements do not bar class actions. In accordance with Rule 12204 of the FINRA Code of Arbitration Procedure, class action claims are simply not eligible for submission to arbitration. Any person purporting to assert a putative class action claim against a broker-dealer is able to bring such claim in the appropriate federal or state court.

Nor are claimants in securities arbitrations required to "arbitrate their claims hundreds of miles from their homes." Rather, under Rule 12213 of the FINRA Code of Arbitration Procedure, the Director of Arbitration is required to "select the hearing location closest to the customer's residence at the time of the events giving rise to the dispute." FINRA Dispute Resolution provides a hearing location in every state along with Washington, D.C. and Puerto Rico, and in many states it provides more than one location. See FINRA Dispute Resolution Regional Offices and Hearing Locations (hyperlink at

<http://www.finra.org/ArbitrationMediation/FINRADisputeResolution/WhatIsDisputeResolution/DisputeResolutionRegionalHearingLocations>

Last, the bills' criticisms of arbitration based on the lack of judicial review of arbitrators' decisions and the absence of transparency are, as Professor Peter Rutledge of the Catholic University of America, Columbus School of Law has pointed out, not at all unique to arbitration. As Professor Rutledge testified at the hearing on 2007 H.R. 3010, settlement is another mechanism which is not transparent, nor does it facilitate the development of public law, yet there are clear benefits associated with settlement, such as "reduced stress on the judicial system, speedier relief for plaintiffs and lower legal fees for both sides." See Testimony of Peter B. Rutledge, Associate Professor of Law, Columbus School of Law, Catholic University of America, Hearing on H.R. 3010, House Judiciary Committee, Subcommittee on Commercial and Administrative law (Oct. 25, 2007) at 9. As Professor Rutledge concluded, "the same logic supporting settlements -- notwithstanding their retarding effect on the development of public law -- also supports arbitration."

In short, the proposed findings upon which the Arbitration Fairness Act is premised lack substantial foundation in law or fact with respect to the arbitration of securities claims.

Conclusion. The legislative process with respect to the Arbitration Fairness Act is still at a relatively early stage. It is unclear whether any Senate hearing will be scheduled on the Act at any time in the near future. It is clear, however, that securities arbitrations do not suffer from the defects that are claimed to exist with respect to other types of consumer arbitrations. In light of the seriously flawed nature of its findings from both a legal and factual perspective, and the absence of any significant supporting empirical evidence whether the Arbitration Fairness Act's attempt to invalidate arbitration provisions contained in securities brokerage agreements constitutes necessary or appropriate public policy should be questioned.

Cross References. LexisNexis Practice Guide NJ Pretrial Practice Chapter 6: Arbitration.

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n1 . FINRA was formed as a result of a merger in July 2007 between the regulatory arms of the National Association of Securities Dealers, Inc. and the New York Stock Exchange, Inc. Arbitrations previously governed by NASD Dispute Resolution and the NYSE are now conducted by FINRA Dispute Resolution.

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Bisceglie on High-Low Agreements

2008 Emerging Issues 1386

Bisceglie on High-Low Agreements

By Kyle C. Bisceglie

December 7, 2007

SUMMARY: The NY Ct. of Apps. held that the right to a fair trial mandates that parties to a high-low agreement who remain as parties in a multi-defendant case must disclose the existence of the agreement to the court and to all non-agreeing defendants. Kyle Bisceglie, a Partner at Olshan Grundman examines considerations for the practitioner entering high-low and related agreements in light of *In the Matter of Eighth Jud. Dist. Asbestos Litigation*.

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ARTICLE: High-Low Agreements Must Be Disclosed to Court and Non-Agreeing Parties. In *the Matter of Eighth Judicial District Asbestos Litigation*, 8 N.Y.3d 717, 872 N.E.2d 232, 840 N.Y.S.2d 546 (2007), a unanimous Court of Appeals ruled that a high-low agreement between plaintiff and defendant, who remain in a multi-defendant lawsuit, must be disclosed to the trial court and to non-settling defendants. The Court also expressly ruled that disclosure of the agreement to the jury lay in the "sound discretion" of the trial court. This case is significant for at least three reasons. First, it provides bright line instruction on disclosure where previous practice standards varied. Second, the decision reaffirms the discretion held by the trial court to permit a jury to hear evidence about the agreement. Third, it raises the question whether disclosure will affect other partial settlements in multi-defendant cases including so-called Mary Carter agreements.

Elements of a High-Low Agreement. A high-low agreement is commonly used in a case going to trial to guarantee the plaintiff a minimum recovery while capping a defendant's potential maximum exposure. It is commonly asserted that high-low agreements allow the parties to re-allocate the risk of going to trial. In the context of a multi-defendant litigation where not all remaining defendants are parties to the high-low agreement, a defendant not a party to the agreement may be prejudiced if it is not informed of the agreement until after trial.

In *the Matter of Eighth Judicial District*, the plaintiff and the settling defendant entered into an agreement wherein settling defendant's liability would fall within a pre-determined range. If the jury awarded damages against settling defendant of \$155,000 or less, settling defendant would pay \$155,000; \$185,000 or more, settling defendant would pay \$185,000; and only in the range of \$155,000 and \$185,000 would settling defendant be obligated to pay the actual amount awarded. The Court was made aware of the existence of this high-low agreement but the agreement was not disclosed to the non-settling party or the jury. After trial, the jury returned a verdict for plaintiff in the amount of \$3,750,000 and apportioned 60%, or \$2,250,000, to the non-settling party. After various post-trial motions, the trial

court ultimately granted judgment against the non-settling defendant for \$1.55 million.

Prejudice of a Secret High-Low Agreement. In *Matter of Eighth Judicial District*, the Court of Appeals found that the agreement "furnished plaintiff with an incentive to maximize" the non-settling defendant's liability. While it is "not uncommon" for the plaintiff to maximize the liability of one defendant, the non-settling defendant was entitled to know "the true posture of the case." Such disclosure would have permitted the non-settling defendant the opportunity to adjust trial strategy and re-evaluate its decision to proceed to trial as "the target defendant." The Court noted a litany of procedural and evidentiary strategies denied to the non-settling party: conducting jury selection differently, arguing that it is entitled to its own peremptory challenges rather than sharing them with the settling co-defendant, filing *in limine* motions on the admissibility of the agreement and cross-examining witnesses differently.

The Court of Appeals ruled that disclosure of the existence of the agreement to the trial court and to the non-settling defendant strikes "the proper balance between [New York's] public policy of encouraging the expeditious settlement of claims, and the need to ensure that all parties to a litigation are apprised of the true posture of the litigation so they may tailor their strategy accordingly." Additionally, disclosure of the agreement allows the non-settling party the opportunity to make a record of how it believes the high-low agreement affects its rights, and allows the trial court to consider the interests of all the parties before determining the high-low agreement's role, if any, at trial. The Court of Appeals left all determinations about the evidentiary treatment of the high-low agreement to the "sound discretion of the trial court."

Prior to *Matter of Eighth Judicial District*, whether or not such agreements were disclosed to the non-settling parties or the court was a matter of varying practice without any significant limitation beyond guidance imported from other jurisdictions and equity. For example, *Matter of Eighth Judicial District* involves an appeal from *Reynolds v. Anchem Products*, 32 A.D.3d 1268, 822 N.Y.S.2d 216 (4th Dep't 2006). Therein, in a three-to-one decision with one justice abstaining, the Appellate Division based solely on authority cited from other states, upheld a non-disclosed high-low agreement because it found no "evidence of collusion" to "realign the loyalties" of the parties. *Id.*, 32 A.D.3d at 1270, 822 N.Y.S.2d at 218 (citations omitted).

The Court of Appeals cited a singular concern with "lack of disclosure." Read broadly, the decision raises questions under New York practice about the role of disclosure, the trial court and jury in all partial settlements.

Open Questions in New York. *Matter of Eighth Judicial District* raises the issue whether other types of partial settlement agreements must be disclosed in New York. Examples include: settlement agreements involving sums certain, (see, e.g., *Wausau Bus. Ins. Co. v. Turner Constr. Co.*, 2001 U.S. Dist. LEXIS 7294 (S.D.N.Y. June 5, 2001)); agreements calling for testimony at trial of witnesses of the settling defendant, (see, e.g., *Minpeco, S.A. v. Hunt*, 127 F.R.D. 460 (S.D.N.Y. 1989)); or agreements between the plaintiff and defendant to forego summation against one another (see, e.g., *Leon v. J & M Peppe Realty Corp.*, 190 A.D.2d 400, 596 N.Y.S.2d 380 (1st Dep't 1993)).

Effect of Decision on Status of Mary Carter Agreements in New York. *Matter of Eighth Judicial District* raises the question of whether Mary Carter agreements, which are generally viewed as impermissible by New York courts, will now be per se permissible as long as disclosure of the agreement is made to the court and to the non-settling defendants. Both high-low and Mary Carter agreements raise similar policy concerns. To wit, they are often secret and realign the interests of supposedly adverse and aligned parties alike. The term "Mary Carter Agreement" arises from *Booth v. Mary Carter Paint Co.*, 202 So. 2d 8 (Fla. Dist Ct. App. 1967) and usually describes confidential agreements that require the settling defendant's continued participation as a party to the litigation with reduced exposure in proportion to an increase in the non-settling defendants' liability over a specific amount. Some courts define the key characteristic as realignment of the parties: "most importantly, .. the settling parties structure the settlement in such a way as to give the settling defendant a financial incentive to assist the plaintiff in increasing the liability of the non-settling defendant." *Wausau Bus. Ins. Co.*, 2001 U.S. Dist. LEXIS 7294, *2 (the agreement in *Wausau* was disclosed to the Court but not the non-settling party). Other courts emphasize its secrecy, and, nearly, use a "secret" partial settlement as a synonym for Mary Carter agreement. E.g., *Minpeco*, 127 F.R.D. at 463 ; *Sierra Rutile Ltd. v. Katz*, 1994 U.S. Dist. LEXIS 14921, *9-10 (S.D.N.Y. October 19, 1994) ("[S]ecrecy is part of the essence of a Mary Carter

agreement," and disclosure "avoids prejudice to the non-settling defendants.").

Either way, federal courts consistently have observed that New York law precludes Mary Carter agreements. *See, e.g., Wausau, 2001 U.S. Dist. LEXIS 7294*, at *3 ("Most jurisdictions, including New York, hold that such agreements are void as against public policy, because they secretly realign the parties, may confuse juries if not disclosed, and may affect the settling defendant's presentation of evidence in a way that prejudices the non-settling defendants.")(Citations omitted); *Minpeco, 127 F.R.D. at 463-464* (finding agreement not "unlawful" because agreement was not a Mary Carter agreement); *Sierra Rutile Limited, 1994 U.S. Dist. LEXIS 14921*, at *9-10 (agreement "not a Mary Carter agreement and is thus not void against public policy").

At least two First Department cases note, in passing, the impermissible collusive nature of Mary Carter agreements. *See Considar, Inc. v. Equipment & Parts Export, Inc.*, 271 A.D.2d 288, 706 N.Y.S.2d 633 (1st Dep't 2000)(litigation agreement between two parties in multi-defendant case "did not amount to an impermissible collusive *Mary Carter* agreement since [co-defendant] did not agree to feign a defense so as to minimize liability.."); *Herbst v. 40 Worth Associates*, 276 A.D.2d 320, 321, 714 N.Y.S.2d 211, 212 (1st Dep't 2000)(agreement to apportion liability "not an improper Mary Carter agreement").

Treatise authority goes so far to state that New York *prohibits* Mary Carter agreements. 1-10 Weinstein, Korn & Miller *CPLR Manual* § 10.05 (2007). While this may be a valid observation about New York *practice*, there are no New York State cases that so hold. The only New York state authority relied upon in federal cases is *Stiles v. Batavia Atomic Horseshoes, Inc.*, 174 A.D.2d 287, 579 N.Y.S.2d 790 (4th Dep't 1992), reversed on other grounds, *Stiles v. Batavia Atomic Horseshoes, Inc.*, 81 N.Y.2d 950, 613 N.E.2d 572, 597 N.Y.S.2d 666 (1993). In *Stiles*, the Appellate Division stated that a Mary Carter agreement *may* be invalid in some circumstances, found that the agreement before it was not a Mary Carter agreement and, in any event, was ultimately reversed.

The combined weight of prior authority and *Matter of Eighth Judicial District* suggests that, provided full disclosure to the court and non-settling defendants, New York law would permit parties to enter partial settlements that provide greater realignment than called for in a high-low agreements including but not limited to the type of realignment typically associated with Mary Carter agreements.

Disclosure to the Jury. *Matter of Eighth Judicial District* reminds practitioners that the trial court has discretion to reveal high-low agreements to the jury. Many practitioners rely on CPLR 4533-b (takes proof of settlement "out of the hearing of a jury" to show "mitigation of damages") or *Federal Rule of Evidence 408* to argue that the jury should not be made aware of settlement as the prejudice outweighs probative value. *Matter of Eighth Judicial District* emphasizes the discretion trial courts possess to disclose the high-low agreement to the jury for purposes other than proving liability, mitigation or amount of the claim in dispute, which adds a dimension of risk that settling parties likely previously underestimated or ignored, *viz.*, will they have to disclose to the jury part or all of the elements of their high-low agreement? Disclosure of settlement to the jury in a multi-defendant case has precedent in New York. *See, e.g., Lambert Houses Redevelopment Co. v. HRH Equity Corp.*, 117 A.D.2d 227, 234, 502 N.Y.S.2d 433, 437 (1st Dep't 1986)(plaintiff and settling defendant annexed copies of the settlement agreement to proposed amended pleadings "thereby assuring that the jury in this case will be fully informed of the [settlement] agreement and of the relationship" between plaintiff and settling defendant); *Meleo v. Rochester Gas & Elec. Corp.*, 72 A.D.2d 83, 98, 423 N.Y.S.2d 343, 353 (4th Dept. 1979)(failure to disclose secret agreement between plaintiff and four settling defendants denied the jury the opportunity to "scrutinize the evidence in the light of the true self-interests and interrelationships of the parties.") In light of *Matter of Eighth Judicial District*, parties interested in entering high-low agreements and other partial settlement agreements in multi-defendant cases ignore potential disclosure to the jury at their own risk.

Cross-references: 1-5 LexisNexis AnswerGuide New York Negligence § 5.51 (2006); 1-10 LexisNexis AnswerGuide New York Civil Litigation § 10.10 (discussing offering proof of payment by joint tortfeasor in mitigation of damages); John E. Benedict, It's a Mistake to Tolerate the Mary Carter Agreement, *87 Colum. L. Rev.* 368 (1987)(outlining problems created by Mary Carter agreements); 1-3 New York Practice Guide: Negligence § 3.08(3)(d) (note on Mary Carter Agreements); Lisa Bernstein & Daniel Klerman, An Economic Analysis of Mary Carter Settlement Agreements, *83 Geo. L.J.* 2215, 2222-23 (1995)(more on Mary Carter Agreements); 9-45 *New York Civil Practice: CPLR P 4533-b.01* (2007)(notes that CPLR § 4533-b provision was designed to avoid drawing of prejudicial inference by jury); 2-408 Weinstein's Federal Evidence 408 (2007) (1-7 Weinstein's Evidence Manual § 7.05 discussing admissibility of evidence of settlement and consequences of admitting evidence of a settlement).

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Secura Ins. Co. v. Ill. Farmers Ins. Co.

2008 Emerging Issues 1384

Secura Ins. Co. v. Ill. Farmers Ins. Co., 2007 Ill. App. LEXIS 1198 (Ill. App. Ct. 2007)

By Joseph B. McDonnell

December 7, 2007

SUMMARY: An automobile liability insurance policy excludes from coverage "any person or organization, other than (the named insured) or a family member, who is the employer of any insured person." Is such a clause consistent with IL public policy?

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ARTICLE: From time to time, Illinois courts have determined that a particular provision of a liability insurance policy violates Illinois public policy. This is one such case. The Second District Appellate Court holds void a policy provision excluding from coverage "any person or organization [other than the named insured or a family member] who is the employer of any insured person."

Background. Daniel Dill was employed by Bogoja Muzikoski, d/b/a B&A Automotive Repair. B&A had a commercial liability insurance policy issued by Secura which provided coverage for B&A and its employees while operating "non-owned" vehicles in the course and scope of their employment. On October 21, 2000 Dill was driving, in the course and scope of his employment by B&A, a vehicle owned by a B&A customer when he collided head-on with another vehicle. Suit was filed by the occupants of the second vehicle against both Dill and B&A as Dill's employer. The vehicle Dill was driving was insured by Farmers. Their policy contained an exclusion from coverage with respect to "any person or organization, other than you or a family member, who is the employer of any insured person."

Defense of the suit was initially tendered by B&A to Secura, its carrier, and, after several exchanges of correspondence between Secura and Farmers, Farmers accepted the defense of the employee Dill, but declined the tender as to B&A, Dill's employer.

Dill was eventually dismissed from the underlying suit, leaving B&A as the only defendant. The case was eventually settled and Secura then sued Farmers, seeking a declaratory judgment that B&A was covered by Farmers' policy and that Farmers owed Secura reimbursement of attorney's fees and costs. It also sought a bad faith finding against Farmers that would entitle Secura to reimbursement of the entire settlement paid.

On cross-motions for summary judgment, the trial court found in Farmers' favor on the coverage issue, ruling that Farmers' policy clearly excluded B&A as an insured because of the language excluding from coverage the employer of

any insured (other than the named insured or a family member), and that the provision did not violate Illinois public policy. Secura appealed.

The "Omnibus Clause." Secura argued on appeal that the Farmers' policy provision excluding the employer of any insured (with exceptions not pertinent) from coverage violated Illinois' public policy. The Illinois Vehicle Code (625 ILCS 5/1-100, et seq.) requires that both a user and any other person responsible for the use of a motor vehicle, with the express or implied permission of the insured, be covered by liability insurance. Excluding an employer from coverage where the employee himself is covered does not, Secura contended, comply with the statute. Accordingly, argued Secura, the trial court erred in finding that Farmers could exclude B&A from coverage as long as its employee, Dill, was covered.

Application of the Illinois Vehicle Code. The Appellate Court pointed out that Section 5/7-601(a) of the Illinois Vehicle Code requires that a motor vehicle be insured through a liability insurance policy (625 ILCS 5/7-601(a) and that Section 7-317(b)(2) mandates that such a policy "insure the person named therein and any other person using or responsible for the use of such motor vehicle with the express or implied permission of the insured."

This section, said the court, requires an insurer to provide coverage to the named insured and any permissive user of the insured vehicle. The quoted language mandates coverage for not only the named insured but "any other person using or responsible for the use of" the vehicle with the insured's express or implied permission. This, said the court, was the only reasonable interpretation to be given the statute.

The court then examined case law interpreting Section 7-317(b)(2). *State Farm Mutual Automobile Insurance Company v. Smith*, 197 Ill. 2d 369 (2001), held that an automobile policy's business exclusion clause violated Illinois' public policy and was, therefore, unenforceable. There, the insured had dropped his automobile off to a valet driver at a casino, who then had an accident injuring a third party. The insured declined to cover the driver or the casino on the basis of the business exclusion clause, which provided that there was no coverage while the insured vehicle was "being repaired, serviced or used by any person employed or engaged in any way in a car business." (The definitions section included those engaged in "parking" vehicles). The *Smith* court held that this clause clearly violated Section 7-317(b)(2) and its mandate that a motor vehicle liability policy cover the named insured and any other person using the vehicle with the insured's permission.

In *Progressive Universal Insurance Co. of Illinois v. Liberty Mutual Fire Insurance Co.*, 215 Ill. 2d 121 (2005), a pizza deliverer, driving his mother's vehicle, struck and injured a pedestrian. The issue presented was whether Progressive, which had issued the liability policy on the mother's vehicle, had a duty to defend and indemnify the son in the personal injury action brought by the injured pedestrian and his wife. The Progressive policy contained a provision excluding coverage for bodily injury arising out of the use of a vehicle to carry persons or property for compensation or a fee, including food delivery. The Supreme Court upheld the trial court's determination that the food delivery exclusion was not void as against public policy. *Progressive*, 215 Ill. 2d at 134. In doing so, the court distinguished the "omnibus clause" of a liability policy from a provision that excludes certain risks from policy coverage. Whereas *Smith* dealt with the arbitrary exclusion from coverage of *persons*, the policy in *Progressive* dealt with the exclusion of *risks*. The teaching of the cases is that actual owners, i.e. "named insureds" and permissive users, must be treated equally in terms of policy coverage. In excluding a named insured's employer from coverage, Farmers' policy treated persons differently in terms of coverage based on whether or not they were named insureds (or family members). The trial court, applying an inappropriate standard, ignored the fact that certain permissive users were not covered, in contravention of Illinois public policy. Accordingly, the trial court's judgment was reversed and the cause remanded for further proceedings consistent with the opinion.

Tips for Practitioners. Both the Illinois Vehicle Code and the Illinois Insurance Code should be consulted when the validity of any auto policy provision is an issue. Effective July 1, 1989, Illinois joined those states enacting compulsory automobile liability insurance. 625 ILCS 5/7-601 mandates that the insurance on the vehicle cover the person named in the policy and any other person using or responsible for the use of such motor vehicle with the

insured's express or implied permission. *See also* 625 ILCS 5/7-317(b)(2)("omnibus clause"). This, of course, is consistent with well-established case law. At the same time, Illinois courts have recognized the right of the legislature to prohibit insurers from excluding certain risks from coverage (*see, e.g., State Farm Mut. Auto. Ins. Co. v. Illinois Farmers Ins. Co.*, 226 Ill.2d 395 (2007) and the Illinois Insurance Code recognizes that certain risks may be excluded. (*See, e.g.,* 215 ILCS 5/143a (recognizing exclusions from uninsured motorist coverage.)

Cross References. *See* Appleman on Insurance Chapter 132: "Coverage A" Exclusions in the Commercial General Liability (CGL) Insurance Policy.

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Mike Wilson on Davis v. Fischer Single Family Homes, LTD

2008 Emerging Issues 1387

Mike Wilson on Davis v. Fischer Single Family Homes, LTD, 231 S.W.3d 767 (Ky. App. 2007)

By Mike Wilson

December 7, 2007

SUMMARY: Ky. CR 47.03 permits co-parties to have three peremptory challenges each, rather than sharing three, if the parties interests are antagonistic. In *Davis v. Fischer Single Family Homes, LTD*, the KY Court of Appeals held that the presence or absence of any particular factors listed in *Sommerkamp v. Linton*, 114 S.W.3d 811 (Ky. 2003) is not determinative as to whether interests are antagonistic.

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ARTICLE: Analysis. In *Davis*, a homeowner sued a builder and a subcontractor claiming personal injuries related to mold exposure and alleging construction defects, fraud and negligence.

The trial court allowed three peremptory challenges to each of the defendants.

The homeowner argued that because the defendants engaged in common defense efforts, their interests were not antagonistic and therefore they were not entitled to separate preemptory challenges.

Davis, quoting *Sommerkamp v. Linton*, 114 S.W.3d 811 (Ky. 2003), listed factors to be considered in determining if co-parties have antagonistic interests. One factor is whether the co-parties have filed cross-claims. In *Davis*, the defendants had not filed cross-claims but nonetheless had antagonistic interests in the court's view. The court noted that the complaint charged separate acts of negligence, that the defendants had separate, independent counsel, and that each defendant had a different strategy for the case. *Davis* states that all factors identified in *Sommerkamp* are to be given due weight "as the existence or absence of a single factor is insufficient to make a determination as to the reasonableness of [finding that interests are antagonistic]. Each factor must be weighed in the balance with the others." 231 S.W.3d at 773-4.

However, a few paragraphs later, relying upon the *Sommerkamp*, *Davis* also held that co-defendants' interests are inherently antagonistic when apportionment applies, as it did in *Davis*. A question raised, then, is whether apportionment of fault, by itself, is sufficient to constitute antagonistic interests or is just one factor to weigh along with others.

Cases holding that no particular factor is necessary. *Roberts v. Taylor*, Ky., 339 S.W.2d 653 (1960) held that if defendants in a personal injury action are charged with independent acts of negligence, the interests of the defendants are most always antagonistic.

The assertion of cross-claims merely formalizes the antagonism, but is not necessary for a finding that interests are antagonistic. Co-defendants who share a theory of the case may not have antagonistic interests. In *Davenport v. Ephraim McDowell Mem'l Hosp., Inc.* 769 S.W.2d 56 (Ky.App. 1988), a medical malpractice case against an anesthesiologist, hospital, and others, not only were no cross-claims filed, the co-defendants shared the same theory of the case. The Court of Appeals found the co-defendants' interests were not antagonistic. *Sommerkamp v. Linton*, 114 S.W.3d 811 (Ky. 2003), citing *Roberts* and *Davenport*, identified three "elements" to consider in determining if interests are antagonistic:

- 1) whether the co-parties are charged with separate acts of negligence;
- 2) whether they share a common theory of the case; and
- 3) whether cross-claims are filed.

Sommerkamp also identified as relevant whether the defendants are represented by separate counsel, whether the alleged acts of negligence occurred at different times, whether the defendants have individual theories of defense, and whether fault will be subject to apportionment. 114 S.W.3d at p. 816[*cedil*] states that "[a]ll of these factors are to be weighed by the trial court in determining if the defendants have antagonistic interests and thus are entitled to separate peremptory challenges." *Davis* quotes *Sommerkamp* on all of these points.

Is apportionment alone sufficient to demonstrate antagonistic interests? *Sommerkamp* also noted, however, that prior to the adoption of comparative negligence, and the enactment of Ky. Rev. Stat. Ann. 411.182, a defendant was required to cross-claim for contribution against joint tortfeasors pursuant to Ky. Rev. Stat. Ann. 412.030 or Ky. Rev. Stat. Ann. § 454.040. The adoption of Ky. Rev. Stat. Ann. 411.182, said the court, dispensed with the need for cross-claims:

Contemporary apportionment requirements including Ky. Rev. Stat. Ann. 411.182 provide that fault in a tort action is automatically subject to apportionment among the parties to the action. This statute renders a crossclaim for contribution, as well as a counterclaim for contributory or comparative negligence, needless. Ky. Rev. Stat. Ann. 411.182 deems codefendants that are charged with separate acts of negligence to be antagonistic because it requires apportionment of the total liability. *Sommerkamp*, p. 817. How does adoption of Ky. Rev. Stat. Ann. 411.182 affect the question of antagonistic interests in a case like *Davenport*, where defendants share a theory of the case? *Sommerkamp* states at page 816 that

The [apportionment] system is inherently antagonistic because it requires codefendants to attempt to shift responsibility to each other. The Court of Appeals failed to consider the role of apportionment and the clear antagonism which is created by that method of assessing liability. . . [R]eliance on *Davenport* was misplaced. That case was decided prior to the adoption of the apportionment statute, Ky. Rev. Stat. Ann. 411.182.

Similarly, *Davis*, p. 774, says "[t]he system of apportionment is inherently antagonistic."

Though neither *Sommerkamp* nor *Davis* expressly says so, the language in *Sommerkamp* and *Davis* could be argued to mean that apportionment is sufficient to create antagonistic interests without weighing other factors. If there is antagonism, *Sommerkamp* says, "the clear language of .. rule [47.03] does not require the defendants to demonstrate a certain degree of antagonism, but only the existence of antagonism between the [parties] at the time of jury selection, in order to permit separate peremptory challenges." *Sommerkamp*, p. 816.

Practice Tips. Language in *Sommerkamp* and *Davis* can be used to make contrary arguments- Athat apportionment alone is sufficient to permit separate peremptory challenges, and that apportionment is just one factor to be weighed.

Illustrative examples

Argument that apportionment is sufficient to create antagonistic interests. Apportionment alone is sufficient to create antagonistic interests because *Sommerkamp* says that Ky. Rev. Stat. Ann. 411.182 deems codefendants that are charged with separate acts of negligence to be antagonistic because the statute requires apportionment of the total liability. Other factors, therefore, do not matter because if there is antagonism, whatever the degree, separate peremptory challenges are permitted under *Sommerkamp*. Both *Sommerkamp* and *Davis* hold that apportionment is inherently antagonistic.

Argument that apportionment is just a factor to be weighed. Both *Sommerkamp* and *Davis*, after listing factors, including whether fault is to be apportioned, state that all factors should be given due weight. Neither case expressly states that apportionment is sufficient to require separate peremptory challenges without weighing other factors.

Both cases make a point of examining facts, other than apportionment, that show interests are antagonistic, which would be unnecessary if apportionment alone were sufficient to determine the issue. Also, *Davis* expressly states that the existence or absence of a single factor is insufficient to make a determination.

Cross-References to Caldwell's Kentucky Form Book. Caldwell's Kentucky Form Book Form 19.14, Admonition to Jury; Caldwell's Kentucky Form Book § 130.00, Practice Context for Negligence; Caldwell's Kentucky Form Book Form 130.10, Answer Asserting Assorted Defenses

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Mike Wilson on U.S. Bank, NA v. Hasty, 232 S.W.3d 536 (Ky. App. 2007)

2008 Emerging Issues 1388

Mike Wilson on U.S. Bank, NA v. Hasty, 232 S.W.3d 536 (Ky. App. 2007)

By Mike Wilson

December 7, 2007

SUMMARY: When can a judgment or order be set aside on the basis of mistake, surprise, or excusable neglect? According to *U.S. Bank, NA v. Hasty, 232 S.W.3d 536 (Ky. App. 2007)*, a key factor is whether the moving party was able, through exercise of reasonable diligence, to present the claim or defense prior to entry of the order or judgment sought to be set aside.

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ARTICLE: Analysis. *U.S. Bank, NA v. Hasty* involved a foreclosure action where the mortgagee attempted to set aside foreclosure sale proceedings and join a judgment lien creditor as a party. The trial court initially set aside the proceedings, but then rescinded its order. The Kentucky Court of Appeals, relying on *Fortney v. Mahan, 302 S.W.2d 842 (Ky. 1957)*, affirmed the trial court, holding that with minimal effort the bank could have discovered the lien prior to entry of a final judgment in the foreclosure action and, therefore, the plaintiff "had the ability to have presented its claim prior to the entry of judgment." *232 S.W.3d at 542*. *U.S. Bank* reaffirms the notion appearing in many Kentucky cases interpreting Ky. CR Rule 60.02 and, before it, the similar provision in section 518 of the old Code of Civil Practice: claims of mistake, surprise or excusable neglect are given less weight if the movant failed to exercise reasonable diligence.

Duty of diligence. Kentucky courts maintain that Ky. CR Rule 60.02 is only intended to provide relief if the reasons for the relief are of an extraordinary nature. *Ray v. Commonwealth, 633 S.W.2d 71 (Ky. App. 1982)*. The Kentucky courts generally have not held that the client's or attorney's neglect is both extraordinary and excusable where reasonable diligence has not been exercised.

In *Fortney*, relied upon by the *U.S. Bank* court, a litigant sought relief under Ky. CR Rule 60.02 on the grounds that his attorney mistakenly failed to introduce certain records into evidence. The *Fortney* court denied relief, holding that Ky. CR Rule 60.02 does not apply to such a mistake. The rule stated in *Fortney* is "[t]wo of the factors to be considered by the trial court in exercising its discretion [to set aside judgment under Ky. CR Rule 60.02] are whether the movant had a fair opportunity to present his claim at the trial on the merits and whether the granting of the relief sought would be inequitable to other parties." *Fortney*, p. 843. *Fortney* cites a case interpreting a similar provision under the Civil

Code of Practice, *Mason v. Lacy*, 117 S.W.2d 1026 (Ky. 1938), which sets forth that "The casualty or misfortune that will authorize the vacating of a judgment must be 'unavoidable.' A mere casualty or misfortune is not sufficient. It must be such as could not by the exercise of reasonable skill and diligence have been avoided." *Mason v. Lacy* at 1029. Similarly, *Workingmen's Perpetual Bldg. & Loan Ass'n v. Stephens*, 184 S.W.2d 575 (Ky. 1944) held that a party seeking to set aside a judgment must have exercised reasonable foresight and diligence to avoid surprise and misfortune.

Presence of other factors. Obtaining relief based upon mistake, surprise, or excusable neglect is more likely to occur if elements of fraud are present. *Childers v. Potter*, 165 S.W.2d 3 (Ky. 1942) held that negligence of counsel "unaccompanied by disarming or misleading facts" will not be grounds for setting aside a judgment, citing *McGuire v. Mishawaka Woolen Mills*, 291 S.W. 741 (Ky. 1927) where it was alleged that "disarming" statements by opposing counsel caused the neglect resulting in default judgment (however, in this case, relief was denied). Also, if the opposing party will agree to set aside the judgment, *Robertson v. City of Hazard*, 401 S.W.2d 223 (Ky. 1966) has held that the court should do so.

Trial court discretion. *U.S. Bank*, quoting *Schott v. Citizens Fidelity Bank and Trust Co.*, 692 S.W.2d 810, 814 (Ky. App. 1985), emphasizes that the decision to grant relief under Ky. CR Rule 60.02 "is generally left to the sound discretion of the trial court." *U.S. Bank*, p. 540. Numerous Kentucky cases affirming the trial court's ruling on a Ky. CR Rule 60.02 motion also mention deferring to the trial court's "sound discretion." Though in most of these cases the trial court declined to set aside the judgment, the same deference to the trial court's "broad discretion" has been in cases where relief was granted, as in *Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454 (Ky. 2002); *Webb v. Compton*, 98 S.W.3d 513 (Ky. App. 2002); and *Dull v. George*, 982 S.W.2d 227 (Ky. App. 1998).

Practice Tips. Determine whether opposing counsel will agree to set aside the order or judgment on grounds of mistake, surprise or excusable neglect. If not, determine whether you can blame factors beyond your or your client's control, and show that a lack of diligence was not the cause. Emphasize the trial court's "broad discretion" to grant the relief requested. Emphasize, if applicable, that granting relief will not be inequitable to other parties (the second factor mentioned in *Fortney*). Ensure that your motion is filed within one year, per the requirements of Ky. CR Rule 60.02.

Cross-References. 1-51 Caldwell's Kentucky Form Book Form 51.34 Motion to Set Aside Judgment or Order.

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Ferstendig on Thomas v. Alleyne, 302 A.D.2d 36, 752 N.Y.S.2d 362 (2d Dept 2002)

2008 Emerging Issues 1392

Ferstendig on Thomas v. Alleyne, 302 A.D.2d 36, 752 N.Y.S.2d 362 (2d Dept 2002)

By David L. Ferstendig

December 7, 2007

SUMMARY: In *Thomas v. Alleyne*, the Second Department correctly recognized that in view of numerous technological advancements, particularly the internet, it is futile for plaintiffs counsel to try to conceal the experts identity in medical, dental and podiatric malpractice actions. CPLR 3101(d)(1)(i) provides, plaintiffs counsel should be permitted only to omit the name of the expert, while providing all of the other information required by the statute.

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ARTICLE: Omitting information other than the expert's identity in medical, dental or podiatric malpractice actions

In *Thomas v. Alleyne, 302 A.D.2d 36, 752 N.Y.S.2d 362 (2d Dept 2002)* the Second Department correctly recognized that in view of numerous technological advancements, particularly the internet, it is futile for plaintiff's counsel to try to conceal the expert's identity in medical, dental and podiatric malpractice actions. As CPLR § 3101(d)(1)(i) provides, plaintiff's counsel should be permitted only to omit the name of the expert, while providing all of the other information required by the statute. An even better and more realistic result would be for the Legislature to repeal the exception totally and make expert disclosure in all areas uniform.

Statute permits plaintiff to omit name of expert only. CPLR § 3101(d)(1)(i) provides that a party must, upon demand, disclose the identity and qualifications of his or her prospective expert witness in "reasonable detail". The statute goes on to create an exception applicable in medical, dental and podiatric malpractice cases, in that in such cases, the expert's name need not be disclosed. Reading the statute literally, however, there is no exception to the requirement that, upon demand, the qualifications of the parties' experts be set forth in "reasonable detail."

Nevertheless, arguments have been made as to whether a party can in fact omit reference to the expert's qualifications. These arguments are based on the proposition that with the expansion of computer technology, it is relatively easy for attorneys and their staff to determine the identity of an expert based on the qualifications provided. Courts have come down on both sides of this issue, and fashioned various remedies ranging from full disclosure of the expert's qualifications to the withholding of information that could lead to revealing the expert's identity.

The Federal Rules of Civil Procedure Compared. The Federal Rules of Civil Procedure allow the discovery of the names of adverse expert witnesses (and much more) in medical malpractice cases through depositions or interrogatories. Virtually every jurisdiction in the United States, except New York, conforms to the Federal Rules of Civil Procedure in this respect. Thus, New York's rule is at variance with the Federal Rules, by permitting parties in medical malpractice cases to conceal the identity of their expert witness. This somewhat anomalous rule adhered to by New York is contrary to the policy of encouraging full pre-trial disclosure. Rather than advancing the fundamental purpose of litigation, which is to ascertain the truth, it appears that New York's rule hinders litigation by giving a party statutory authority to limit what might be essential disclosure.

Policy underlying CPLR 3101(d)(1)(i). CPLR § 3101(d)(1)(i) was enacted in 1985 (L1985, ch 294, § 4) as part of a legislative package aimed at reform in medical malpractice litigation. The Legislature's enactment permits litigants in medical, dental or podiatric malpractice cases (but not litigants, for example, in cases based on accounting, legal or architectural malpractice) to omit the name of their proposed expert during disclosure, thus postponing revelation of the expert's identity until trial. The policy underlying the enactment was apparently based on a "concern that medical experts might be discouraged from testifying by their colleagues." *Ryan v. Michelsen*, 241 A.D.2d 434, 435, 660 N.Y.S.2d 435 (1st Dept 1997). It appears that the Legislature concluded that doctors as a class are somehow more aggressive than other professionals in applying pressure on their colleagues, who might also serve as an expert witness. Or, perhaps the Legislature believed that experts in medical malpractice cases are more sensitive to whatever pressures might be exerted on them by their colleagues.

The Jasopersaud decision. In *Jasopersaud v. Tao Gyoun Rho*, 169 A.D.2d 184, 572 N.Y.S.2d 700 (2d Dept 1991), the Appellate Division for the Second Department adopted a restrictive approach to expert disclosure. The defendants in that case were prohibited from obtaining disclosure to which they would otherwise have a statutory right, because the court found that such disclosure would have, or at least might have, led to revelation of the identity of the plaintiff's expert. Thus, the court determined that the defendants were entitled to disclosure limited to:

- (1) the expert's board certifications,
- (2) the jurisdictions in which the expert was licensed,
- (3) the medical school attended by the expert,
- (4) the expert's areas of expertise, and (5) the institutions in which the expert served in connection with any internship, residency or fellowship.

The court refused to require the revelation of (i) the "dates associated with the attainment of the foregoing qualifications," and (ii) the expert's present hospital affiliations.

In limiting the defendant's right to disclosure, the court recognized the balancing act required in determining such an issue.

[T]he Legislature could not have intended to undermine a party's statutory right to omit an expert's identity by authorizing excessively detailed demands for an expert's qualifications (citation omitted). Accordingly, in order to harmonize and effectuate the objectives sought to be achieved by the competing provisions of the statute, the desirability of broad disclosure must be balanced against the concern that the information requested will "effectively lead to the disclosure of the expert's identity" (*Jones v Putnam Hosp. Center*, 133 A.D.2d 447; *Renucci v Mercy Hosp.*,

124 AD2d 796). *Jasopersaud v. Tao Gyouun Rho*, 169 A.D.2d at 188, 572 N.Y.S.2d at 703.

Modernizing the Jasopersaud decision. In *Thomas v. Alleyne*, 302 A.D.2d 36, 45-46, 752 N.Y.S.2d 362, 369-370 (2d Dept 2002), the plaintiff argued that the decision in *Jasopersaud* should be overruled to further limit disclosure of expert qualifications to essentially only the licensing state and board certifications. Given the developments in computer technology, particularly the internet, the plaintiff argued that an opposing party would be able to ascertain the identity of one's expert witness with relative ease based on a full and accurate statement of credentials.

The Appellate Division for the Second Department agreed with the plaintiff that their decision in *Jasopersaud* should be modified to reflect modern developments in technology.

However, the *Thomas* court came to a dramatically different conclusion in overruling its earlier decision:

The plaintiff argues that the law should recognize this technological change by further limiting defendants' right to the disclosure of background information relating to a medical malpractice plaintiff's expert's qualifications. We believe, instead, that this technological change points to the futility of attempting to conceal the identity of expert witnesses in medical malpractice cases, or in any other kind of case for that matter. *Thomas v. Alleyne*, 302 A.D.2d at 43, 752 N.Y.S.2d at 368.

The court held that to obtain relief under the statute, plaintiff must provide a factual showing of a concrete risk that a prospective expert medical witness would be subjected to intimidation or threats if the expert's name were revealed before trial. The *Thomas* court, in essence, shifted the burden to the plaintiff to establish that the expert will be "subjected to intimidation" if the expert's identity were revealed, before the court would consider limiting the disclosure of the expert's qualifications. 302 A.D.2d at 46, 752 N.Y.S.2d at 370.

Fourth Department disagrees. In *Thompson v. Swiantek*, 291 A.D.2d 884, 736

N.Y.S.2d 819 (4th Dep't 2002), the Fourth Department came to a diametrically opposed conclusion and carved out its own rule. The plaintiffs disclosed only that their expert was (i) a board certified urologist, (ii) licensed to practice both in New Jersey and Pennsylvania, and (iii) a professor of urology in Pennsylvania. The court permitted the plaintiff to withhold information concerning the expert's medical school education, and the location of his or her internships, residences and fellowships, finding that: Because disclosure of that additional information would "effectively lead to disclosure of the expert's identity", the request for such disclosure is "palpably improper". 291 A.D.2d at 885, 736 N.Y.S.2d at 820.

The other departments have not ruled yet. The First and Third Departments have not ruled yet as to whether they will accept the *Thomas*, *Thompson* or some other approach to expert disclosure in medical, dental or podiatric malpractice actions. Moreover, the lower courts in these departments have shown no consistency in predicting how the appellate courts will rule. Compare e.g. *Quinn v. St Peter's Hospital*, 9 Misc.3d 1002 (A), 806 N.Y.S.2d 448, 2005 N.Y. Misc Lexis 1846 (Sup. Ct. Albany Co. 2005), *Muniz v. Our Lady of Mercy Medical Center*, 2003 N.Y. Misc Lexis 617, 2003 NY Slip. Op 50910U (Sup. Ct. Bx Co. 2003); *Scher v. St Luke's Roosevelt Hospital*, N.Y.L.J. 2/03/03, p. 18, col. 4 (Sup. Ct. N.Y. Co. 2003) (adopting *Thomas*) and *Hall v. Shah* (Sup. Ct. Albany Co. Index No. 10897-02, 6/6/03); *Hara v. Levin*, 2003 N.Y. Misc Lexis 184, 2003 N.Y. Slip. Op. 50615U (Sup. Ct. Bx Co 2003) (limiting disclosure of qualifications).

Conclusion. The Second Department's burden-shifting approach in *Thomas* recognized that New York's rule of

excluding an expert's name only in medical malpractice cases is futile, given recent technological advancements. The court correctly identified its decision in *Jasopersaud* as unduly restrictive and inconsistent with the terms of the governing statute, CPLR § 3101(d)(1)(i). Rather, the court held that a party in a medical malpractice case is presumptively entitled to a statement of the opposing party's expert's qualifications in "reasonable detail". A party can shield itself from disclosing qualifications, only if compliance with disclosure would lead to "unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice." CPLR § 3103(a).

The author believes this is the more logical and reasonable approach. A practitioner is left with the clear conflict between the Second Department decision in *Thomas* and the Fourth Department decision in *Thompson*. Practitioners in those Departments must strictly follow the dictates of those decisions. Practitioners in the First and Third Departments are left to divine the intention of the Appellate Division in their Departments, not a very fruitful task in view of the lower courts' disagreement on this issue.

Clearly, some type of action is needed. A Court of Appeals pronouncement on the proper rule to apply would be helpful. Perhaps more useful would be the abolishment by the Legislature of the medical, dental and podiatric practice exception entirely. It is questionable whether the original rationale for the exception -- the possible harassment of potential experts -- still exists to any great measure. Indeed, [w]hile the capability of computer technology has expanded greatly, so has the willingness and availability of medical experts" to come forward and testify, which is clearly attested by the proliferation of medical, dental and podiatric cases, in the 12 years since *Jasopersaud*. *Muniz v. Our Lady of Mercy Medical Center*, 2003 N.Y. Misc Lexis 617 at 11 (*Sup. Ct. Bx. Co.* 2003). See also *Esquelin v. Brooklyn Hospital Center -- Downtown Campus*, 190

Misc.2d 753, 757, 739 N.Y.S.2d 230, 233 (*Sup. Ct. Kings County* 2002).

It should be noted that the locality rule -- which required a plaintiff in a medical malpractice action to seek an expert familiar with the local standard of care -- has been in steady decline for years. Under that system, an expert could conceivably be testifying against someone he or she actually worked with or with whom he or she were friends.

Now, with the decline of the locality rule, experts are more likely to come from jurisdictions far from the defendant's and thus are less likely to be testifying against "friends" or close colleagues.

Moreover, even under the *Thomas* rule, all that is being accomplished is deferring the revelation of the expert's identity until trial. See e.g., *Schiffer v. Speaker*, 6 Misc 3d 1010(A), 800 N.Y.S.2d 356, 2004 N.Y. Misc Lexis 2925 (*Sup. Ct. NY Co.* 2004) (court requires plaintiff "to make arrangements for this expert to return to court on a second day (plaintiff to abide the cost) so that defendants will have an opportunity, at the least, to properly research the expert and his/her writings".) And, since the expert's identity is revealed at trial, does that mean that the experts are presumed to testify only once in their lifetimes -- since they will be discouraged by their colleagues from testifying ever again? Would that not have resulted after all these years in a very limited supply of nonpressured medical experts, for which there appears to be no empirical evidence?

In sum, in an era where there have been continuous efforts on the federal level to increase the ease of disclosure, New York should follow their lead and make expert disclosure uniform. Even better, perhaps New York could pattern its expert disclosure after the federal model.

Cross References. Weinstein, Korn & Miller, New York Civil Practice: CPLR 3101; LexisNexis AnswerGuide New York Civil Litigation § 6.25, Using Experts; § 2.12, Obtaining Disclosure of Medical, Dental or Podiatric Experts; § 21.03 Exchanging Expert Qualifications While Withholding Identity; Weinstein, Korn & Miller *CPLR Manual* § 20.02, Scope of Disclosure.

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Hudson v. YMCA of Metro. Chi. LLC

2008 Emerging Issues 1368

Hudson v. YMCA of Metro. Chi. LLC, 2007 Ill. App. LEXIS 1196 (Ill. App. Ct. 2007)

By Joseph B. McDonnell

December 6, 2007

SUMMARY: Does the purchase of liability insurance by an organization which is otherwise immune from liability for negligence waive its immunity to the extent of the liability insurance limits? *Hudson v. YMCA of Metro. Chi. LLC*, was a suit for personal injuries sustained by plaintiff while performing community service at the YMCA in connection with a sentence entered on his plea of guilty to a criminal offense.

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ARTICLE: Immunity as a Fact of Legal Life. Illinois trial lawyers are aware that state statutes provide immunity from suit to governmental entities and public employees under a variety of circumstances. Even before the advent of the Tort Immunity Act, the doctrine of "charitable immunity" protected hospitals and other charitable institutions from tort liability, under the theory that subjecting such an entity's trust funds to the payment of damage awards would subvert the charitable or eleemosynary purpose for which those funds were designed to be used. Over time, an exception to the immunity doctrine was recognized where the organization had procured liability insurance. In such cases, the courts held that the insurance served the purpose of protecting the organization's trust funds and that the public policy favoring compensation of tort victims would be served by holding that the immunity was waived to the extent of the insurance coverage. Thus, the "waiver of immunity" rule was born. In the *Hudson* case, the court considers, in the context of a suit for negligence and willful and wanton conduct, whether the immunity provided by the Probation Community Service Act (730 ILCS 115/1(e)) is waived by the purchase of liability insurance.

Background. *Hudson v. YMCA of Metro. Chi. LLC*, 2007 Ill. App. LEXIS 1196 (Ill. App. Ct. 2007) was a suit for personal injuries sustained by plaintiff while performing community service at the YMCA in connection with a sentence entered on his plea of guilty to a criminal offense. The trial court entered summary judgment on the plaintiff's negligence claim, finding the YMCA immune from tort liability under Section 1(e) of the Probation Community Service Act. 730 ILCS 115/1. Plaintiff's motion to reconsider was denied and he appealed.

The Statute. Under Sec. 1 of 730 ILCS 115/1, certain not-for-profit organizations may agree to accept offenders to perform community service and to report to the court on the offender's progress. Under Sec. 3, the organization and its employees are not liable for injury to anyone performing community service at the site, except for willful or wanton misconduct or gross negligence.

Charitable Immunity is Buried, but is the Waiver Rule Alive? On appeal, plaintiff, drawing upon the common-law "charitable immunity" and case authority creating the "waiver of immunity" rule, contended that the YMCA's purchase of liability insurance amounted to a waiver of its statutory immunity, to the extent of the limits of the insurance. While the charitable immunity doctrine was overturned in *Darling v. Charleston Community Memorial Hospital*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965), plaintiff argued that the "waiver of immunity" rationale survived; and that the purpose behind the waiver rule, i.e., compensating tort victims where the otherwise immune defendant was protected by liability insurance, should apply in interpreting Sec. 1 of the Probation Community Service Act (730 ILCS 115/1).

Close but No Cigar. The Appellate Court disagreed. It recognized that, in fashioning the "waiver of immunity" rule, the courts had held that charitable immunity was not absolute as long as the entity's trust funds were protected; that the purchase of liability insurance afforded such protection and at the same time provided compensation for tort victims for their injuries. However, the court determined that plaintiff's argument was overly simplistic. Turning to the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/9-103), the court noted that the legislature had specifically provided that a local public entity may protect itself from liability by taking out insurance, but that the insurance company which provides coverage "shall utilize any immunities or may assert any defenses to which the insured public entity or its employees are entitled." 745 ILCS 10/9-103(c). While plaintiff contended that the absence of any such directive in the Probation Community Service Act amounted to legislative recognition of the waiver of immunity by the purchase of liability insurance, the court pointed out that the plain language of Section 1(e) makes no mention of any such legislative intent that the existence of liability insurance operates as a waiver of immunity to the extent of the insurance. Moreover, the court observed that the legislature recognized that there might be cases in which the immunity granted to a public entity might not protect it from liability; for example, where a willful and wanton misconduct exception exists. In such cases, the purchase of insurance would simply be prudent; and permitting a public entity to acquire insurance coverage does not in and of itself reflect a legislative recognition of waiver of immunity if such insurance were purchased. This is further demonstrated by the fact that the statute then directs the insurance company to assert any immunities and defenses to which the insured was entitled.

Statutory immunities are generally considered absolute unless the legislature provides language expressly limiting the scope of the immunity. *Jost v. Bailey*, 286 Ill. App. 3d 872, 878-79, 676 NE 2d 1033, 1037 (1997). The only exception contained in Sec. 1(e) is for willful and wanton misconduct or gross negligence. 730 ILCS 115/1(e). The legislature's awareness of the "waiver" rule is evidenced by the fact that until November 25, 1986 Section 9-103(c) of the Tort Immunity Act required that every liability insurance policy must provide that the company issuing the policy waived any right to refuse payment or to deny liability by reason of the non-liability of the insured public entity for wrongful or negligent acts and its immunity from suit by reason of the defenses and immunities provided in the Act. Effective November 25, 1986, the statute was amended to eliminate the requirement that an insurer waive any such defense of immunity of its insured, and to specifically direct insurers to claim such immunities. The amendment reflected a clear legislative direction that insurance coverage makes no difference with respect to the extent of a public entity's immunity.

Turning to the statute in question, the court stated that Section 1(e) of the Probation Community Service Act contains no provision allowing a public or charitable entity to purchase insurance to protect itself from tort liability. Thus, there exists no implied waiver of immunity by the purchase of insurance and there was no need for the legislature to clarify that an insurer may assert its insured's immunities, notwithstanding the existence of insurance. Had the legislature intended that the waiver of immunity doctrine should apply to Section 1, it could have said so expressly or, as it had done with respect to Section 9-103(c) of the Tort Immunity Act, could have provided that the entity could acquire liability insurance without including the instruction that an insurer may claim its insured's immunities. This it did not do, and, accordingly, the YMCA did not waive its statutory immunity to the extent of its coverage.

Tips for Practitioners: It is important to recognize that, while statutes are often construed *in pari materia*, that rule

has its limitations. Here, for example, plaintiff's attempt to link the insurance provisions of Section 9-103(c) of the Tort Immunity Act to Section 1(e) of the Probation Community Service Act was unavailing. The Acts deal with different subjects and different considerations. The Probation Community Service Act supplements the Code of Criminal Corrections by providing offenders with the opportunity to escape confinement while at the same time allowing community organizations to realize the benefit of free labor in return for protection against liability for negligent acts. The Tort Immunity Act, on the other hand, is concerned with liability for acts or omissions of public entities and their employees in the discharge of certain governmental functions. Recognition of the nature and purpose of the statute involved may serve to clarify its application.

Cross References. See Appleman on Insurance § 140.5; Appleman on Insurance § 128.14.

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Professor Robert Aronson on State v Foxhoven

2008 Emerging Issues 1366

Professor Robert Aronson on State v Foxhoven

By Robert Aronson

December 5, 2007

SUMMARY: The Washington Supreme Courts standards for a trial court to determine whether to admit such prior acts given ER 404(b) does not provide any tests or procedures for admitting such evidence. The Court holds that while the trial court and Court of Appeals erred in holding that prior graffiti evidence of tagging was admissible as part of a common plan or scheme, the evidence was admissible to show a particular modus operandi or signature.

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ARTICLE: Signature (Modus Operandi) and Common Plan or Scheme Bases for Admissibility of Character Evidence

Background. In *State v. Foxhoven*, 160 Wn.2d 910, 163 P.3d 786 (2007), the defendants Michael Foxhoven and Anthony Sanderson were convicted of malicious mischief for etching graffiti on the windows of several businesses. The graffiti included tags moniker[s] or pseudonym[s] used by a graffiti artist in his or her graffiti. A tag is placed on public or private property to identify the person responsible for the graffiti (the tagger) [*Foxhoven*, 161 Wn.2d at 172 n.1]. The trial judge admitted evidence that the defendant and Sanderson had used the tags on previous occasions, including: Foxhovens criminal history of graffiti from California and photographs seized from his home showing the SERIES tag; and Sandersons prior arrests for graffiti, drawings of the HYMN tag seized from his home, and photos of him painting the HYMN tag. The trial judge admitted the other acts of graffiti vandalism to show a common scheme or plan or to establish a particular modus operandi.

Court Establishes Standards For Admission. Although ER 404(b) lists purposes, other than to show conformity, that warrant admission of prior acts of misconduct, it does not provide any tests or procedures for admitting such evidence. The Washington Supreme court has, however, established the standards a trial court should use in determining whether to admit such prior acts [see *The Law of Evidence in Washington* § 404.04[2][c]].

(1) Standards of Proof and Standards of Review. In deciding whether to admit other act evidence under ER 404(b), the trial court must: (1) find by a preponderance that the prior act occurred; (2) identify the purpose for which the evidence is sought to be introduced; (3) determine whether the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value against the prejudicial effect [*Foxhoven*, 161 Wn.2d at 175, quoting *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)]. The court must do the balancing on the record [*State v. Saltarelli*,

98 Wn.2d 358, 655 P.2d 697 (1982)], and find that the relevancy of the evidence outweighs the prejudicial effect [*State v. DeVries*, 149 Wn.2d 842, 72 P.3d 748, 751 (2003)]. Finally, due to the strong tendency of the jury to use prior acts of misconduct for the improper purpose of showing action in conformity on the present occasion, the trial court must instruct the jury as to the limited purpose for which the jury may consider the evidence [*Foxhoven*, 161 Wn.2d at 175, citing *State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995); see *Saltarelli*, 98 Wn.2d at 366].

Finally, it should be noted that any prior acts introduced to show it is more likely the defendant committed the presently charged crime must be analyzed under ER 404(b). In *Foxhoven*, the Court rejects the States contention that since the drawings and tags do not show criminal conduct or bad acts, they are outside the scope of ER 404(b). Rather, the rule encompasses not only prior bad acts and unpopular behavior but any evidence offered to show the character of a person to prove the person acted in conformity with that character at the time of a crime [*Foxhoven*, 161 Wn.2d at 175, citing *State v. Everybodytalksabout*, 145 Wn.2d 456, 466, 39 P.3d 294 (2002)].

As the Court notes in *Foxhoven*, interpretation of an evidentiary rule is a question of law, which is reviewed de novo [*Foxhoven*, 161 Wn.2d at 175, citing *State v. DeVincentsis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003)]. Once the trial court has correctly interpreted ER 404(b), however, its decision to admit the evidence of other acts is reviewed for an abuse of discretion. Discretion is abused if it is exercised on untenable grounds or for untenable reasons [*Foxhoven*, 161 Wn.2d at 174, quoting *Thang*, 145 Wn.2d at 642]. Failure to adhere to the requirements of an evidentiary rule can be considered an abuse of discretion [*Foxhoven*, 161 Wn.2d at 174, citing *Sate v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001)].

(2) Common Plan or Scheme. Evidence of prior acts to show a common plan or scheme has been admitted for three discrete purposes: First, to hear the whole story or get the entire picture surrounding the charged crime--activities such as stealing the getaway car, assaulting a customer outside the bank, or raping another victim, in the same vicinity, near the time of the charged crime, all fall within this category, sometimes referred to as *res gestae* [see *The Law of Evidence in Washington* § 404.04[2][d][v]]. Second, to show a causal connection between the offenses, so that proof of the other offense[s] could be said to evidence a pre-existing design, system, plan, or scheme directed toward the doing of the very act charged [*State v. Goebel*, 40 Wn.2d 18, 21, 240 P.2d 251 (1952); *State v. Bennett*, 36 Wash. App. 176, 672 P.2d 772 (1983) (statutory rape case, testimony of two similar incidents with defendant admissible to show common plan to entice teens to his home and trade food and shelter for sex)]. Third, to show markedly similar acts of misconduct against similar victims under similar circumstances [*Lough*, 889 P.2d at 492], or when an individual devises a plan and uses it to repeatedly perpetrate separate but very similar crimes [*Lough*, 889 P.2d at 491; see *State v. Devincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003)].

The *Foxhoven* Court holds that the evidence relating to prior tagging by the defendant is not admissible under the common plan or scheme exception. Noting that the exception is generally employed when the occurrence of the crime or the intent of the defendant is at issue, it requires a slightly lower level of similarity inconsistent with that required to show identity [*Foxhoven*, 161 Wn.2d at 179]. In *Foxhoven*, there was no dispute that the buildings were vandalized with graffiti or that whoever did it intended to paint the graffiti. Therefore, since the evidence of the defendants prior graffiti was not sufficiently similar to the currently charged crime to show identity, the trial court abused its discretion in admitting the evidence as part of a common plan or scheme, and the Court of Appeals erred in affirming that decision. However, as discussed below, the Court holds that the evidence was admissible under the signature or *modus operandi* exception, so the error was harmless [*Foxhoven*, 161 Wn.2d at 179].

(3) Signature (Modus Operandi). As the Court states [*Foxhoven*, 161 Wn.2d at 176]:

When evidence of other bad acts is introduced to show identity by establishing a unique *modus operandi*, the evidence is relevant to the current charge only if the method employed in the commission of both crimes is so unique that proof that an accused committed one of the crimes creates a high probability that he also committed the other crimes with which he is charged.

[quoting *Thang*, 145 Wn.2d at 643, see also *State v. Coe*, 101 Wn.2d 772, 777, 684 P.2d 668, 672 (1984) (The device used must be so unusual and distinctive as to be like a signature, quoting E. Cleary, *McCormick on Evidence* § 190, at 449 (2d ed. 1972))]. The defendant in *Foxhoven* contended that the prior tagging was too dissimilar from the vandalism in the present charge (different mediums, on a wide variety of buildings, vehicles and papers, using varied styles and fonts) to constitute a modus operandi. However, based on extensive evidence introduced at trial, the Court holds that the tags in this case *were* signatures. Therefore, the identity of surrounding circumstances essential to show modus operandi in the usual case is not necessary where, as here, a tag is a persons identity [*Foxhoven*, 163 P.3d at 178-179].

Several police officers testified that taggers do not take on another taggers identity by stealing or biting their tag. In fact, Sanderson himself told one officer, You dont do that. People will throw down with you if that happens [*Foxhoven*, 163 P.3d at 178]. The few circumstances in which a tagger may practice with anothers tag did not exist in the present case. Thus, the trial court did not abuse its discretion in admitting the evidence under ER 404(b). Where a signature is provided, the signature alone is sufficiently distinctive to be admissible under the modus operandi exception to ER 404(b) [*Foxhoven*, 163 P.3d at 179].

Finally, as indicated, the Court found the probative value of the prior tagging evidence to be high. With respect to the mandatory balancing of prejudicial effect, the prior tagging did not involve violent crimes, sexual misconduct, drug use, or other emotionally inflammatory conduct. Thus, the probative value did outweigh the prejudicial effect.

Practical Import: The lesson for practitioners is that the list of exceptions to the inadmissibility of prior acts in ER 404(b) is not exclusive -- any basis for admissibility that does not require the impermissible conformity inference may cause the trial court to admit the evidence.

For further analysis of the issues in *Foxhoven*, see *The Law of Evidence in Washington* § 404.04[2][a]--[d] (Other Acts Admissible for Purposes Other Than to Show Conformity) (LexisNexis Matthew Bender).

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Robert Aronson joined the University of Washington School of Law faculty in 1975. Prior to coming to UW, he was a Teaching Fellow at Stanford Law School, and taught Civil Procedure at the University of San Diego Law School while clerking for Judge James Carter of the Ninth Circuit Court of Appeals. He is a nationally recognized expert in professional responsibility and his book, *The Law of Evidence in Washington*, is one of the leading treatises on the subject. He has served as Chair of The Association of American Law Schools (AALS) Section on Professional Responsibility, National Conference of Bar Examiners MPRE Drafting Committee, Commissioner on Uniform State Laws, Washington Legislative Ethics Board, AALS Committee on Bar Admission and Lawyer Performance, Law School Admission Council, Finance and Legal Affairs Committee, President of the Board of the Washington Appellate Defender Association, Reporter for the American Academy of Matrimonial Lawyers Standards of Conduct, and Hearing Tribunal Member for the Washington Human Rights Commission.

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Sinclair and Harrison on Scott v. Commonwealth

2008 Emerging Issues 1341

Sinclair and Harrison on Scott v. Commonwealth, 274 Va. 636, 651 S.E.2d 630, 2007 Va. LEXIS 132 (2007)

By Prof. Kent Sinclair and Gessner H. Harrison

December 5, 2007

SUMMARY: It has long been established in VA that evidence of "other crimes, wrongs, or acts," while not admissible to prove the character of a person in order to show that he or she acted in conformity therewith, may be admissible for purposes of proving "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

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ARTICLE: Character Proof: Differences and Similarities Between Common Scheme and Common Plan Evidence in Virginia

It has long been established in Virginia that evidence of "other crimes, wrongs, or acts," while not admissible to prove the character of a person in order to show that he or she acted in conformity therewith, may be admissible for purposes of proving "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." In criminal cases, Virginia has followed the rule that evidence of other crimes is admissible when it tends to establish a common plan, design, or scheme embracing a series of crimes including the current offense. In *Scott v. Commonwealth*, 274 Va. 636, 651 S.E.2d 630 (2007), in the context of an appeal from a trial court ruling granting a motion to join multiple criminal charges for trial, the Supreme Court of Virginia clarified how it may be established that evidence of a series of other crimes, wrongs or acts constitutes either a "common plan" or a "common scheme" sufficient to permit joinder of multiple charges for trial.

In this decision the Court also provides guidance as to how such evidence may be used for the other proper purposes for which character proof may be admissible under Virginia evidence law. Thus, the decision has important implications for evidence in civil cases as well as criminal cases.

Background. In *Scott*, the defendant was indicted for 27 offenses based on incidents that occurred between February and June of a particular year in a large metropolitan area of Virginia. The charges included nine counts of robbery and 18 other related charges, including three counts of burglary, one count of abduction with the intent to extort money, one count of attempted extortion, one count of attempted carjacking, and 12 counts of use of a firearm in the commission of these offenses. The Commonwealth filed a pretrial motion requesting that the trial court join the charges for a single trial, arguing that the robberies were part of a "common scheme or plan" and, therefore, could be tried

together under the provisions of Rules 3A:6(b) and 3A:10(c) of the Rules of the Supreme Court of Virginia. After oral argument, the circuit court granted the motion over defense objections. The circuit court found that several of the Commonwealth's witnesses might be required to testify regarding the identity of the perpetrator in the different offenses, and that there were substantial similarities among the offenses that constituted a "modus operandi." At trial, various victims testified to the details of the crimes committed against them, including the various contexts, times and manners in which they were accosted, robbed, assaulted, asported and otherwise victimized.

The jury convicted defendant of seven counts of robbery, three counts of burglary, one count of abduction with the intent to extort money, one count of attempted extortion, and nine related counts of use of a firearm in the commission of a felony. He was acquitted of two robbery counts and related firearm charges, and acquitted of attempted carjacking and use of a firearm with another victim. The circuit court sentenced him to a total of 253 years' imprisonment, in accordance with the jury verdict.

The Court of Appeals held that it was not an abuse of discretion for the trial court to have granted the Commonwealth's motion for a single trial of all the charged offenses because the nine robberies had "strikingly similar" characteristics and it was reasonable to conclude that the offenses were part of a "common scheme," within the meaning of Rule 3A:6(b). The Court of Appeals also held that the circuit court properly exercised its discretion in concluding that justice did not require separate trials under Rule 3A:10(c), because evidence of the other crimes would have been admissible in each individual trial to establish the identity of the criminal agent. The defendant appealed, arguing that "the Commonwealth failed to establish that the [offenses] shared unusual characteristics, were linked to one another, were committed within a limited geographic area, or were committed to meet a single goal."

General Principles Underlying the Supreme Court of Virginia's Analysis. The Supreme Court of Virginia analyzed the issue of whether the series of other crimes alleged to have been committed by the defendant constituted either a "common plan" or a "common scheme" sufficient to permit joinder under the provisions of **Rules 3A:6(b)** and **3A:10(c)** by stating the following principles of Virginia evidence law:

. Other similar acts evidence is admissible to establish the identity of the perpetrator. Relying on its prior opinions in *Scates v. Commonwealth*, 262 Va. 757, 762, 553 S.E.2d 756, 759 (2001) and *McWhorter v. Commonwealth*, 191 Va. 857, 870-71, 63 S.E.2d 20, 26 (1951), the Court explained that "evidence of similar offenses is admissible to prove a 'common scheme, design, or plan,' for purposes of establishing a defendant's identity, when those offenses exhibit 'such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.'" In addition, the Court explained that, based on its prior opinions in *Turner v. Commonwealth*, 259 Va. 645, 651, 529 S.E.2d 787, 791 (2000); *Chichester v. Commonwealth*, 248 Va. 311, 326-27, 448 S.E.2d 638, 649 (1994); and *Spencer v. Commonwealth*, 240 Va. 78, 89-90, 393 S.E.2d 609, 616-17 (1990), evidence of other crimes "is admissible in cases of disputed identity to prove the probability of a common perpetrator, provided that the other crimes bear a 'singular strong resemblance to the pattern of the offense charged' and are 'sufficiently idiosyncratic to permit an inference of pattern for purposes of proof.'"

. "Common scheme" and "Common plan" are not synonymous concepts. Relying on its prior opinions in *Johnson v. Commonwealth*, 259 Va. 654, 676-78, 529 S.E.2d 769, 782-83 (2000); *Turner*, 259 Va. at 651-53, 529 S.E.2d at 790-92; and *Spencer*, 240 Va. at 81, 87-91, 393 S.E.2d at 611, 615-17, the Court distinguished the concepts of "common scheme" and "common plan" with respect to other crimes, wrongs, or acts evidence, finding that "'common scheme' describes crimes that share features idiosyncratic in character, which permit an inference that each individual offense was committed by the same person or persons as part of a pattern of criminal activity involving certain identified crimes." In contrast, the Court, relying on its prior opinions in *Powell v. Commonwealth*, 267 Va. 107, 118, 140-41, 590 S.E.2d 537, 544, 557-58 (2004) and *Collins v. Commonwealth*, 226 Va. 223, 228-32, 307 S.E.2d 884, 888-90 (1983), found that "'common plan' describes crimes that are related to one another for the purpose of accomplishing a particular goal."

. "Common scheme" and "Common plan" are not mutually exclusive concepts. Relying on its prior opinion in

Satcherv. Commonwealth, 244 Va. 220, 229-30, 421 S.E.2d 821, 827, the Court concluded that "a series of crimes may exhibit both a 'common scheme' and a 'common plan.'"

Key Issue #1: Did the series of crimes establish a "common scheme"? After reviewing the record, the Court determined that the series of acts did not establish a "common scheme." Instead, the Court found that "[t]he Commonwealth proved only that during a period of about four months in the same large city, various individuals who were alone outside their homes were robbed during the late evening hours, and that the robber displayed a gun, usually threatening the victims with harm or actually striking them, and demanded from the victims money, credit cards and, in some cases, their PINs." According to the Court, "[t]his evidence demonstrated only a general similarity of manner in which the crimes were committed and failed to establish that the crimes shared idiosyncratic features permitting an inference of a pattern of criminal activity committed by the same person." As a result, the Court concluded that "[t]he absence of idiosyncratic features in the present record leaves a record showing only separate crimes of the same type that share features that are likely similar to numerous other robbery offenses."

In reaching this conclusion, the Court was quick to make several observations concerning information that did and did not appear in the record. First, the Court observed that "[t]he fact that the robber in five of the . . . offenses demanded a PIN for the stolen credit cards was not an idiosyncratic feature, because it is common knowledge in our consumer society that such a number must be provided before making a cash withdrawal." Continuing, the court noted that the record "does not indicate the relative location of each robbery to the other robberies committed," and that, as a result, it "fails to show that the robberies were committed in any particular neighborhood or area of th[e] city."

In its decision, the Court further noted that the record "fails to show that a weapon of the same description was used in the commission of the crimes, that the robber made unusual threatening remarks, or that the robber chose victims only of a certain gender or age group." The Court then emphasized that it "cite[d] these various factors, not as requirements of a 'common scheme,' but merely to illustrate that the possible range of idiosyncratic features that may establish a 'common scheme' is very broad, and that no such idiosyncratic features were common incidents of all the . . . offenses [at issue]."

Key Issue #2: Did the series of crimes establish a "common plan"? Likewise, after reviewing the record, the Court determined that the series of acts did not establish a "common plan." Referring to the assessment of the record that it had undertaken in an effort to determine whether a "common scheme" had been established, the Court found that "the evidence showed only the commission of nine robberies and other related offenses bearing a general similarity to one another." The Court also found that "the evidence completely lacked any proof that the offenses were related to one another for the purpose of accomplishing a particular goal."

Importance of Ruling. Character evidence is one of the most frequently used types of evidence. In *Scott*, the Court provides an important clarification and delineation of closely-related character evidence concepts that had previously seemed duplicative, while at the same time expressly acknowledging that the concepts can overlap. Thanks to the pronouncements made in *Scott*, practitioners will know that, with respect to "other crimes, wrongs, or acts" evidence, a "common scheme" describes acts that share features idiosyncratic in character, so as to permit an inference that each individual act was committed by the same person or persons as part of a pattern, while a "common plan" describes acts that are related to one another for the purpose of accomplishing a particular goal.

Practitioners can also rely on the explicit conclusion made in *Scott* that a series of acts may exhibit both a "common scheme" and a "common plan," and know what kinds of facts and commonalities they should endeavor to establish in order to prove the existence of either or both. As a result, *Scott* not only clarifies the requirements necessary for use of "other crimes, wrongs, or acts" evidence to establish and/or resolve identity issues; it also helps to clarify the requirements necessary for the use of such evidence for any of the other proper purposes previously recognized under Virginia evidence law respecting character proof, specifically, the establishment of motive, opportunity, intent,

preparation, plan, knowledge, or absence of mistake or accident.

Virginia Cross-References. For further analysis of the topics of Virginia law addressed herein, please consult the following sources:

Regarding character proof and the use of "other crimes, wrongs, or acts" evidence, see Kent Sinclair, et al., Virginia Evidentiary Foundations, Chapter 6: Handling Character, Habit, and Prior Circumstances Proof (2002); Charles E. Friend, The Law Of Evidence In Virginia, Chapter 5: Character Evidence (6th ed. 2003).

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Professor Sinclair, an active member of the Virginia Bar, teaches the program in Virginia Law & Practice at the University of Virginia School of Law. He is Professor of Law and served for many years as Associate Dean of the Law School. He has written more than a dozen books, and is the author of Sinclair & Middleditch, Virginia Civil Procedure (4th ed. 2003 and annual supplements), and co-author of Friend & Sinclair, Virginia Pleading and Practice (2nd ed. 2007 with annual supplements). He is Chair of the Advisory Committee on Rules of Court for Virginia, and has served as Reporter for the Virginia Model Jury Project for a number of years. He has served on the Board of Governors of the Litigation Section of the Virginia Bar Association and the Boyd-Graves Conference on Virginia Law. He edits the Virginia Court Rules and Practice Service for Lexis Law Publishing and is a frequent lecturer at continuing education programs for attorneys and Virginia judges.

Mr. Harrison has experience as a judicial clerk and as a practicing attorney, and presently serves as Senior Staff Attorney in the office of the Reporter of Decisions for the Supreme Court of Virginia. Mr. Harrison plays a major role in the Model Jury Instructions program in Virginia, and is primarily responsible for the identification of all new developments in Virginia law, and the finalization of jury instructions for the electronic and looseleaf jury instructions volumes, published by Lexis Law Publishing, covering all areas of civil causes of action and criminal developments. He holds both J.D. and M.B.A. degrees, with advanced course work in legal research and information management, and is the author of multiple law review articles on subjects including criminal appellate procedure, constitutional law, crime victim's rights legislation, and environmental law. He has collaborated with Professor Sinclair on numerous projects in diverse areas of Virginia law.

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Bochet on Janicky v. Point Bay Fuel, Inc.

2008 Emerging Issues 1357

Bochet on Janicky v. Point Bay Fuel, Inc., 2007 N.J. Super. LEXIS 350 (App. Div. 2007)

By William C. Bochet

December 5, 2007

SUMMARY: In *Janicky v. Point Bay Fuel Inc.*, the Appellate Division issued a strong opinion condemning the lower court practice of certifying certain interlocutory orders as final to avoid the need for leave to appeal an interlocutory order. Both the pervasiveness of this abuse of N.J. Ct. R. 4:42-2 and the lack of clarity in the rule itself make it unlikely that this practice will cease any time soon, despite the sharp rebuke by the Appellate Division.

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ARTICLE: Appellate Division Condemns Improper Finality Certifications; An appeal as of Right May be Taken to the New Jersey Appellate Division Only from a Final Judgment

Aside perhaps from using plastic sheet covers on briefs and appendices, one of the most certain ways to rouse the ire of appellate judges is to bypass their prerogative to select which cases should be subject to interlocutory review. Appeals to the Appellate Division as of right come only after the entry of final judgment. In the interim, an order granting an interlocutory appeal must be obtained. Such orders are granted "only sparingly". See *State v. Reldan*, 100 N.J. 187, 205, 495 A.2d 76 (1985), quoting *In re Pennsylvania R.R.*, 20 N.J. 398, 404, 120 A.2d 94 (1956).

In *Janicky v. Point Bay Fuel, Inc.*, 2007 N.J. Super. LEXIS 350 (App. Div. 2007), the bypass efforts of counsel and the court below are excoriated by what is more a polemic than a legal opinion. The villainy below was the misuse of N.J. Ct. R. 4:42-2, which allows for certification of an order as final in very limited circumstances. The frustration of the appellate panel is palpable within the opinion which concludes with dismissal of the "appeal".

Doing It Wrong. Appellate Division Presiding Judge Stephen Skillman filled the opinion with a litany of prior published instances of abuse of N.J. Ct. R. 4:42-2 to avoid the need for leave to appeal an interlocutory order. In each of these instances, the trial judge certified as "final" orders which were, in fact, interlocutory. Counsel then proceeded to appeal as of right [N.J. Ct. R. 2:2-3(a)(1)]. The cases cited by Judge Skillman reflect a variety of errant instances:

Leonardis v. Bunnel, 164 N.J. Super. 338, 396 A.2d 357 (App. Div. 1978), certif. denied, 81 N.J. 265 (1979) -- certification of partial summary judgment.

Delbridge v. Jann Holding Co., 164 N.J. Super. 506, 397 A.2d 356 (App. Div. 1978) -- certification where damages

and dispossession claims were still open.

Di Marino v. Wishkin, 195 N.J. Super. 390, 479 A.2d 444 (App. Div. 1984) -- certification of judgment on a third party complaint when primary claims remained.

Taylor v. Gen. Elec. Co., 208 N.J. Super. 207, 505 A.2d 190 (App. Div. 1986) *certif. denied*, 104 N.J. 379 (1986) -- order for summary judgment as to two parties certified, although the motion as to a third party was denied.

Jacob v. Norris, Mc Laughlin & Marcus, 247 N.J. Super. 266, 588 A.2d 1297 (App. Div. 1991) -- summary judgment order for only one count of the complaint certified as final.

Kurzman v. Appicie, 273 N.J. Super. 189, 641 A.2d 566 (App. Div. 1994) -- certification of summary judgment order for two of three counts of the complaint.

Cobo v. Market Transition Facility, 293 N.J. Super. 374, 680 A.2d 1103 (App. Div. 1996) -- judgment on bifurcated issue certified.

Bloom v. Clara Maas Med. Ctr., 295 N.J. Super. 594, 685 A.2d 966 (App. Div. 1996) -- partial summary judgment certified before entry of final judgment.

Hallowell v. Am. Honda Motor Co., 297 N.J. Super. 314, 688 A.2d 110 (App. Div. 1996) -- summary judgment order in favor of two defendants certified, although multiple defendants remained in the case.

Fu v. Fu, 309 N.J. Super. 435, 707 A.2d 473 (App. Div. 1998), *rev'd on other grounds*, 160 N.J. 108 (1999) -- order directing that the case proceed under foreign law certified as final.

S.N. Golden Estates, Inc., v. Continental Cas. Co., 317 N.J. Super. 82, 721 A.2d 307 (App. Div. 1998) -- certification of an order awarding partial counsel fee.

D'Oliviera v. Micol, 321 N.J. Super. 637, 729 A.2d 1084 (App. Div. 1999) -- order granting a motion for new trial certified as final.

Tradesoft Tech. v. Franklin Mut. Ins. Co., 329 N.J. Super. 137, 746 A.2d 1078 (App. Div. 2000) -- certified order for judgment as to two of seven counts of the complaint.

Caggiano v. Fontoura, 354 N.J. Super. 111, 804 A.2d 1193 (App. Div. 2002) -- certified summary judgment order on two counts where a third remained pending.

Interestingly, in all but four of the cited cases, the Appellate Division decided the issue on appeal despite the improper certification.

Doing It Right. An order is interlocutory unless it disposes of "...all claims against all parties." *S.N. Golden Estates, Inc., v. Continental Cas. Co.*, 317 N.J. Super. 82, 87, 721 A.2d 307 (App. Div. 1998). In the absence of such finality, an appeal of an order can only be obtained by seeking permission for the same through a motion for an interlocutory appeal (N.J. Ct. R. 2:5-6). This must be made within 20 days of service of the order in question. After that time, it is necessary to move for an extension or for leave to appeal *nunc pro tunc* [N.J. Ct. R. 2:4-4(b)]. Relief under that rule is a long shot, particularly if there is no compelling reason why a motion for leave to file an interlocutory appeal was not sought.

An exception to these rules is the certification procedure set forth in N.J. Ct. R. 4:42-2. That rule allows the trial court to certify a judgment as final if the "...order would be subject to process to enforce a judgment..." and it comes within one of three prerequisite categories. Relief under that rule is primarily sought to permit an appeal where the trial court refuses to stay execution under N.J. Ct. R. 2:9-5. The purpose of the rule is to allow for appellate review under circumstances where assets may be seized to satisfy the interlocutory judgment. It is not the objective of the rule to permit trial judges to bypass the prerogatives of the Appellate Division to decide what should be heard by that court on an interlocutory basis. Put simply, the rule can be used in certain circumstances where execution may result in assets changing hands.

Can the Court's Goal Be Reached? Judge Skillman provides a list of cases of wrongful use of the "certification" rule over a period of 30 years. The obvious frustration of the appellate court is compounded by the fact that judges of the lower courts are necessary participants in the process. Dismissal of the appeal and even sanctions may send a partial message to counsel, but that occurs after the appellate panel has done its work. Clearly, counsel and trial judges are confused by the rule. The "recurrent problem" cited by Judge Skillman will continue, but not because the bar and bench are miscreants deliberately sneaking cases into the Appellate Division. N.J. Ct. R. 4:42-2 with its 100 word sentence should be changed and, more importantly, made comprehensible.

Cross-references: See Robert B. Hille and Mark R. Vespoli LexisNexis Practice Guide NJ Pretrial Practice §§ 5.02 and 5.04.

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Sinclair and Harrison on Little v. Cook

2008 Emerging Issues 1346

Sinclair and Harrison on Little v. Cook, 274 Va. 697, 652 S.E.2d 129, 2007 Va. LEXIS 136 (2007)

By Prof. Kent Sinclair and Gessner H. Harrison

December 5, 2007

SUMMARY: In *Little v. Cook*, a decision that will doubtless be of interest to real estate and other investment-based partnerships in the Commonwealth, the Supreme Court of VA was called upon to determine the kinds of damages that could be awarded to a limited partnership via a derivative suit brought by a group of its limited partners. In *Little*, the Court addressed several significant issues.

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ARTICLE: Partnership Derivative Suits: The Scope of Recoverable Damages and Attorneys Fees and Costs in Virginia

In *Little v. Cook*, 274 Va. 697, 652 S.E.2d 129 (2007), a decision that will doubtless be of interest to real estate and other investment-based partnerships in the Commonwealth, the Supreme Court of Virginia was called upon to determine the kinds of damages that could be awarded to a limited partnership via a derivative suit brought by a group of its limited partners. In *Little*, the Court addressed several significant issues, including whether *income tax consequences* arising from the sale of the partnership's sole asset and flowing through to the limited partners could be recovered by the partnership as damages, and whether damages allegedly arising from the "hurried sale" of that asset for a below-market price, were properly awarded to the partnership. The Court also construed the "common fund" exception to *the American Rule* generally prohibiting the assessment of attorneys fees and costs of suit against unsuccessful litigants to determine whether and to what extent the limited partners were entitled to recover the fees and costs incurred in pursuing the derivative suit under Va. Code Ann. § 50-73.65.

Background. In connection with the sale of an apartment complex that was the sole asset of a limited partnership, a group of the limited partners, representing two-thirds of the ownership interest, filed a derivative suit on behalf of the partnership pursuant to Va. Code Ann. § 50-73.62 and sought monetary damages against its general partner and an attorney, both individually and as trustee for the general partner. The limited partners asserted, among other things, counts for breach of fiduciary duty and legal malpractice. After a bench trial, the circuit court held that the attorney defendant breached not only the standard of care applicable to attorneys in his role as the attorney for the partnership and its general partner but also his fiduciary duties while performing the tasks and responsibilities of the partnership's general partner. It awarded, among other things, over \$3 million in damages to the partnership, principally comprised of what the circuit court referred to as "tax damages." The circuit court also awarded attorneys' fees and costs to the limited

partners individually, which were to be "added on" to the total amount of damages otherwise awarded.

The attorney and the general partner appealed, asserting five assignments of error, and the limited partners cross-appealed. In the first assignment of error, the defendants challenged the award of "tax damages" asserting, among other arguments, that "tax damages" are not damages to the partnership and thus are not recoverable in a derivative action. In the remaining assignments of error, the defendants contested, among other things, the award of attorneys' fees to the limited partners individually in addition to the other damages awarded rather than an award of attorneys' fees from the "common fund" recovered for the partnership. The plaintiffs' assignments of cross-error asserted that the circuit court erred either by refusing to award an additional \$2,050,000 in damages against the defendants arising from the sale of the apartment complex based on valuations made on the closing date of the sale and on a date shortly before trial, or by failing to award at least a sum representing the difference between the appraised market value of the complex and the sale price on the date of sale.

General Principles. The Court in *Little* analyzed the damages and "common fund" exception issues by stating the following well-settled principles of Virginia law regarding derivative actions, the recovery of damages, and the recovery of attorneys fees and costs by the prevailing party:

- **Nature of derivative actions.** Citing *Simmons v. Miller*, 261 Va. 561, 573, 544 S.E.2d 666, 674 (2001) and *Bernstein v. Levenson*, 437 F.2d 756, 757 (4th Cir. 1971), the Court explained that "[a] derivative action is an equitable proceeding in which a shareholder asserts, on behalf of the corporation, a claim that belongs to the corporation rather than the shareholder." Within the context of limited partnerships, the Court, quoting *Va. Code Ann. § 50-73.62*, explained that a limited partner could "bring an action in the right of a limited partnership to recover a judgment in its favor to the same extent that a stockholder may bring an action for a derivative suit under the [Virginia] Stock Corporation Act [(*Va. Code Ann. § 13.1-601 et seq.*)]."

- **Recovery of damages in derivative actions.** The Court, quoting *Michaud v. Morris*, 603 So. 2d 886, 887 (Ala. 1992) and citing 13 William Mead Fletcher et al., *Fletcher Cyclopedic of the Law of Private Corporations* §§ 6028 and 6038 (perm ed., rev. vol. 2004), explained that generally, in the context of a corporate derivative suit, "the corporation must have suffered an actual injury for there to be grounds for a shareholder's derivative suit," and that "the only damages recoverable in a derivative suit are those related to the loss or damage proximately caused by the wrong committed."

The Court then observed that its prior decisions in *Mount v. Radford Trust Co.*, 93 Va. 427, 431, 25 S.E. 244, 245 (1896) and *Brown v. Bedford City Land & Improvement Co.*, 91 Va. 31, 37, 20 S.E. 968, 970 (1895), were consistent with these principles. Citing *Strain v. Seven Hills Assocs.*, 75 A.D.2d 360, 371, 429 N.Y.S.2d 424, 432 (N.Y. App. Div. 1980), the Court also observed that these same principles "apply in the context of a derivative suit filed on behalf of a limited partnership," and expressly held that, as a matter of Virginia law, the claim asserted in such a suit "belongs to the limited partnership, not to the limited partners, and the limited partnership itself must have sustained injury." The Court further held that, with respect to damages that may be recovered in a derivative suit filed on behalf of a limited partnership, "any recovery belongs to the limited partnership."

- **Income tax liability of limited partnerships and partners.** Citing and quoting *section 701 of the Internal Revenue Code* (26 U.S.C. § 701), and relying upon *Bufferd v. Commissioner*, 506 U.S. 523, 525 (1993) and *Littriello v. United States*, 484 F.3d 372, 375 (6th Cir. 2007), the Court observed that the Code expressly provides that partnerships, as such, are not be subject to the income tax imposed by chapter 1 of Subtitle A of the Code, pertaining to "Normal Taxes and Surtaxes." The Court further observed that *section 701 of the Internal Revenue Code* also provides that "[p]ersons carrying on business as partners shall be liable for income tax only in their separate or individual capacities."

■ **Recovery of attorneys' fees and costs in a successful derivative suit.** Quoting *Va. Code Ann. § 50-73.65*, the Court explained that Virginia law regarding the recovery of attorney's fees and costs incurred in connection with derivative suits provides, *inter alia*, that "[i]f a derivative action is successful, in whole or in part, or if anything is received by the plaintiff as a result of a judgment, compromise or settlement of an action or claim, except as hereinafter provided, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, and shall direct [the plaintiff] to remit to the limited partnership the remainder of those proceeds received." Finding the language of the statute to be "clear and unambiguous," the Court, ascribing a plain meaning interpretation of its terms, concluded that "[t]he [Virginia] General Assembly's use of the word 'remainder' [in *Va. Code Ann. § 50-73.65*] indicates its intent for the award of reasonable attorneys' fees and expenses to be subtracted from the total amount 'received by the plaintiff as a result of a judgment, compromise or settlement of an action or claim,' with the 'remainder' being remitted to the limited partnership." The Court then observed that its interpretation of *Va. Code Ann. § 50-73.65* "is consistent with what is known as the 'common fund' exception to the 'American Rule' prohibiting the shifting of attorneys' fees to the losing party." Relying upon *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991), the Court explained that the "'common fund exception' is based on a court's 'historic equity jurisdiction . . . allow[ing] a court to award attorney's fees to a party whose litigation efforts directly benefit others.'" The Court then explained, relying on *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980), that under the common fund exception, "[Whoever] recovers a common fund for the benefit of persons other than himself . . . is entitled to a reasonable attorney's fee from the fund as a whole." Specifically regarding the recovery of attorneys fees and costs in the context of a derivative suit, the Court, relying on *Mardel Secur., Inc. v. Alexandria Gazette Corp.*, 278 F. Supp. 1010, 1017-1018 (E.D. Va. 1967), explained that under the common fund exception, "attorneys' fees constitute an incident to the claim" and "are payable out of the fund recovered."

■ **Measure of damages applicable to allegedly below-market price property sales.** Quoting and citing to its prior opinion in *Definite Contract Bldg. & Loan Ass'n v. Tumin*, 158 Va. 771, 784, 164 S.E. 562, 566 (1932), the Court explained that "generally the measure of [plaintiff's] damages is the difference between the contract price and the [saleable] or market value of the property at the time of the breach." Specifically, within the context of below-market price sales of real property, the Court relied upon its prior holding in *Barr v. MacGlothlin*, 176 Va. 474, 482, 11 S.E.2d 617, 620 (1940), as well as similar holdings reached in *Webster v. Di Trapano*, 114 A.D.2d 698, 699, 494 N.Y.S.2d 550, 551 (N.Y. App. Div. 1985) and *First Methodist Episcopal Church of Strong City v. North*, 140 P. 888, 889 (Kan. 1914), in explaining that "the measure of damages ordinarily is the difference between the contract price and the saleable or market value at the time of the breach."

Key Issue #1: Were the tax consequences incurred by the limited partnership's investors as a result of the sale of the partnership's sole asset damages recoverable in a derivative suit? In *Little*, the defendants surmised that the "tax damages" awarded by the circuit court represented the estimated collective income tax liability incurred by the limited partnership's investors as a result of the sale of the apartment complex, its sole asset. The defendants also argued that such damages were not damages sustained by the limited partnership since it, like any partnership, does not pay taxes. Instead, the defendants asserted that the tax consequences represented damages to all of the limited partnership's investors, including the plaintiffs, and that because the purpose of a derivative suit is to recover those damages actually suffered by the partnership, as opposed to its partners, the "tax damages" could not be recovered and were not properly awarded.

The plaintiffs, on the other hand, theorized that the value of the limited partnership decreased by virtue of the sale of the apartment complex, positing that "the 'tax damages' were computed as a surrogate for the loss of the value of the partnership as an investment vehicle." As support for their theory, they relied on the testimony of their own accounting expert, who opined that the partnership was damaged because the value of its asset was reduced "by the taxes that were paid from the sale." They also relied on the testimony of a defense witness who qualified as an expert in the field of certified public accounting and partnership taxation and who, when asked if the value of an investment vehicle declines

when its only asset is converted to cash and then part of the cash has to be distributed to pay taxes, responded in the affirmative. Based on the foregoing, the plaintiffs argued that the diminution in value of the partnership would not have occurred if the apartment complex had not been sold or if the transaction had been structured as a tax-free exchange pursuant to *section 1301 of the Internal Revenue Code*.

The Court ultimately rejected the plaintiffs' arguments "for several reasons." First, the Court explained that the plaintiffs' argument "overlooks the legal posture of a limited partnership with regard to income tax liability" under *section 701 of the Internal Revenue Code* (26 U.S.C. § 701), *Bufferd*, and *Littriello*, insofar as "[t]he partnership's investors-not the partnership-incurred whatever income tax liability resulted from the sale of [the apartment complex]." As a result, the Court held that the circuit court "erred in its assessment of 'damages to the [p]artnership . . . relating to any tax consequences attributed to the [p]artnership,'" because "there were no tax consequences attributable to the partnership."

Next, the Court addressed the plaintiffs' assertion that the sale of the apartment complex "converted the partnership's sole asset to cash and that the value of the [p]artnership decreased when that cash had to be distributed to pay the [ir] and [the] other investors' income tax liabilities." Responding, the Court opined that the sale of the apartment complex, while resulting in a conversion of the asset to cash, did not diminish the value of that asset because "at that moment in time, the value of the . . . asset was the same as before the sale; it . . . just changed the nature of the . . . asset."

Continuing, the Court addressed the plaintiffs' assertion that "cash had to be distributed to pay the investors' income tax liabilities resulting from the sale of [the apartment complex]," finding that such assertion "was not supported by" the terms of the partnership agreement governing the limited partnership. The Court explained that the partnership agreement provided that "[a]ny revenues of the [p]artnership not required to meet its obligations and to conduct future operations were to be distributed to the investors on a quarterly basis," and that upon dissolution, the partnership's assets "were to be distributed in cash or in kind in proportion to each partner's capital account as adjusted according to a formula set forth in the [p]artnership [a]greement." Contrary to what the plaintiff's asserted, the Court concluded that "[n]o provision in the [p]artnership [a]greement required a distribution of cash to pay income taxes owed by the [p]artnership's investors as a result of the [p]artnership's business activities."

Finally, the Court rejected the plaintiffs' assertion, purportedly supported by the Court's opinion in *Rutter v. Jones, Blechman, Woltz & Kelly, P.C.*, 264 Va. 310, 568 S.E.2d 693 (2002), that "the 'tax damages' were a proper measure of damages . . . because legal 'malpractice damages are calculated on the basis of the value of what is lost by the client which in many cases will be measured by tax consequences.'" The Court found that the plaintiffs' assertion had "no merit" because the decision in *Rutter* "d[id] not support their position," inasmuch as *Rutter* was readily distinguishable on the ground that it "did not address the type of damages recoverable in a derivative suit involving a claim for legal malpractice."

As a result, the Court held that "the circuit court erred by awarding 'tax damages' against the [d]efendants," because "[s]uch damages were not sustained by the [p]artnership and thus were not recoverable in th[e] plaintiffs' derivative suit."

Key Issue #2: Did the circuit court err in awarding attorneys' fees and costs to the plaintiffs in addition to the other damages awarded to the partnership, instead of awarding such fees and costs from the "common fund" recovered for the Partnership? In addressing the issue of whether the circuit court had erred in awarding the plaintiffs the attorneys fees and costs incurred by them in bringing the derivative suit, the Court plainly stated that, under the operative language of Va. Code Ann. § 50-73.65, a successful plaintiff who has received an award of reasonable attorneys' fees and expenses in a derivative suit is directed "to remit to the limited partnership the remainder of those proceeds received by him." The Court then explained that the use of the word "remainder" in the statute indicated that the General Assembly had "intended for the award of reasonable attorneys' fees and expenses to be subtracted from the total amount 'received by the plaintiff as a result of a judgment, compromise or settlement of an action or claim,' with

the 'remainder' being remitted to the limited partnership." As a result, the Court held that the circuit court erred by awarding reasonable attorneys' fees and expenses to the individual plaintiffs in addition to the other damages awarded to the partnership. Instead, the Court concluded that "in accordance with the requirements of Va. Code Ann. § 50-73.65, the award of attorneys' fees and expenses must be paid from the 'common fund' received by the limited partners on behalf of the partnership and the remainder remitted to the partnership."

Key Issue #3: Did the circuit court err in failing to award the plaintiffs damages relating to the allegedly "hurried sale" of the apartment complex? In addressing the issue of whether the circuit court erred in failing to award damages to the plaintiffs arising from the allegedly "hurried sale" of the apartment complex, the Court was asked to consider the plaintiffs' evidence consisting of two valuations—one made on the closing date of the sale (January 30, 2003), and the other made on a date shortly before trial (June 30, 2005)—as purportedly establishing that the value of the apartment complex as of the date of the sale exceeded the contract price. The Court ultimately concluded, however, that "[t]he fair market value of [the apartment complex] on either January 30, 2003 or June 30, 2005 was irrelevant and did not establish any damages on the date of breach," which the parties did not dispute was the date when the attorney defendant entered into the contract to sell it to a third party (October 16, 2002). As a result, the Court held that the plaintiffs had "offered no proof to establish that the fair market value of [the apartment complex] on the date of breach . . . exceeded the contract price."

Importance of Ruling. There are likely many cooperative business entities in the Commonwealth that, like the partnership involved in *Little*, were formed to acquire real property for investment purposes. Invariably, some portion of the memberships of these entities will find themselves dissatisfied with the business decisions made by those in control regarding the sale of their investment properties. Whether these entities are small or large, the Supreme Court of Virginia's opinion in *Little* provides valuable guidance to their members and their counsel regarding the limitations of a derivative suit as a vehicle for the recovery of damages arising from the sale of an entity's only asset. First and foremost, the Court teaches in *Little* that the recovery of damages arising from the tax consequences of such a sale flowing through to the members of a partnership is not within the scope of a derivative action, because such damages do not belong to the partnership as a result of its exclusion from taxation under *section 701 of the Internal Revenue Code*.

Little also clarifies that the expense of the derivative suit—specifically, attorneys fees and court costs—is to be awarded out of the entire fund recovered as a result of the derivative suit via the "common fund" view that the Court expresses with respect to Va. Code Ann. § 50-73.65, and not awarded in addition to such amount. As a practical matter, this means that members who are dissatisfied with the decision to dispose of a partnerships' sole asset will do well to make an honest assessment of what the likely recovery will be if they choose to initiate a derivative suit, because if the likely recovery is small, the deduction of attorneys fees and costs therefrom may mean that it will likely not be cost effective to pursue the remedy.

In addition, *Little* teaches that the recovery of damages arising from an allegedly below-market price sale of real property caused by a failure to properly market it or by a failure to advantageously time the sale thereof must be established using adequate proof of the property's value. Thus, members contemplating the initiation of a derivative suit based on the theory of a deficient sale of a partnerships' investment property would be well advised, based on the Court's analysis and rejection of the proffered valuation evidence in *Little*, to (1) ascertain the precise point in time at which the breach giving rise to the loss takes place and (2) obtain sufficient evidence of the value of the property at that time, in order to sufficiently establish a claim for damages.

Virginia Cross-References. For further analysis of the topics of Virginia law addressed herein, please consult the following sources:

Regarding damages, see Charles E. Friend and Kent Sinclair, Virginia Pleading and Practice Chapter 23: Damages; Kent Sinclair, Virginia Civil Procedure § 3.2: Damages; John L. Costello, Virginia Remedies Chapter 21:

Damages; Virginia Model Jury Instructions -- Civil, Chapter 9: Damages.

Regarding contracts and breach of contract, see Charles E. Friend and Kent Sinclair, Virginia Pleading and Practice Chapter 24: Contract Actions; Kent Sinclair, Virginia Civil Procedure § 2.3: Contract Actions Generally; Virginia Model Jury Instructions -- Civil, Chapter 45: Contracts.

Regarding partners and partnerships, see John L. Costello, Virginia Remedies Chapter 22: Partners and Partnerships.

For a general discussion of partnerships and tax aspects of partnerships, see Michie's Jurisprudence of Virginia and West Virginia, PARTNERSHIP; Zolman Cavitch, Business Organizations with Tax Planning, Part 2: Taxation of Partnerships; Part 3: Partnership: Formation, Operation, Dissolution; and Part 4: Limited Partnerships (Matthew Bender 2007).

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Professor Sinclair, an active member of the Virginia Bar, teaches the program in Virginia Law & Practice at the University of Virginia School of Law. He is Professor of Law and served for many years as Associate Dean of the Law School. He has written more than a dozen books, and is the author of Sinclair & Middleditch, Virginia Civil Procedure (4th ed. 2003 and annual supplements), and co-author of Friend & Sinclair, Virginia Pleading and Practice (2nd ed. 2007 with annual supplements). He is Chair of the Advisory Committee on Rules of Court for Virginia, and has served as Reporter for the Virginia Model Jury Project for a number of years. He has served on the Board of Governors of the Litigation Section of the Virginia Bar Association and the Boyd-Graves Conference on Virginia Law. He edits the Virginia Court Rules and Practice Service for Lexis Law Publishing and is a frequent lecturer at continuing education programs for attorneys and Virginia judges.

Mr. Harrison has experience as a judicial clerk and as a practicing attorney, and presently serves as Senior Staff Attorney in the office of the Reporter of Decisions for the Supreme Court of Virginia. Mr. Harrison plays a major role in the Model Jury Instructions program in Virginia, and is primarily responsible for the identification of all new developments in Virginia law, and the finalization of jury instructions for the electronic and looseleaf jury instructions volumes, published by Lexis Law Publishing, covering all areas of civil causes of action and criminal developments. He holds both J.D. and M.B.A. degrees, with advanced course work in legal research and information management, and is the author of multiple law review articles on subjects including criminal appellate procedure, constitutional law, crime victim's rights legislation, and environmental law. He has collaborated with Professor Sinclair on numerous projects in diverse areas of Virginia law.

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Garcia C&I Steel, LLC v. Travelers Casualty & Surety Co. of America

2008 Emerging Issues 1300

Garcia C&I Steel, LLC v. Travelers Casualty & Surety Co. of America

By Grace V. B. Garcia

December 4, 2007

SUMMARY: In *C&I Steel, LLC v. Travelers Cas. & Surety Co. of Am.*, 70 Mass. App. Ct. 653 (2007), the Appeals Court, considering an issue of first impression in Massachusetts, reversed the lower court and held that a surety who issued a construction bond could not be held liable for a punitive damage award against its principal because the terms of the bond covered only payment for labor, materials and equipment. Thus, this decision confirms the important principle that a surety will be responsible only for the obligations the surety specifically undertakes in the bond. This commentary, written by Grace Garcia, discusses the implications of this decision.

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ARTICLE: Suretys Responsibility for Punitive Damages

In *C&I Steel, LLC v. Travelers Cas. & Surety Co. of Am.*, 70 Mass. App. Ct. 653 (2007), the Appeals Court, considering an issue of first impression in Massachusetts, reversed the lower court and held that a surety who issued a construction bond could not be held liable for a punitive damage award against its principal because the terms of the bond covered only payment for labor, materials and equipment. Thus, this decision confirms the important principle that a surety will be responsible only for the obligations the surety specifically undertakes in the bond.

Types of Surety Bonds. Essentially, a surety bond is a bond that a surety issues guaranteeing that the entity it is bonding, called the principal, will pay monies that it owes to third parties. In the construction industry, there are generally three types of surety bonds: (1) a performance bond, which is a promise by the surety to pay, or sometimes to perform, if the principal fails to complete the contract; (2) a payment bond, which protects the owner from liens or claims if the principal fails to pay for the labor or material; and (3) a maintenance bond, which guarantees the principals performance of certain maintenance over a fixed period of time after completion of the work. Under all of these bonds the surety promises that, if the contract is not properly performed, the surety will pay the damages if the principal cannot. A surety bond is not an insurance policy; the surety will not be liable for personal injuries or property damages that result from the principals negligence. Rather, a surety bond acts as a further financial resource behind the contractor, if the contractor fails to make good on the contract. These bonds are generally issued by a licensed corporate surety, who is often a subsidiary or affiliate of an insurance company.

In Massachusetts, for most public construction projects in towns and cities if the contract price is more than \$2,000, and for contracts over \$5,000 with the Commonwealth, the public entity must obtain a surety bond in an amount equal to at least one half of the total contract price to ensure that the contractor pays for labor, materials and equipment. Mass. Gen. Laws ch. 149, § 29. Thus, in most cases in Massachusetts when a town hires a general contractor to perform work, the town will require that the general contractor obtain a surety bond that guarantees that the general contractor will pay for all of the labor, materials and equipment it needs to perform the contract. By requiring the bond, the town, as owner of the project, is guaranteed that the project will be completed; that all of the project bills, such as those by subcontractors and suppliers, will be paid; and that any claims can be referred to the surety. From a public interest standpoint, a surety bond is beneficial because it allows the owners of public projects to mitigate the performance and payment risks associated with construction projects.

Background for the Courts Decision. In *C&I Steel, LLC*, a town awarded a general contractor a contract for the construction of a school. The general contractor obtained a payment bond from Travelers Casualty & Surety Company of America (Travelers), as required by the contract and Mass. Gen. Laws ch. 149, § 29. Under the terms of the bond, the general contractor and Travelers jointly and severally bound themselves to the town to pay for labor, materials and equipment furnished for use in the performance of the construction contract. Additionally, the bond defined the construction contract as the agreement between the town and the general contractor, including all contract documents and changes thereto.

After being awarded the contract, the general contractor subcontracted with C&I Steel to perform work required for the project. The subcontract agreement contained a broad arbitration clause. Throughout the project the general contractor and C&I Steel had numerous disputes, leading to an action by C&I Steel against the general contractor, as well as Travelers as the surety, in Superior Court. Based on the terms of the subcontract, the general contractor moved the case to arbitration, in which Travelers did not participate. Travelers then stayed the Superior Court action pending the arbitration.

Following the hearing, the arbitrator found in favor of C&I Steel and issued an award that included both contract and punitive damages against the general contractor. C&I Steel sought confirmation of the entire award in the Superior Court as against both the general contractor and Travelers. Travelers opposed the motion to the extent that the award contained punitive damages. After the Superior Court confirmed the award in total, Travelers appealed. The Appeals Court reviewed this case to determine whether Travelers could be held liable for punitive damages awarded against its principal because this was a question of first impression in Massachusetts.

Surety Bonds Are Interpreted Like All Other Contracts. Absent any ambiguity, when interpreting a contract, the plain meaning of the contract controls. With regard to the surety bond, the Appeals Court looked to the plain language of the bond which stated that Travelers, as the surety, agreed to pay for labor, materials and equipment furnished for use in the performance of the construction contract. By the clear terms, the bond did not include an obligation to pay for punitive damages or any other type of damages not related to labor, materials and equipment. Punitive damages are not considered compensation for an injured party; rather, they are considered to be a form of deterrence and punishment. *Gasior v. Massachusetts Gen. Hosp.*, 446 Mass. 645, 653 (2006). Therefore, punitive damages are not covered by a bond unless the bond specifically spells out an obligation to cover more than labor, materials and equipment. Hence, the Appeals Court held that Travelers could not be held liable for punitive damages.

As a result of *C&I Steel, LLC*, Massachusetts now follows the Restatement 3d of Suretyship & Guaranty, § 73 (1996), which states that a surety's liability generally does not include penalties beyond the actual losses resulting from the principal's breach. In addition, Massachusetts joins many other states that have refused to find a surety responsible for punitive damages. Those states include: Alabama, Arizona, Colorado, Connecticut, Florida, Kansas, Kentucky,

Mississippi, Missouri, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania and Texas. *C&I Steel LLC*, 70 Mass. App. Ct. 653, 658 (2007). In addition, the *C&I Steel, LLC* decision now allows sureties in Massachusetts to clearly limit their liability and protect themselves from the bad-faith conduct of their principal simply by limiting the language contained in the bond.

Lessons for Practitioners. Practitioners must be aware of, and properly advise their clients about, the potential limits of a surety bond. As a result of the *C&I Steel, LLC* decision, it is now clear that a surety cannot be held liable for its principals wrong-doing beyond the obligations it undertook in the bond. Consequently, an owner, subcontractor or other entity who seeks damages, such as punitive damages, against the general contractor, will not be able to rely on the bond for payment. In determining whether to bring a suit, the owner, subcontractor or other entity will want to assess the general contractors capacity to pay any future judgment and possibly take steps to secure assets to cover any potential judgment.

On the other hand, practitioners should also counsel their clients that although a surety may not be obligated in Massachusetts to pay for the wrongful actions of its principal under the bond, a surety can still be held liable for its own wrongful actions. Thus, a surety could be sued, for example, pursuant to Mass. Gen. Laws. ch. 93A, also known as Massachusetts Consumer Protection Statute. This statute, which allows claims to be asserted by either consumers or businesses, protects against unfair acts or practices. The statute allows the prevailing party who successfully proves a Chapter 93A claim to recover its reasonable costs and attorneys fees and, under some circumstances, allows the court to assess punitive damages in the amount of multiple (double or treble) damages.

For additional discussion of surety contracts in Massachusetts, see 7-65.1 MA Pleading and Practice § Rule 65.1 Security: Proceedings Against Sureties; 3-14 MA Pleading and Practice § 14.8 Who "Is or May Be Liable" to Defendant: General Scope of Rule 14(a); 2-8 MA Pleading and Practice § 8.23.1 Punitive Damages; 2-8 MA Pleading and Practice § 8.170.1 Complaint by Consumer for Injunctive Relief and Damages Under Massachusetts Consumer Protection Act, Mass. Gen. Laws ch. 93A-Form.

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Grace V. B. Garcia is a Partner in the Boston office of Morrison Mahoney LLP. Ms. Garcias practice is concentrated in the areas of commercial litigation, construction law, product liability and premises liability. In 2005, 2006, and 2007, she was recognized by Boston Magazine and Law & Politics as a Super Lawyer Rising Star. Ms. Garcia is admitted to the bars of the Commonwealth of Massachusetts and the State of New York. She is actively involved in several bar associations and serves on the Massachusetts Bar Association's Litigation Section Council. Previously, Ms. Garcia served as a member of the MBA's Business Law Section Council (2003 -- 2006), New Lawyer Section Council (2000 -- 2003), co-chair of the Boston Bar Association's New Lawyer's Section (2002 -- 2004), and the BBA's Task Force on Pro Bono and New Lawyers (2002 -- 2003). Ms. Garcia is a part of the Massachusetts Associated General Contractors Safety Committee. Additionally, after being on the Executive Committee for several years, Ms. Garcia is the co-director for the Boston Chapter of the Downtown Women's Club for the 2007-2008 year. Ms. Garcia is the author of the Massachusetts Litigation Blog. In addition, Ms. Garcia has authored several articles including: Fundamentals of Electronic Discovery, Boston Bar Journal (March/April 2003) and Achieving Equitable Balance: Justice Wilkins and Chapter 93A, Boston Bar Journal (Nov./Dec. 2000) (co-author). She has lectured for various continuing legal education programs on electronic discovery, document retention, and deposition techniques.

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Papageorge on Pioneer Electronics (USA), Inc. v. Superior Court

2008 Emerging Issues 1242

Papageorge on Pioneer Electronics (USA), Inc. v. Superior Court

By Thomas A. Papageorge

November 30, 2007

SUMMARY: The California Supreme Court has unanimously held that the plaintiffs discovery interests outweighed privacy concerns such that a discovery request for victim contact information in a consumer class action did not require the affirmative written consent of those consumers. This Emerging Issues Analysis offers insights on how they may frame the facts and issues to support their positions on a motion for pre-certification discovery.

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ARTICLE: Privacy Considerations Do Not Outweigh Plaintiffs Rights to Class Member Information

Background. In the brave new world after Proposition 64, with its substantial limits on private representative actions under Californias Unfair Competition Law [*Bus. & Prof. Code § 17200 et seq.*], plaintiffs counsel must now rely much more on certifying class actions in order to succeed with consumer protection lawsuits. However, a recent California Supreme Court opinion has provided an important boost to plaintiffs attempting to scale the privacy barriers that defendants often erect around their customers contact information.

In a unanimous decision, the California Supreme Court in *Pioneer Electronics (USA), Inc. v. Superior Ct. (2007) 40 Cal. 4th 360, 53 Cal. Rptr. 3d 513, 150 P.3d 198* has ruled that privacy considerations, while important, do not necessarily outweigh plaintiffs traditional rights to discovery to identify potential class members. The plaintiffs sought discovery of contact information for consumers who had lodged complaints about an alleged product misrepresentation by defendant Pioneer Electronics. The court of appeal ruled that the class members privacy rights outweighed the competing discovery interests, requiring affirmative consent (opt-in permission) by the consumers before disclosure of contact information would be allowed.

The Supreme Court reversed the appellate court and held that the lower courts ruling was overprotective of the purchasers privacy rights, inconsistent with established privacy principles, and likely to cause adverse consequences in future cases [*Pioneer Electronics, 40 Cal. 4th at 365*]. Defendants would have a distinct and unfair litigation advantage if they enjoyed the exclusive use and benefit of the putative class members contact information. The Court concluded that the trial court had correctly permitted opt-out notices requiring consumer complainants to object in order to have their contact information withheld from plaintiffs counsel.

The Balancing Test for Discovery of Class Member Information. The Supreme Court has thus provided clear guidance on the balancing test to be used in determining if privacy concerns outweigh discovery rights. The Court of Appeals approach was too strict and failed to consider the nature of the privacy invasion involved here and apply a balancing test that weighs the various competing interests, as outlined in our case law." [*Pioneer Electronics*, 40 Cal. 4th at 370].

The Court emphasized that the right of privacy protects the individuals *reasonable* expectation of privacy against a *serious* invasion," citing *Hill v. National Collegiate Athletic Assn* (1994) 7 Cal. 4th 1 (U.S. Supreme Court upheld NCAA drug testing program; emphasis by the Court). The California Court adopted the U.S. Supreme Courts analytical elements, derived from *Hill*, which a court must evaluate when assessing invasion of privacy claims under the California Constitution: (1) Does the claimant possess a legally protected privacy interest? (2) Does the privacy claimant possess a reasonable expectation of privacy under the particular circumstances? (3) Is the privacy invasion serious or egregious? "[T]rivial invasions afford no cause of action." [*Pioneer Electronics*, 40 Cal. 4th at 371]; (4) If the first three criteria are met, the trial court must then engage in a balancing test. "Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests" [*Pioneer Electronics*, 40 Cal. 4th at 371 , citing *Hill*, 7 Cal. 4th at 38].

Under *Pioneer* and *Hill*, trial courts are vested with substantial discretion to strike this balance of interests. Litigants in California today should affirmatively address these competing discovery needs and privacy interests in their discovery motions in order to help the courts exercise this discretion in determining whether substantial privacy concerns are threatened inappropriately. Where, as in *Pioneer*, the plaintiff seeks only basic contact information (such as name and address) from persons who have already complained about defendants conduct and thus would be likely to want contact from plaintiffs counsel the privacy interests are minimal and plaintiffs access to potential class members will take precedence.

Litigation Significance of *Pioneer* and Its Balancing Approach. The *Pioneer* opinion has far-reaching significance for private plaintiffs and class action counsel. At least where the contact information sought is basic and victims can be expected to welcome contact, plaintiffs attorneys can successfully argue that opt-out and negative option procedures (as approved by the trial court in *Pioneer*) provide all the privacy protection necessary in those circumstances. This approach will greatly reduce class certification costs and broaden the range of victims whom counsel will be easily able to reach.

Class action counsel may also find that the policy statements in *Pioneer* apply well beyond traditional consumer law. Plaintiffs can argue in appropriate cases that these principles apply to precertification access to class members in other contexts where state law protects those who would ordinarily welcome contact, including employees, insureds, utility and bank customers, and others.

If under particular facts a court proves reluctant to accept opt-out or negative option protections of privacy interests, plaintiffs counsel should be prepared to suggest other means of assuring adequate privacy protection, including protective orders governing the uses of the information.

Defense counsel may also find support in the *Pioneer* balancing process. Where the facts permit, counsel should stress the presence of greater privacy interests, such as those associated with health records or personal financial information. In cases involving such interests, arguments that putative class members might value privacy over contacts from plaintiffs lawyers will have greater force.

Pioneer will also prove useful to public prosecutors handling unfair competition cases and related matters. The Court specifically endorsed the suggestion in an *amicus* brief submitted by prosecutors that a contrary rule would have improperly restricted public enforcement in such cases as consumer and investor fraud, elder financial abuse schemes, food and drug hazards, and breaches of consumer product warranty, health, and safety standards [*Pioneer Electronics*, 40 Cal. 4th at 374]. On this basis prosecutors should vigorously resist efforts to limit the Peoples access to victim

contact information in all the types of health and safety and consumer fraud matters favorably referenced by the Supreme Court in *Pioneer*.

For further discussion of class certification and pre-certification discovery, see Cabraser, California Class Action Practice and Procedure, Ch. 8, Class Action Notice, § 8.07 (LexisNexis Matthew Bender) and Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 33, Class Actions, § 33.16 (LexisNexis Matthew Bender).

For further discussion of privacy interests and the balancing of these interests in discovery proceedings, see California Forms of Pleading and Practice, Ch. 191, Discovery: Privileges and Other Discovery Limitations, § 473.28 (LexisNexis Matthew Bender).

For further discussion of the scope of unfair and deceptive trade practice actions brought by public prosecutors in California, see Papageorge & Fellmeth, California White Collar Crime, Ch. 3 (LexisNexis Matthew Bender).

ABOUT THE AUTHOR(S):

Thomas A. Papageorge, a graduate of UCLA and the Harvard Law School, has supervised the Consumer Protection Division of the Los Angeles District Attorney's Office since 1984, and presently directs the Office's sections of consumer law, antitrust, environmental law, and elder abuse. He has served with the Federal Trade Commission in Los Angeles and Washington, D.C., including as Regional Director of the FTC's Los Angeles Regional Office. Mr. Papageorge is past chair of the Antitrust and Unfair Competition Law Section of the State Bar of California, past chair of the Antitrust Section of the Los Angeles County Bar Association, and has chaired the Consumer Protection Committee of the California District Attorney's Association for several terms between 1985 and 2006. In 2004 he was honored by the Antitrust and Unfair Competition Section of the State Bar of California as the Antitrust Lawyer of the Year. Mr. Papageorge has served as Associate Dean and Associate Professor of Law at the Whittier Law School, and he continues as an Adjunct Professor of Law there, teaching and writing in the areas of antitrust, consumer law, and white collar crime. His publications include more than twenty articles and four books, the latest of which is his treatise California White Collar Crime (2nd Ed., 2004), with R. Fellmeth, published by LexisNexis Matthew Bender.

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Professor Robert Aronson on State v. Mason

2008 Emerging Issues 1249

Professor Robert Aronson on State v. Mason, 160 Wn.2d 910, 162 P.3d 396 (July 19, 2007)

By Robert Aronson

November 30, 2007

SUMMARY: Noting the lapse between the time a murder victim was assaulted and when he made statements to the police, combined with the fact that the statements were made in the safety of the police station, miles from the encounter, the Washington Supreme Court holds that the statements were testimonial under the United States Supreme Courts Confrontation Clause.

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ARTICLE: The Meaning of Testimonial For Confrontation Clause Purposes, and Adopting The Forfeiture by Wrongdoing Doctrine

Background. *State v. Mason*, 160 Wn.2d 910, 162 P.3d 396 (2007) involves a trial court's admission of statements the murder victim made to police and a domestic violence victim's advocate before he disappeared. The defendant was convicted of aggravated first-degree murder. At trial, the prosecution introduced the testimony of a police officer concerning the victim's statements about being choked, gagged, threatened with a gun and drain cleaner, and being forced by the defendant to write a note and a check. Despite being hearsay and made 24 hours after the attack, the trial court admitted the statement as an excited utterance. [For a discussion of the excited utterance exception, and particularly the requirement that the declarant must still be under the shock of the event, see *The Law of Evidence in Washington* § 803.04].

At the outset of its opinion, the Washington Supreme Court notes that it will not consider arguments that the trial court erred by also admitting statements reported by an emergency room doctor who treated the victim after the assault, or that the Washington State Constitution, Art. I, § 22 provides greater protection than the Confrontation Clause of the United States Constitution, because those arguments were not adequately argued or briefed previously. *Mason*, 162 P.3d at 400 nn.1 & 2. The lesson to be learned is that evidentiary -- and even most Constitutional -- objections and arguments must be made at the first possible opportunity, usually when the evidence is first offered at trial.

The Meaning of Testimonial for Purposes of Confrontation Clause Analysis. In *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court reformulated Confrontation Clause analysis that had been employed

by courts for 24 years. Under *Ohio v. Roberts*, 448 U.S. 56 (1980), out-of-court statements of an unavailable witness could be admitted without violating the Confrontation Clause if they bore adequate indicia of reliability. However, in *Crawford*, the Court shifted the focus from the reliability of the statement to whether or not it was testimonial. Such statements are only admissible if they have been subject to confrontation, either at the present trial or on a previous occasion (e.g., prior trial or deposition). The *Crawford* Court did not provide a clear definition of testimonial, but it would appear to apply at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a formal trial; and to police interrogations [*Crawford*, 541 U.S. at 51-52]. In addition, the core class of testimonial statements includes those pretrial statements that declarants would reasonably expect to be used prosecutorially [*Crawford*, 541 U.S. at 51]. Further, the Court appeared to approve a definition of testimonial statements as those that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial [*Crawford*, 541 U.S. at 52].

For two years after *Crawford*, state and federal courts struggled with the definition of testimonial, particularly with respect to statements made by victims and witnesses to police officers. While some statements accusing someone of criminal conduct were clearly intended to aid in criminal prosecution, many others were ambiguous concerning the declarants' purpose and belief.

In *Davis v. Washinton*, 126 S. Ct. 2266 (2006), the United States Supreme Court clarified the meaning of testimonial, at least with respect to statements made to law enforcement personnel. In *Davis*, the Court held that the primary purpose of a police interrogation distinguishes testimonial from nontestimonial statements. Statements are nontestimonial under circumstances objectively indicating that the *primary purpose of the interrogation* is to enable police assistance to meet an ongoing emergency. [Statements] are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that *the primary purpose of the interrogation* is to establish or prove past events potentially relevant to later criminal prosecution [*Davis*, 126 S. Ct. at 2273-74 (emphasis added)].

Out-Of-Court Statements Must Survive *Both* Hearsay and Confrontation Clause Objections to be Admissible. In addition to the victim's statements to a police officer regarding being choked, gagged, and threatened with a gun and drain cleaner, the victim also stated to other police officers that he was terrified for his life and asked to sleep at the police station. The trial court admitted the first statements as excited utterances and the latter statements to show the victim's state of mind and because the request to sleep at the police station was a question, and therefore not hearsay because not offered for its truth. See The Law of Evidence in Washington §§ 803.04[4][b] & [c] (state of mind exception to the hearsay rule) and 801.04[2] (exclusion from hearsay treatment of statements not offered to prove their truth).

It is at least questionable whether the latter statements were relevant if admitted solely for the purposes indicated. As the Court notes, In a homicide case, the general rule is that statements by the victim, typically expressing fear of, or anxiety about, the defendant, are not admissible under the state of mind exception because the victim's state of mind is deemed irrelevant. See *State v. Powell*, 126 Wn.2d 244, 266, 893 P.2d 615(1995) (prosecution witnesses should not have been permitted to recount murdered wife's out-of-court statements that she was afraid of her defendant husband) [*Mason*, 162 P.3d at 401-402 n.3]. And it would seem that the only relevance of the victim's request to sleep at the police station would be to show his fear of the defendant. The Court thus cautions against any backdoor' admission of inadmissible hearsay statements, and that [w]hether or not the United States Supreme Court would approve the introduction of [the victim's] entire testimonial story to explain the admission of exhibits or someone's state of mind, under one theory or another that the evidence was not offered for its truth is, at the very least, debatable. [W]e are not convinced a trial court's ruling that a statement is offered for a purpose other than to prove the truth of the matter asserted immunizes the statement from confrontation clause analysis. To survive a hearsay challenge is not, per se, to survive a confrontation clause challenge [*Mason*, 162 P.3d at 402].

In light of the Court's holding, prosecutors and defense counsel should consider the admissibility of out-of-court statements *both* under a hearsay and Confrontation Clause analysis. Finding that a statement is not hearsay, or meets a hearsay exception does not ensure admissibility in criminal cases.

Standard of Review. An appellate court will not reverse a trial court's ruling on a hearsay objection unless it constitutes an abuse of discretion. Discretion is abused only if the trial court's decision is manifestly unreasonable or is based on untenable reasons or grounds.' [*Mason*, 162 P.3d at 402 (quoting *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003))]. A confrontation clause challenge is, on the other hand, reviewed de novo. [*Mason*, 162 P.3d at 402 (citing *State v. Price*, 158 Wn.2d 630, 638-39, 146 P.3d 1183 (2006))].

Application of Davis' Definition of Testimonial to the Statements in *Mason*. The Court appears to suggest that the victim's statements to the police officers should be considered testimonial. However, because the Court adopts the doctrine of forfeiture by waiver (see discussion below) and finds that any of the claimed errors were harmless in light of other substantial evidence of guilt, it finds it unnecessary to decide the issue with respect to those statements. The Court clearly holds that similar statements the victim made to a domestic violence victim's advocate were testimonial. Although the victim may have been seeking protection, not bearing witness to a crime as held by the Court of Appeals (*State v. Mason*, 127 Wn.App. 554, 568, 126 P.3d 34 (2005)), the Washington Supreme Court finds that his statements would be viewed by an objective witness as available for use at a later trial [*Mason*, 162 P.3d at 403, quoting *Crawford*, 541 U.S. at 52]. The statements were made six days after the assault, not during any emergency, and not as part of a call for help against [a] bona fide physical threat [*Mason*, 162 P.3d at 403 (quoting *Davis*, 126 S. Ct. 2276)]. Therefore, the statements were testimonial, and their admission would have violated the Confrontation Clause, were it not for the Court's adoption of the forfeiture by wrongdoing doctrine.

Forfeiture by Wrongdoing Doctrine. The forfeiture by wrongdoing doctrine extinguishes confrontation claims on essentially equitable grounds [*Crawford*, 541 U.S. at 62]. Essentially, a defendant forfeits his or her confrontation clause claim by causing the out-of-court declarant to be unavailable. As the Court states in *Mason*, by causing the victim to be unavailable, Mason made his right impossible to implement; he has only himself to blame for its loss [*Mason*, 162 P.3d at 404]. While many courts have adopted the basic principle of forfeiture by wrongdoing, however, at least two sub-issues remained to be decided in *Mason*: first, whether the doctrine should be applied when the conduct of the defendant alleged to have made the declarant unavailable is the same conduct for which the defendant is being tried; and second, what standard should the trial judge use in deciding whether the defendant has caused the declarant's unavailability?

(1) Where the conduct of the defendant alleged to have made the declarant unavailable is the conduct for which the defendant is being tried. Four Justices (two concurring and two dissenting) would not adopt the forfeiture by wrongdoing doctrine, at least where the alleged wrongdoing forms the factual basis for the charge against the defendant. As stated by Justice Sanders in dissent, under such circumstances, the court must assume the defendant's guilt *prior* to trial, an assumption which offends the presumption of innocence imbedded in our state and federal constitutions [*Mason*, 162 P.3d at 411]. For that reason, a number of state and federal courts that have adopted the forfeiture by wrongdoing doctrine have not applied it in cases where the alleged wrongdoing that caused the declarant's unavailability is the same as the conduct alleged in the charged crime [*see, e.g., State v. Jarzbek*, 204 Conn. 683, 529 A.2d 1245 (1987); *People v. Maher*, 89 N.Y.2d 456, 654 N.Y.S.2d 1004, 677 N.E.2d 728 (1997); *United States v. Lentz*, 282 F. Supp. 2d 399 (2002), *aff'd in part, rev'd in part on other grounds*, 383 F.3d 191 (4th Cir. 2004)].

(2) Clear, cogent, and convincing standard of proof required. Although noting that a majority of the courts that have adopted the forfeiture by wrongdoing doctrine apply a preponderance of the evidence standard to decide whether the witness was made unavailable by the wrongdoing of the accused, the Court in *Mason* agrees with the New York Court of Appeals that forfeiture of the right of confrontation warrants a more exacting standard of proof [*Mason*, 162 P.3d at 404 (citing *People v. Geraci*, 85 N.Y.2d 359, 367, 649 N.E.2d 817, 635 N.Y.S.2d 469 (1995))]. Therefore, although under ER 104(a) preliminary facts relating to the admissibility of evidence are normally decided by the judge under a preponderance of the evidence standard [*see, e.g., Condon Bros. v. Simpson Timber Co.*, 92 Wn.App. 275, 966 P.2d 355, 360 (1998)], the Court in *Mason* establishes a clear, cogent, and convincing standard to be applied under the forfeiture by wrongdoing doctrine.

Additional Issues. The Court addresses a number of additional issues, finding either a waiver of the alleged error, no error, or harmless error. First, the Court finds that the trial judge erred in informing the jury, over a somewhat lukewarm objection, that the present trial was not a death penalty case. The Court reaffirms its holding in *State v. Townsend*, 142 Wn.2d 838, 15 P.3d 145 (2001): The strict prohibition against informing the jury of sentencing considerations ensures impartial juries and prevents unfair influence on a jury's deliberations [*Mason*, 162 P.3d at 406 (quoting *Townsend*)]. Again, however, the Court finds the error harmless.

Second, the court finds that a number of potential errors in admitting prior bad acts under ER 404(b) were waived. Those acts included evidence indicating the defendant possessed a loaded gun and two knives and admission of a passage from a book he owned titled, *The Ancient Art of Strangulation*. However, because defense counsel objected to the testimony about the gun and knives on the basis of relevance and not prior bad acts under ER 404(b), any error was waived. Because defense counsel objected to the State's introduction of fingerprint evidence on the pages from the book, but not to the introduction of the pages themselves, the objection on that basis was also not preserved. In light of the number of potentially valid objections that were either waived or not preserved in *Mason*, practitioners would be well advised to comply with ER 103(a): Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and [i]n case the ruling is one admitting evidence, a timely objection or motion to strike is made, stating the specific ground of objection . For a discussion of the procedures for excluding evidence, see *The Law of Evidence in Washington* § 103.05[2].

For further analysis of the issues in *Mason*, see *The Law of Evidence in Washington* §§ 103.05[3][a]--[c] (Reversible Error on Appeal), 404.04[2][a]--[e] (Admissibility of Prior Bad Acts), 804.04[1][c] (Confrontation Clause Analysis) (LexisNexis Matthew Bender).

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Robert Aronson joined the University of Washington School of Law faculty in 1975. Prior to coming to UW, he was a Teaching Fellow at Stanford Law School, and taught Civil Procedure at the University of San Diego Law School while clerking for Judge James Carter of the Ninth Circuit Court of Appeals. He is a nationally recognized expert in professional responsibility and his book, *The Law of Evidence in Washington*, is one of the leading treatises on the subject. He has served as Chair of The Association of American Law Schools (AALS) Section on Professional Responsibility, National Conference of Bar Examiners MPRE Drafting Committee, Commissioner on Uniform State Laws, Washington Legislative Ethics Board, AALS Committee on Bar Admission and Lawyer Performance, Law School Admission Council, Finance and Legal Affairs Committee, President of the Board of the Washington Appellate Defender Association, Reporter for the American Academy of Matrimonial Lawyers Standards of Conduct, and Hearing Tribunal Member for the Washington Human Rights Commission.

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Bochet on Massachi v. AHL Services

2008 Emerging Issues 1223

Bochet on Massachi v. AHL Services

By William C. Bochet

November 30, 2007

SUMMARY: The Appellate Division faced a tragic set of facts and a lower court decision which granted summary judgment to the Police Department of the City of Newark and a police emergency operator who allegedly erred in recording information given in the course of a 9-1-1 call. The court reversed, finding that the Tort Claims Act did not give immunity to the City and its employee.

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ARTICLE: This case was decided on November 15, 2007

Appellate Division Finds 9-1-1 Operator Not Immune under Tort Claims Act-Operator's Errors are Actionable

In *Massachi v. AHL Services*, the Appellate Division faced a tragic set of facts and a lower court decision which granted summary judgment to the Police Department of the City of Newark and a police emergency operator who allegedly erred in recording information given in the course of a 9-1-1 call. The court reversed, finding that the Tort Claims Act did not give immunity to the City and its employee. The decision hinged on whether or not the conduct of the operator was ministerial in nature and not a failure to provide adequate police protection.

Sohayla Massachi was abducted by her former boyfriend outside of the gates of Seton Hall University. The act was witnessed by several persons, including two off-duty sheriff's officers. One of the officers called 9-1-1, reported the abduction and provided a detailed description of the abduction vehicle and the direction it was traveling. This information was allegedly recorded incorrectly by the 9-1-1 operator. This resulted in the vehicle being long gone and untraceable when police arrived at the scene where Ms. Massachi was abducted. She ultimately was brought to the ex-boyfriend's home where he proceeded to shoot her, as well as himself. The injuries proved to be mortal.

Ministerial or Immune? The municipal defendants moved for summary judgment on three grounds: (1) immunity under N.J.S. § 59:5-4 (Tort Claims Act), (2) immunity under N.J.S. § 52:17C-10(d) [9-1-1 Statute] and (3) insufficient facts to show proximate cause. The motion judge granted summary judgment on the first of these grounds. The court

relied upon *Sczyrek v. County of Essex*, 324 N.J. Super. 235, 735 A.2d 33 (App. Div. 1999), *certif. denied*, 163 N.J. 75 (2000). That case arose from a fatal shooting in the Essex County Courthouse. The plaintiff therein argued that the County was liable due to the insufficiency of its security plan, as well as its failure to respond to warnings before the incident which portended the shooting. The Appellate Division found that N.J.S. § 59:5-4 conferred immunity upon the County as the plaintiff's claims were premised upon a "...failure to provide sufficient police protection" which the statute exempts from liability. *Sczyrek* found that the inadequacy of the security plan was a result of decisions on the part of the County and that there was immunity under the Tort Claims Act from liability for policy or political decisions. The court went further, however, and said that the cited provision confers immunity for alleged negligent performance in responding to the warnings. The statute's clear language and its basic policy provide immunity for acts or omissions in the course of law enforcement. The analogy of the facts in *Sczyrek* to the claimed negligent conduct of the 9-1-1 operator was clear to the motion judge.

Perhaps influenced by the tragic facts and the obvious carelessness of the emergency call recipient, the Appellate Division reversed the granting of summary judgment. The court found that the acts of the operator were mere ministerial acts which did not reach a level where immunity would attach. The opinion distinguished ministerial acts from public policy decisions or other exercises of judgment or discretion by a public servant or entity.

The Case Law. In finding against the County and operator, the Appellate Division cited cases which held that the immunity conferred by the Tort Claims Act does not come into play in situations where police officers were negligent in the performance of their duties. In *Shore v. Housing Authority of Harrison*, 208 N.J. Super. 348, 506 A.2d 16 (App. Div. 1986), for example, a public security officer was held subject to liability for "goofing off" in the performance of his duties. Also, in *Suarez v. Dosky*, 171 N.J. Super. 1, 407 A.2d 1237 (App. Div. 1979), *certif. denied*, 82 N.J. 300 (1980), two state troopers were held subject to liability for failure to escort a family off of a busy highway after responding to an accident. These acts by police officers were deemed "ministerial" and not the allocation of resources to which immunity would attach. The alleged mistakes of the 9-1-1 operator also were "ministerial".

The Undecided Issue. The Appellate Division has the innate power under N.J. Ct. R. 2:10-5 to retain jurisdiction and decide an issue not necessarily addressed by the court below. In this case, it chose not to do so. Rather, the court remanded the case for "fuller development" of the question of immunity under the "9-1-1 Act" [N.J.S. § 52:17C-10(d)]. That statute holds that a person at a "public safety answering point" shall not be liable for civil damages for "failure or omission" in performing 9-1-1 services. The language and intent of the statute appear to grant immunity in this instance.

Yet, the Appellate Division skirted the issue. Several reasons may be inferred:

1. The appellate panel felt the Title 59 immunity issue was ripe for review by the Supreme Court. The judges did not want to terminate the case on other grounds, thus making the prospects of a published opinion unlikely in this instance.
2. There was dissatisfaction with the way the 9-1-1 issue was addressed in the court below and/or before the appellate court. Also, the trial judge did not decide the question, leaving the Appellate Division to defer consideration if it so chose.
3. Sympathy for the plaintiff's cause, under the circumstances, provoked an attitude to keep the claim against the City and its employee alive. This also keeps as a possibility the chances of settlement.

More likely than not, all of these factors played a role in the panel's decision to avoid the 9-1-1 statute issue.

Whither the Action? The claims against the other defendants in the case were reported settled by the plaintiff's attorney in the *New Jersey Law Journal* (190 N.J.L.J. 691). The dismissal of these claims made the appeal of summary judgment entered earlier an appeal as of right [N.J. Ct. R. 2:2-3(a)], as compared to an interlocutory appeal. The case now stands with the Title 59 and proximate cause issues ready for trial, absent grant of certification by the Supreme Court. The 9-1-1 Act immunity issue remains open. The defendant City and its employee may move for summary

judgment on that question, as per the invitation within the appellate court opinion. That would open up a new appeal, if successful. Case law provides no guidance as to the probabilities of what direction that will go.

The Risks. The County has already provoked "bad law" for its Title 59 colleagues. This case is one more precedent in favor of ordinary negligent conduct by police officers being excluded from Title 59 immunity, even when a criminal act is involved. On the other hand, there is no certainty from plaintiff's point of view that the Supreme Court will tolerate the ministerial conduct exception to what *Sczyrek* described as the clear meaning of the language and intent of the Tort Claims Act.

Tip for Counsel. One of the bases for the Appellate Division's not addressing the 9-1-1 Act immunity question was that the City did not cross-appeal the trial judge's failure to rule on the issue. This may have been a deliberate tactic on the part of the City. Nonetheless, appellate counsel should always raise issues they wish the appellate court to decide both in the Notice of Appeal (N.J. Ct. R. 2:5-1), Case Information Statement (N.J. Ct. R. 2:5-1) and in their briefs (N.J. Ct. R. 2:6-2). Otherwise, as happened here, the Appellate Division may refuse to consider the question.

Cross-references

See generally New Jersey Pleadings (LexisNexis 2007) § 5.44, Asserting Third-party Claim.

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Professor Robert Aronson on State v. Dixon

2008 Emerging Issues 1202

Professor Robert Aronson on State v. Dixon

By Robert Aronson

November 29, 2007

SUMMARY: Relying on the since deleted Task Force Comments, the Court holds that extrinsic evidence of prior inconsistent statements of a testifying witness may only be excluded if the witness admits making the statements or the proponent of the evidence fails to provide sufficient evidence of the preliminary fact that the prior statements refer to the subject of the statements at trial. This Emerging Issues Analysis analyzes the views of this case.

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ARTICLE: *Admissibility of Prior Inconsistent Statements to Impeach Testifying Witnesses in Child Molestation Cases*

Background. *State v. Dixon*, 159 Wn.2d 65, 147 P.3d 991 (2006) involves a trial courts refusal to allow the defendant, charged with child molestation, to cross-examine the child witness regarding a conversation with her aunt. According to the aunt, the child had asked, What do I do if Im lying? and said that she could not tell anyone about her lie because it had gone too far [*Dixon*, 147 P.3d at 995]. The aunt further testified that the conversation had taken place in the context of a conversation about the defendant. Observing that the relevancy of the conversation (Fact A) depended upon the defenses ability to prove that the childs question pertained to the molestation allegations (Fact B), the court held that the trial court could require the defense to prove Fact B before it allowed the questioning to proceed. As the defense had shown only that the witness had possibly lied about something, it had not established the foundation necessary to admit the evidence [*Dixon*, 147 P.3d at 997-98].

Child sexual abuse cases often raise the most difficult evidentiary issues. On the one hand, such cases involve the most heinous crimes, so there is a strong incentive to convict those who commit them. In addition, the victims are not only traumatized by the acts themselves, but there is concern that they will be traumatized by having to testify and be cross-examined. On the other hand, the seriousness of a conviction for child sexual abuse requires that constitutional and evidentiary protections of criminal defendants be strictly enforced, particularly since statements by children can be inaccurate due to their young age and susceptibility to manipulation.

Numerous appellate decisions each year address aspects of evidence offered in child sexual abuse cases, including: prejudice [ER 403], character [ER 404], impeachment [ER 608 and ER 613], scientific evidence [ER 702 and ER 703], and hearsay [ER 803 and ER 804].

Dixon addresses at least three significant issues: (1) Under what circumstances should the defendant be permitted to introduce a prior inconsistent statement by a witness? (2) What standard of proof must the defendant meet before introducing evidence that a witness is lying? (3) What harmless error standard should be applied to the erroneous refusal to allow the defendant to impeach a witness with a prior inconsistent statement?

(1) Use of Prior Inconsistent Statement for Impeachment under ER 613(b). At trial, the defendants nine-year-old daughter testified that the defendant molested her. In addition to the child's testimony, her mother and a police officer testified to statements the child had made to them about the abuse. For a discussion of the admissibility of child hearsay statements in abuse cases, see *The Law of Evidence in Washington* §§ 803.04[3][e] (excited utterances); 803.04[5][c] (statements for purposes of diagnosis or treatment); 804.04[1][c][v] (Confrontation Clause analysis); and 807.04 (child victim or witness hearsay exception).

The child admitted at trial that she later told her mother it didn't happen because he said to me that he was only trying to teach me something. And, in another conversation, the child told her mother that it didn't happen exactly the way she said. That the touching hadn't happened. However, her mother testified to a number of occasions where the child related the molestation in some detail. Further, a police detective testified to a number of statements about the molestation the child made to him.

The defense sought to impeach the child by calling a counselor to testify that the child told her she could not tell whether the molestation had actually happened or was a dream. The trial court held that the defense could only introduce the evidence if the child denied making the statement. In response to the question, Do you remember saying I don't know if it happened or if it was a dream?, the child responded, Yes, but I know it wasn't a dream. The trial court ruled that the response foreclosed the defense from calling the counselor for impeachment purposes.

Standard of Review. On appeal, Washington Supreme Court holds that [d]eterminations regarding the scope of cross-examination are within the trial court's discretion and will not be overturned on appeal absent an abuse of discretion. Abuse of discretion will be found only when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons, namely, if it rests on facts unsupported by the record or was reached by applying the wrong legal standard [Quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)].

Analysis Under ER 613(b). ER 613(b) governs the admissibility of impeachment evidence, providing that [e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon. In upholding the trial court's refusal to permit the defense to call the child's counselor to testify to the inconsistent statement, the Washington Supreme Court relies heavily on the Task Force Comment that [t]here are prior Washington decisions to the effect that if the witness responds to foundation questions by admitting making the prior inconsistent statement, then extrinsic evidence of the statement is inadmissible. Although ER 613 does not expressly preclude admission of extrinsic evidence in such a situation, rule 403 gives the court broad discretion to exclude evidence on the grounds that it would cause undue delay, be a waste of time, or that it is a needless presentation of cumulative evidence [Task Force Comment, quoted at *Dixon*, 147 P.3d at 996].

Ironically, effective September 1, 2006, the Court deleted the Task Force Comments from the Washington Evidence Rules. Therefore, although the trial in *Dixon* occurred prior to September 1, 2006, the Court's heavy reliance on the Comments suggests that attorneys would be well-advised to consult the Comments in interpreting the Rules. It should also be noted that neither the Comment to ER 613 nor the Court's opinion in *Dixon* cites to any case support for the inadmissibility of extrinsic evidence of a statement that the witness admits making.

(2) Standard of Proof Regarding Conditional Facts. The trial court also refused to permit the defense to call the child's aunt to testify that the child had asked, What do I do if I'm lying? and said that she couldn't tell anyone about her lie because it had gone too far. Although the aunt testified that she and the child had been talking about her dad and the aunt believed the child was referring to lying about her dad, the trial court ruled that the defense had not made an

adequate showing that the child's statement pertained to her molestation allegations against the defendant. In a 5-4 decision (on this issue), the Washington Supreme Court affirmed, holding that the child's statements were *conditionally relevant* under ER 104(b) only upon proof that the statements pertained to the molestation allegations.

The court states that the standard of proof under ER 104(b) is whether the evidence is sufficient to support a finding of the needed fact [*Dixon*, 147 P.3d at 997 (emphasis in opinion), quoting *State v. Karpenski*, 94 Wash. App. 80, 102, 971 P.2d 553 (1999)]. As noted in the concurring and dissenting opinions in *Dixon*, however, When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the condition. ER 104(b). In other words, the judge determines only whether a juror could reasonably find the preliminary fact [see The Law of Evidence in Washington § 104.04; see also Justice Sanders dissenting opinion, *Dixon*, 147 P.3d. at 1000 n.2 (could a reasonable jury conclude, from the evidence before them [the child's] question referred to Dixon's molestation charges)]. Under that standard, it would seem evident that a juror could reasonably find that the child in *Dixon* was referring to her lying about the molestation, given that her aunt testified she believed the child was talking about her dad, based on the context and surrounding circumstances. Therefore, *Dixon* should have been allowed to pursue this area of inquiry. The State could then have attempted to demonstrate that the earlier statement was not made or that it not refer to Dixon [*Dixon*, 147 P.3d. at 999 (Madsen, J., concurring)].

(3) Harmless Error Standard. The majority in *Dixon* (5 Justices) and the concurring judge hold that any error in refusing to admit the testimony regarding the child's prior inconsistent statements was harmless. According to the majority, the untainted evidence is so overwhelming it necessarily leads to a finding of guilt beyond a reasonable doubt [*Dixon*, 147 P.3d. at 998, quoting *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996)].

The dissenters believe that because the entire case rested upon the child's credibility, the refusal to permit testimony concerning her statement that she was lying and couldn't tell anyone about her lie because it had gone too far was not harmless error. Because criminal defendants have a constitutional right to impeach prosecution witnesses with prior statements that are inconsistent with the witness's trial testimony, reversal is required unless no rational jury could have a reasonable doubt about the defendant's guilt absent the error [*Dixon*, 147 P.3d. at 1001].

Practical Import. *Dixon* is important for practitioners for several reasons. First, the Court confirms that a trial judge may refuse to admit a prior inconsistent statement, even one by the alleged victim in a criminal case, if the witness admits making the statement. Second, the Court relies heavily for support on the Task Force Comments, despite the fact that the Court deleted those Comments from the official version of the Evidence Rules in 2006. For that reason, practitioners would be well advised not to throw away the Comments, although it remains to be seen whether the Court will rely on -- or even permit citation to -- the Comments with respect to cases tried after September 1, 2006. Third, it is unclear whether *Dixon* has changed the standard for admission of conditionally relevant evidence under ER 104(b) and, if so, whether the new standard applies only in child abuse cases, criminal cases generally, or all cases.

For further analysis of the issues in *Dixon*, see The Law of Evidence in Washington §§ 103.053[a]--[c] (Reversible Error on Appeal); 104.04 (Conditional Relevancy); 613.04 (Prior Statements of Witnesses) (LexisNexis Matthew Bender).

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Robert Aronson joined the University of Washington School of Law faculty in 1975. Prior to coming to UW, he was a Teaching Fellow at Stanford Law School, and taught Civil Procedure at the University of San Diego Law School while clerking for Judge James Carter of the Ninth Circuit Court of Appeals. He is a nationally recognized expert in professional responsibility and his book, *The Law of Evidence in Washington*, is one of the leading treatises on the

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Leah A. Martin on Rocker v. KPMG LLP

2008 Emerging Issues 1216

Leah A. Martin on Rocker v. KPMG LLP

By Leah A. Martin

November 29, 2007

SUMMARY: It is often a substantial challenge (or impossibility) for plaintiffs to satisfy NRCP 9(b)s pleading-with-particularity requirement when the details of the fraudulent activity are uniquely within the knowledge of the defendants and/or third parties. The Nevada Supreme Court recently acknowledged this challenge, adopting a common sense approach as to the extent to which the details of fraudulent activity must be pled.

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ARTICLE: In Nevada, it can be a substantial challenge (or impossibility) for plaintiffs to satisfy Nev. R.C.P. 9(b)s pleading-with-particularity requirement when the details of relevant fraudulent activity are uniquely within the knowledge of the defendants and/or third parties. The Nevada Supreme Court recently acknowledged this challenge, adopting a more common-sense approach as to the extent that details of fraudulent activity must be pled. *Rocker v. KPMG LLP* [122 Nev. Adv. Op. 101, 148 P.3d 703 (2006)], provides useful information whether counsel is attempting to (1) navigate the tricky waters of pleading fraud, or (2) identify shortfalls in the pleading of an opponent.

Pleading Requirements in Nevada--Generally. Nevada is a notice pleading jurisdiction, in which it is generally adequate for a pleader to set forth a short and plain statement showing that the pleader is entitled to relief [Nev. R.C.P. 8(a)]. However, the standards for pleading fraud are more stringent, requiring that in claims for fraud or mistake, the circumstances constituting fraud or mistake be particularly identified, while [m]alice, intent, knowledge, and other conditions of mind of a person may be averred generally [Nev. R.C.P. 9(b)]. Traditionally, to satisfy this rule, the plaintiff has been required to plead in detail all averments to the time, the place, the identity of the parties involved, and the nature of the fraud or mistake [*Brown v. Kellar*, 97 Nev. 582, 583584, 636 P.2d 874 (1981)]. Particularized pleading of fraud is necessary so that defendants can effectively defend against the alleged fraud, rather than being forced to simply deny wrongdoing [*Rocker v. KPMG LLP*, 122 Nev. Adv. Op. 101, 148 P.3d 703, 708 (2006)] (citing *Ivory Ranch v. Quinn River Ranch*, 101 Nev. 471, 47273, 705 P.2d 673, 675 (1985); *Neubronner v. Milken*, 6 F.3d 666, 671 (9th Cir. 1993); *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985)). However, when *Rocker v. KPMG LLP* [122 Nev. Adv. Op. 101, 148 P.3d 703, 70810 (2006)] was issued in December 2006, the Nevada Supreme Court clarified that there may be circumstances when it is impracticable and therefore unnecessary to preliminarily plead every detail giving rise to a fraud cause of action.

When May Some Details of Fraud be Omitted? In *Rocker*, the Nevada Supreme Court adopted the looser pleading standard used by federal courts in cases when some or all of the circumstances constituting fraud are peculiarly within the defendants knowledge or possession [*Rocker v. KPMG LLP*, 122 Nev. Adv. Op. 101, 148 P.3d 703, 709 (2006)].

Why Is More General Pleading Allowed in Such Circumstances? The Nevada Supreme Court recognizes in *Rocker* that in cases where plaintiffs lack understanding of the specifics giving rise to the fraud claim because such information is in the possession of the defendants, the plaintiffs face a catch-22. [T]hey are required to file a complaint to enable them to conduct discovery to ascertain the relevant information they need, but they cannot file a complaint with sufficient particularity because they do not know the information possessed by the defendants [*Rocker v. KPMG LLP*, 122 Nev. Adv. Op. 101, 148 P.3d 703, 708 (2006)]. The relaxed pleading requirements are designed to avoid this dilemma and strike a balance when particularized pleading is not possible because the plaintiff cannot ascertain the relevant facts without formal discovery.

How to Avoid Dismissal for Failure to Plead Fraud With Particularity? Even in cases where the facts constituting fraud cannot be pled by the plaintiff because they are exclusively within the knowledge of the defendant (and possibly third persons), general pleading of fraud is still inadequate and would give rise to dismissal for failure to plead with particularity pursuant to Nev. R.C.P. 9(b). To withstand dismissal, the plaintiff must set forth the factual basis for his or her belief that a fraud has been committed [see *Rocker v. KPMG LLP*, 122 Nev. Adv. Op. 101, 148 P.3d 703, 708 (2006) (citing *Neubronner v. Milken*, 6 F.3d 666, 671 (9th Cir. 1993))]. Although not every circumstance may be known, the specific facts pled must give rise to a strong inference of fraud [see *Rocker v. KPMG LLP*, 122 Nev. Adv. Op. 101, 148 P.3d 703, 709 (2006) (citing *Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir. 1990))]. The Nevada Supreme Court augments the relaxed federal standard by requiring that the plaintiff assert that the relaxed standard is appropriate and that more particularized pleading is not possible at that time because the relevant facts are uniquely in the possession of the defendant [see *Rocker v. KPMG LLP*, 122 Nev. Adv. Op. 101, 148 P.3d 703, 709 (2006)].

What Then? On showing that more specific pleading of fraud is impossible, the plaintiff should be permitted to conduct discovery necessary to identify the facts constituting fraud [see *Rocker v. KPMG LLP*, 122 Nev. Adv. Op. 101, 148 P.3d 703, 710 (2006)]. Following discovery, the plaintiff should move to amend the complaint to plead the fraud claims with particularity in conformance with NRCP 9(b). At that point, the defendant may renew the NRCP 9(b) motion to dismiss [see *Rocker v. KPMG LLP*, 122 Nev. Adv. Op. 101, 148 P.3d 703, 710 (2006)].

The Bottom Line. The lesson to be learned from *Rocker* is that the pleading requirements of Nev. R.C.P. 9(b) are not set in stone. The Nevada judiciary recognizes that there are times when the who, what, when, where, and why of the case may not be readily apparent at the outset of litigation. A defendant who effectively conceals the details of fraudulent activity will no longer be allowed to avoid liability.

In light of the Nevada Supreme Courts holding in *Rocker*, a plaintiff wishing to state a claim for fraud should continue to identify as many of the particulars constituting fraud as possible, specify the facts that are unknown to the plaintiff at that time and why they are unknown, and assert that the plaintiff is entitled to take discovery to identify the missing facts. The particularized pleading requirements of Nev. R.C.P. 9(b) have not changed; *Rocker* merely gives plaintiffs an opportunity to identify the particulars. Best practice dictates that discovery as to the fraud claim be propounded at the earliest possible juncture. The cautious practitioner must be careful to demonstrate all efforts to obtain the necessary information, and timely seek leave to amend the complaint when the relevant facts come to light. Likewise, if it becomes apparent during discovery that the facts do not give rise to a claim for fraud, plaintiffs counsel should seek voluntary dismissal of the claim to avoid litigation sanctions and professional discipline.

Although *Rocker* may not calm the choppy waters of fraud pleading, it provides useful insight on how to effectively

navigate those waters. Care should be used at all times to follow the guidelines set forth in *Rocker*. If practitioners become lackadaisical in the manner in which they plead fraud, their claims will undoubtedly be dismissed.

For additional general information on the Nevada pleading requirements, see Nevada Civil Practice Manual, Ch. 8, *Pleadings, Amendments to Pleadings, and Supplemental Pleadings*, § 8.03 (Matthew Bender).

For additional information on the pleading requirements for fraud, see Nevada Civil Practice Manual, Ch. 8, *Pleadings, Amendments to Pleadings, and Supplemental Pleadings*, § 8.07 (Matthew Bender).

For jury instructions related to fraud, see Nevada Pattern Jury Instructions--Civil, 9.009.08 (Matthew Bender).

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Vairo on Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.

2008 Emerging Issues 1198

Vairo on Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.

By Georgene Vairo

November 29, 2007

SUMMARY: In the Argonaut decision, the Seventh Circuit interpreted several issues of an arbitration agreement under the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards. The main issue in the case was whether federal common law applies when interpreting the terms of an arbitration agreement under this Convention. This Emerging Issues Analysis focuses on the applicability of federal common law.

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ARTICLE: *HIF Bio, Inc. v. Yung Shin Pharms. Indus. Co.*, -- F.3d --, 2007 U.S. App. LEXIS 26329 (Fed. Cir. Nov. 13, 2007), involves the question whether 28 U.S.C. § 1447(d) precludes appellate review of a decision to remand state law claims supported by supplemental jurisdiction. This is a significant issue that is dividing the courts of appeals. As a matter of first impression for the circuit, the Federal Circuit parted ways with a number of its sister circuits by holding that a remand based on the district court's decision to decline to exercise supplemental jurisdiction is not reviewable on appeal.

Procedural Facts. *HIF Bio* involved a novel anti-angiogenic, anti-cancer application discovered by two Korean scientists. Two companies that obtained the rights to license the application sued a number of individuals and other companies alleging causes of action for violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) [18 U.S.C. §§ 1961 -1968], violations of rights and ownership of invention, slander of title, conversion, fraud, intentional and negligent interference with contractual relations and prospective economic advantage, breach of implied contract, unfair competition and fraudulent business practices, and unjust enrichment-constructive trust. The district court dismissed the RICO claim for failure to adequately allege a pattern of racketeering. The district court found that the rights and ownership of invention claims were state-law claims lacking an independent federal jurisdiction basis. Under the supplemental jurisdiction statute, 28 U.S.C. § 1367(c), the court then declined supplemental jurisdiction over all state-law claims because the preponderance of state law issues means that a state court is the proper venue to try the state law claims" and remanded the case to state court. The Federal Circuit dismissed the appeal, holding that it did not have appellate jurisdiction.

Review of Remand Decision Basics. 28 U.S.C. § 1447(d) provides that [a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." However, the Supreme Court has limited the scope of § 1447(d)'s non-reviewability principle. For example, in *Thermtron Products, Inc. v. Hermansdorfer*, 423

U.S. 336, 345-346, 96 S. Ct. 584, 46 L. Ed. 2d 542 (1976), the Court reasoned that § 1447(d) must be read in pari materia with, and thus be limited by the grounds enumerated in, 28 U.S.C. § 1447(c). Section 1447(c) requires that a motion to remand based on "any defect other than a lack of subject matter jurisdiction" be made within 30 days, and also requires the district court to remand if at any time before entry of final judgment it appears that the court lacks subject matter jurisdiction. In *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996), the Supreme Court thus clarified that § 1447(d) bars appellate review only if the remand decision is based on a lack of subject matter jurisdiction or a defect in the removal process. Accordingly, as in *Thermtron*, a remand decision based on an overly crowded docket was reviewable; and, as in *Quackenbush*, a remand decision based on abstention was reviewable.

So far, so good. If the remand decision is based on a defect in the removal process, which was not in issue in the *HIF Bio* case, or a lack of subject matter jurisdiction, § 1447(d) bars a review of a remand decision. If the remand decision is based on any other ground, § 1447(d) does not bar appellate review of the remand decision. Only one problem: Determining whether a remand decision is based on a lack of jurisdiction. That is the problem raised by *HIF Bio*.

Reviewability of Remand of Supplemental Claims. When a district court remands claims supported by supplemental jurisdiction because it is declining to exercise such jurisdiction, is the remand based on a lack of subject matter jurisdiction, which would bar appellate review of the decision? Most courts of appeals that have examined this question have ruled that 28 U.S.C. § 1447(d) does not act as a bar. Indeed, the Federal Circuit noted the Third Circuit opinion in *Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217, 223-224 (3d Cir. 1995), which so held, and cited the precedents from the Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits which agreed. These decisions were primarily based on a footnote in *Carnegie-Mellon Univ. v. Cohill* stating that [Section] 1447(c) . . . do[es] not apply to cases over which a federal court has pendent jurisdiction," 484 U.S. 343, 355 n. 11, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988). The circuits reasoned that if § 1447(c) does not apply to cases over which a federal court has pendent jurisdiction, a remand order based on declining supplemental jurisdiction also is not within the class of remands described in § 1447(c) and, therefore, is not subject to the bar on review in § 1447(d).

The law here was clear -- a remand based on a declination of supplemental jurisdiction was not barred by § 1447(d). This approach made sense. Assuming, as the claims in *HIF Bio* were, that the state law claims were so related to the federal claims asserted in the case that they would be supported by supplemental jurisdiction under 28 U.S.C. § 1367(a), the district court unquestionably had subject matter jurisdiction over those state law claims. The only relevant question then, would be whether the district court would decide whether to exercise such jurisdiction. 28 U.S.C. § 1367(c) provides that a district court "may" decline to exercise supplemental jurisdiction under certain circumstances. With all the circuits having weighed in on this issue, why would the Federal Circuit rule that § 1447(d) did bar review of remands based on § 1367(c)?

Supreme Court Raises Doubts. The Federal Circuit questioned the other circuits' reliance on the *Cohill* footnote because of more recent statements by the Supreme Court. In particular, the Federal Circuit noted the Court's statement in *Powerex Corp. v. Reliant Energy Servs., Inc.*, 127 S. Ct. 2411, 168 L. Ed. 2d 112 (2007): It is far from clear . . . that when discretionary supplemental jurisdiction is declined the remand is not based on lack of subject-matter jurisdiction for purposes of § 1447(c) and § 1447(d)." What *Powerex* adds to the supplemental jurisdiction issue is its holding that a remand order is unreviewable if it can be colorably characterized" as a remand based on lack of subject matter jurisdiction.

Federal Circuit Bars Review of Remands Based on Declination of Supplemental Jurisdiction. The Federal Circuit distinguished remands based on abstention, which are reviewable under *Quackenbush*, from remands based on declining supplemental jurisdiction. The court acknowledged that the considerations underlying abstention may in some cases be similar to those enumerated for declining supplemental jurisdiction under § 1367, and both are discretionary doctrines that allow a district court to decline jurisdiction. However, the court reasoned that the two types of remands are fundamentally different in that a court abstains from hearing claims over which it has an independent basis for

subject matter jurisdiction, such as federal question or diversity jurisdiction, while a court declines to exercise supplemental jurisdiction over a claim for which it has no independent basis for subject matter jurisdiction, i.e., state claims. Thus, declining supplemental jurisdiction strips the claims of the only basis on which the district court had jurisdiction. Without the cloak of supplemental jurisdiction," state claims must be remanded for lack of subject matter jurisdiction. The court concluded that because every § 1367(c) remand necessarily involves a predicate finding that the claims at issue lack an independent basis of subject matter jurisdiction, the remand can be colorably characterized as a remand based on lack of subject matter jurisdiction, and thus is within the class of remands described in § 1447(c) and for which appellate review is barred by § 1447(d).

Conclusion. The Federal Circuit decision is significant because it went against the grain of every previous court of appeals decision on the question whether remand decisions based on a declination of supplemental jurisdiction are reviewable. To the extent that *Powerex* can be read as reinvigorating the essence of 28 U.S.C. § 1447(d), and specifically Congress' goal of putting the reviewability of remand decision off-limits, the Federal Circuit may well result in other courts of appeals rethinking their approach. On the other hand, the Federal Circuit's approach seems to be contradicted by *Powerex* itself: That case unquestionably turned on whether or not the district court had the power to exercise jurisdiction, not whether it had discretion to decline to exercise that jurisdiction. Thus, *Powerex* is simply a case about whether the district court got the existence of subject matter jurisdiction question right -- a case involving precisely the type of potential appellate second guessing that Congress sought to thwart by enacting § 1447(d). Accordingly, the better reading of *Powerex* is that decisions to remand based on 28 U.S.C. § 1367(c) remain outside the 28 U.S.C. § 1447(d) bar.

References: 16-107 *Moore's Federal Practice -- Civil* § 107.44 [2][d]; 19-202 *Moore's Federal Practice -- Civil* § 202.11[5], 19-205 *Moore's Federal Practice -- Civil* § 205.08[1]

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Ogden on Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.

2008 Emerging Issues 1203

Professor Gregory Ogden on Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board

By Gregory L. Ogden

November 29, 2007

SUMMARY: This Emerging Issues Analysis analyzes the Courts ban on ex parte communications where the department prosecutor prepared a hearing report after the hearing and issuance of a proposed decision by the Administrative Law Judge and then submitting that report to the chief counsel of the Department before a final decision was reached by the director of the Department in that case.

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ARTICLE: California Third District Court of Appeal Enforces Ex Parte Communications Ban in California APA

Background. In *Chevron Stations Inc. v. Alcoholic Beverage Control Appeals Board* (2007) 149 Cal. App. 4th 116, 57 Cal. Rptr. 3d 6, the California Court of Appeal for the Third District holds the Department of Alcoholic Beverage Control violated provisions of the California Administrative Procedures Act (APA) [see Gov. Code § 11430.10] because the Department prosecutor sent an ex parte communication (prosecutor's hearing report) to the department decision maker prior to the time the decision maker decided whether or not to adopt the proposed decision of the administrative law judge. The Court of Appeal relied on the decision of the California Supreme Court in the *Quintenar* case [*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal. 4th 1, 50 Cal. Rptr. 3d 585, 145 P.3d 462]. In *Quintenar*, the California Supreme Court held that the Department of Alcoholic Beverage Control violated the ex parte communications provisions of the California Administrative Procedures Act by following the practice of having the department prosecutor prepare a hearing report after the hearing and issuance of a proposed decision by the Administrative Law Judge and then submitting that report to the chief counsel of the Department before a final decision was reached by the director of the Department in that case [see *Quintenar* for an expert commentary on that decision].

In *Chevron*, The Third District Court of Appeal holds that the ex parte communication violated the California Administrative Procedures Act even though the Department adopted the proposed decision of the administrative law judge. The Court of Appeal also holds that the licensee established a prima facie case of a violation of the ex parte communications prohibition of Gov. Code §§ 11430.10 to 11430.70. Once that showing was made, the Department had

the burden of proof to justify the department's practices under the APA, and the department failed to meet that burden of proof before the Board. The court rejected the department's efforts to make this showing for the first time on appeal. A first showing on appeal violates exhaustion of administrative remedies requirements, as well as the requirement that the appellate court review the agency decision based on the administrative record before the agency decision maker.

Purposes Under The California APA for Banning Ex Parte Communications Provisions. The ban on ex parte communications under the California Administrative Procedure Act applies to pending adjudicative proceedings under the APA and prohibits communications, direct or indirect, regarding any issue in the proceeding, to the presiding officer from insiders (employees or representatives of an agency that is a party to the proceeding) or outsiders (an interested person outside the agency) without notice and opportunity for all parties to participate in the communication [*Gov. Code* § 11430.10(a)]. The ban does not apply to communications made on the record at the hearing [*Gov. Code* § 11430.10(b)]. The ban starts either from the issuance of the agency's pleading, or from an application for an agency decisions, whichever is earlier [*Gov. Code* § 11430.10(c)].

There are several purposes to ex parte communication bans, including the requirement that the decision in the pending case be based exclusively on the record in the agency proceeding [*Gov. Code* § 11425.10(a)(6) (agency adjudicative decision must be based on the record), *Gov. Code* § 11425.50(c) (factual basis for decision must be based exclusively on the evidence in the record, or officially noticed facts)]. Without the ban, ex parte communications could influence the presiding officer but not be placed in the record of the proceeding.

Second, the ban ensures that adversary communications are made in circumstances that allow the opposing advocate to hear and respond to the communication, and to rebut the substance of the communication in front of the presiding officer [*Matthew Zaheri Corp. v. New Motor Vehicle Bd* (1997) 55 Cal. App. 4th 1305, 64 Cal. Rptr. 2d 705 (ex parte communications to ALJ related to fear for safety of counsel should have been disclosed but did not justify reversal)].

Third, in administrative law proceedings, it is common for agencies to communicate with those parties regulated by the agency in the rulemaking setting, and this ban on interested outsider communications makes clear that such communications are improper in administrative adjudications.

Fourth, the ban on insider ex parte communications helps to enforce an internal separation of functions requirements [*Gov. Code* § 11425.10(a)(4) (agency adjudicative functions separated from advocacy, prosecution, and investigative function); *Gov. Code* § 11425.30 (presiding officers can not adjudicate in agency proceedings if they have served in advocacy, investigative, or prosecutorial roles in the same matter, or they are subject to supervision of an agency employee with those responsibilities); *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal. 4th 1, 4-6, 50 Cal. Rptr. 3d 585, 145 P. 3d 462]. The purpose of internal separation of functions is to protect the impartiality of the agency adjudication process so that advocates, who often work for the same agency as the ALJ, do not unfairly influence the outcome of the agency proceeding, or do not get a second chance at influencing the agency decision maker [see also *Rondon v. Alcoholic Beverage Control Appeals Board* (2007) 151 Cal. App. 4th 1274, 60 Cal. Rptr. 3d 295 (prosecutor's ex parte report of hearing sent to department decision maker violated APA ban on ex parte communications; department decision reversed, no showing of prejudice required to justify reversal on the merits of the decision)].

Import of Chevron Decision. The *Chevron* decision is one of three recent California court opinions deciding ex parte communications questions under the California APA [for expert commentary on these related cases, see *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal. 4th 1, 50 Cal. Rptr. 3d 585, 145 P. 3d 462; *Rondon v. Alcoholic Beverage Control Appeals Board* (2007) 151 Cal. App. 4th 1274, 60 Cal. Rptr. 3d 295].

The *Chevron* decision is important because it clarified three questions in ex parte communications challenges under the California APA.

First, the ex parte communication violated the California APA regardless of whether the department decision maker rejected or adopted the proposed decision of the administrative law judge. Essentially, what this means is that the challenger does not have to show prejudice from the violation to win on appeal, and the normal rule in appellate practice of harmless error [see *FRCP Rule 61* (harmless error)] does not apply to ex parte communications violations. The usual appellate rule is that an appealing party has to show prejudice from a legal error to convince the appellate court to reverse the judgment or decision of the trial court or agency whose action is being appealed. Requiring proof of prejudice caused by legal error makes it more difficult for an appealing party to obtain a reversal of the trial court judgment or agency. Conversely, if the appellant does not have to show prejudice, then it is much easier to obtain a reversal in the same circumstances.

Second, once the challenger established a prima facie case of an APA ex parte communications violation, then the burden of proof shifted to the agency decision maker to show that there was no ex parte communications violation. The Department was unable to make that type of showing in this case. This is significant because it is uncommon in appellate practice for burden of proof requirements to shift from the appealing party (the challenger licensee in this case) to the responding party. It is even less common in administrative law appeals based on an agency administrative record when the responding party is the agency decision maker. Burden of proof shifting is much more common in trial court or equivalent agency process in which the rules of evidence permit the use of presumptions, allow prima facie case showings, and permit burden shifting. An agency that is subject to burden shifting in similar circumstances would have to anticipate this issue in time to get the rebuttal information into the administrative record, which did not happen in this case.

Third, the agency decision maker could not offer rebuttal evidence for the first time on judicial review because appellate review of the decision is limited to material that was part of the administrative record before the Board, and this evidence was not submitted to the board, and was not included in the administrative record. The requirement of a decision on the record is a procedural safeguard, and the requirement that the evidence be presented at the leave of Board review is designed to satisfy exhaustion of administrative remedies requirements, that the Board be given the opportunity to consider this evidence, and make a ruling on the issue. This would have given the Board the opportunity to correct a mistake, and make a ruling that might have avoided the need for an appeal.

Scope of Ex Parte Communication Ban and Remedies. The ban on ex parte communications under the California APA applies not only to presiding officers, but also to agency heads, who are decision makers [*Gov. Code* § 11430.70(a)]. The ban does not apply to certain types of communications [*Gov. Code* §§ 11430.20, 11430.30]. These include ex parte matters authorized by statute [*Gov. Code* § 11430.20(a)], procedure or practice matters, including continuances, that are not in controversy [*Gov. Code* § 11430.20(b)], technical assistance or advice given to the presiding officer by agency staff that has not participated in the proceeding as an advocate, investigator, or prosecutor [*Gov. Code* § 11430.30(a)], and communications to the presiding officer related to settlement proposals [*Gov. Code* § 11430.30(b)]. Remedies for violations include disclosure on the record by the presiding officer of the substance of the ex parte communication [*Gov. Code* § 11430.50], disqualification of the presiding officer [*Gov. Code* § 11430.60], and as noted in the California Supreme court decision, *above*, another remedy can be reversal of the agency decision on the merits.

For further discussion of the prohibition of ex parte communications in public administrative actions, see California Forms of Pleading and Practice § 473.28.

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ABOUT THE AUTHOR(S):

Gregory L. Ogden is a professor of law at Pepperdine University where he has taught since 1978. He teaches administrative law, civil procedure, professional responsibility, and remedies. He is a graduate of UCLA, (BA, cum laude) UC Davis school of Law (JD, Law Review Editor), and he has two LLM's, one from Temple University in legal education, and one from Columbia University in administrative law. He has been an administrative law consultant to the Administrative Conference of the United States, and to the California Law Revision Commission. He has taught administrative law for over 25 years, and was the principal author of *California Public Agency Practice*, (three volumes, Matthew, Bender & Co., Inc. 1989), and *California Public Administrative Law* (two volumes in *California Forms of Pleading and Practice*, (LexisNexis Matthew Bender), the leading treatise on California administrative law. In fall 2005, he completed a major revision of a State Administrative Law in California chapter (200 pages) for a multi volume treatise on *California Environmental Law and Land Use Practice* (LexisNexis Matthew Bender). He has authored several articles in the administrative law field, including most recently the following article in the Journal of the NAALJ: Ogden, Gregory L., "The Role of Demeanor Evidence in Determining Credibility of Witnesses in Fact Finding: The Views of ALJ's," 20 Journal of NAALJ 1 (2000). Professor Ogden was the 1999 NAALJ Fellowship recipient, and he presented his fellowship paper on demeanor evidence at the 1999 NAALJ Conference in Asheville, North Carolina.

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Mike Wilson on Suter v. Mazyck, 226 S.W.3d 837 (Ky. App. 2007)

2008 Emerging Issues 1166

Mike Wilson on Suter v. Mazyck, 226 S.W.3d 837 (Ky. App. 2007)

By Mike Wilson

November 28, 2007

SUMMARY: Summary judgment is appropriate when there is no material issue of fact. But unless there has been an opportunity for discovery, the nonmoving party may be unable to present controvertible evidence because there has not been a chance to discover and develop such evidence. The Court of Appeals of Kentucky, in *Suter v. Mazyck*, 226 S.W.3d 837 (Ky. App. 2007), explains why summary judgment should not be used to short-circuit full development of a case. This commentary, written by Mike Wilson, discusses the implications of this decision.

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ARTICLE: Analysis. In *Davis*, a homeowner sued a builder and a subcontractor claiming personal injuries related to mold exposure and alleging construction defects, fraud and negligence. The trial court allowed three peremptory challenges to each of the defendants. The homeowner argued that because the defendants engaged in common defense efforts, their interests were not antagonistic and therefore they were not entitled to separate preemptory challenges.

Davis, quoting *Sommerkamp v. Linton*, 114 S.W.3d 811 (Ky. 2003), listed factors to be considered in determining if co-parties have antagonistic interests. One factor is whether the co-parties have filed cross-claims. In *Davis*, the defendants had not filed cross-claims but nonetheless had antagonistic interests in the courts view. The court noted that the complaint charged separate acts of negligence, that the defendants had separate, independent counsel, and that each defendant had a different strategy for the case. *Davis* states that all factors identified in *Sommerkamp* are to be given due weight as the existence or absence of a single factor is insufficient to make a determination as to the reasonableness of [finding that interests are antagonistic]. Each factor must be weighed in the balance with the others. 231 S.W.3d at 773-4.

However, a few paragraphs later, relying upon the *Sommerkamp*, *Davis* also held that co-defendants interests are inherently antagonistic when apportionment applies, as it did in *Davis*. A question raised, then, is whether apportionment of fault, by itself, is sufficient to constitute antagonistic interests or is just one factor to weigh along with others.

Cases holding that no particular factor is necessary. *Roberts v. Taylor*, Ky., 339 S.W.2d 653 (1960) held that if defendants in a personal injury action are charged with independent acts of negligence, the interests of the defendants are most always antagonistic. The assertion of cross-claims merely formalizes the antagonism, but is not necessary for

a finding that interests are antagonistic.

Co-defendants who share a theory of the case may not have antagonistic interests. In *Davenport v. Ephraim McDowell Meml Hosp., Inc.* 769 S.W.2d 56 (Ky.App. 1988), a medical malpractice case against an anesthesiologist, hospital, and others, not only were no cross-claims filed, the co-defendants shared the same theory of the case. The Court of Appeals found the co-defendants interests were not antagonistic.

Sommerkamp v. Linton, 114 S.W.3d 811 (Ky. 2003), citing *Roberts* and *Davenport*, identified three elements to consider in determining if interests are antagonistic: 1) whether the co-parties are charged with separate acts of negligence; 2) whether they share a common theory of the case; and 3) whether cross-claims are filed. *Sommerkamp* also identified as relevant whether the defendants are represented by separate counsel, whether the alleged acts of negligence occurred at different times, whether the defendants have individual theories of defense, and whether fault will be subject to apportionment. 114 S.W.3d at p. 816 states that [a]ll of these factors are to be weighed by the trial court in determining if the defendants have antagonistic interests and thus are entitled to separate peremptory challenges. *Davis* quotes *Sommerkamp* on all of these points.

Is apportionment alone sufficient to demonstrate antagonistic interests? *Sommerkamp* also noted, however, that prior to the adoption of comparative negligence, and the enactment of Ky. Rev. Stat. Ann. 411.182, a defendant was required to cross-claim for contribution against joint tortfeasors pursuant to Ky. Rev. Stat. Ann. 412.030 or Ky. Rev. Stat. Ann. § 454.040. The adoption of Ky. Rev. Stat. Ann. 411.182, said the court, dispensed with the need for cross-claims:

Contemporary apportionment requirements including Ky. Rev. Stat. Ann. 411.182 provide that fault in a tort action is automatically subject to apportionment among the parties to the action. This statute renders a cross-claim for contribution, as well as a counterclaim for contributory or comparative negligence, needless. Ky. Rev. Stat. Ann. 411.182 deems codefendants that are charged with separate acts of negligence to be antagonistic because it requires apportionment of the total liability.

Sommerkamp, p. 817. How does adoption of Ky. Rev. Stat. Ann. 411.182 affect the question of antagonistic interests in a case like *Davenport*, where defendants share a theory of the case? *Sommerkamp* states at page 816 that

The [apportionment] system is inherently antagonistic because it requires codefendants to attempt to shift responsibility to each other. The Court of Appeals failed to consider the role of apportionment and the clear antagonism which is created by that method of assessing liability. . . [R]eliance on *Davenport* was misplaced. That case was decided prior to the adoption of the apportionment statute, Ky. Rev. Stat. Ann. 411.182.

Similarly, *Davis*, p. 774, says [t]he system of apportionment is inherently antagonistic.

Though neither *Sommerkamp* nor *Davis* expressly says so, the language in *Sommerkamp* and *Davis* could be argued to mean that apportionment is sufficient to create antagonistic interests without weighing other factors. If there is antagonism, *Sommerkamp* says, the clear language of rule [47.03] does not require the defendants to demonstrate a certain degree of antagonism, but only the existence of antagonism between the [parties] at the time of jury selection, in order to permit separate peremptory challenges. *Sommerkamp*, p. 816.

Practice Tips. Language in *Sommerkamp* and *Davis* can be used to make contrary arguments -- Athat apportionment alone is sufficient to permit separate peremptory challenges, and that apportionment is just one factor to

be weighed.

Illustrative examples:

Argument that apportionment is sufficient to create antagonistic interests. Apportionment alone is sufficient to create antagonistic interests because *Sommerkamp* says that Ky. Rev. Stat. Ann. 411.182 deems codefendants that are charged with separate acts of negligence to be antagonistic because the statute requires apportionment of the total liability. Other factors, therefore, do not matter because if there is antagonism, whatever the degree, separate peremptory challenges are permitted under *Sommerkamp*. Both *Sommerkamp* and *Davis* hold that apportionment is inherently antagonistic.

Argument that apportionment is just a factor to be weighed. Both *Sommerkamp* and *Davis*, after listing factors, including whether fault is to be apportioned, state that all factors should be given due weight. Neither case expressly states that apportionment is sufficient to require separate peremptory challenges without weighing other factors. Both cases make a point of examining facts, other than apportionment, that show interests are antagonistic, which would be unnecessary if apportionment alone were sufficient to determine the issue. Also, *Davis* expressly states that the existence or absence of a single factor is insufficient to make a determination.

Cross-References to Caldwell's Kentucky Form Book. Caldwell's Kentucky Form Book Form 19.14, Admonition to Jury; Caldwell's Kentucky Form Book § 130.00, Practice Context for Negligence; Caldwell's Kentucky Form Book Form 130.10, Answer Asserting Assorted Defenses

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Confidentiality Implications of the UT Uniform Mediation Act for Mediation

2008 Emerging Issues 1190

Tamara A. Fackrell on the Confidentiality Implications of the Utah Uniform Mediation Act for Mediation

By Tamara A. Fackrell

November 28, 2007

SUMMARY: Confidentiality mandated by the Utah Uniform Mediation Act can place parties and attorneys in a quandary unless they carefully consider the consequences of attorneys presence in mediation and in drafting mediation agreements. This Emerging Issues Analysis discusses practical suggestions to avoid common pitfalls and learn recommended procedures to make informed decisions regarding drafting agreements in mediation.

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ARTICLE: Setting the Scene. Bob and Cindy have engaged in a frenzied court battle for four years. While they were waiting in the lobby for mediation, the tension was so strong it was almost visible. Yet after the opening statement and a cooperative beginning, the parties began to let down their guard, work together, and emerge with a resolution. The attorneys were by their clients' sides, providing options, advising on the law, and encouraging the clients. The mediator was able to perform magic as the barriers of a four-year legal battle fell, resulting in a 10-page memorandum of understanding. But what if the mediation is agreed to orally but not signed or drafted in the mediation? Is the agreement binding? Is the communication in the mediation confidential? How can attorneys make binding agreements while also avoiding potential future controversy in court?

Mediation is most simply defined as a facilitated negotiation. Utah Code of Judicial Administration Rule 4-510, Utah Ethical Guidelines Rule 104, and Utah Code Annotated Section 78-31c-101 et seq. (new in 2006, known as the Utah Uniform Mediation Act) all govern alternative dispute resolution.

Confidentiality Under the Utah Uniform Mediation Act. The Utah Uniform Mediation Act (UUMA) was enacted effective May 1, 2006, with Utah the eighth state to adopt the Uniform Mediation Act. Confidentiality is of utmost concern to mediators and parties so as to ensure an open and candid mediation process. The mediation is treated as a confidential communication, in which the mediators, parties, attorneys, or third-parties involved cannot testify in future court proceedings regarding the mediation [see Utah Code Ann. §§ 78-31c-108, 78-31b-8(4), (5) (2006); Utah Rules Alt. Disp. Res. Rule 103; Utah Code Jud. Admin. Rule 4-510]. Before enactment of the UUMA, in *Lyons v. Booker* [982 P.2d 1142 (Utah App. 1999)], the Utah Court of Appeals had held that confidentiality of the mediation process is essential for mediation to function properly, and held that no party to the mediation could disclose any comments or information acquired during mediation or in mediation-related discussions.

The definition of mediation is vast, and includes "conduct or a statement, whether oral, in a record, verbal, or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator" [Utah Code Ann. § 78-31c-102(2) (2006)]. Thus, confidentiality extends to discussions that occur in preparation for mediation, during mediation, and after mediation regarding the case.

Exceptions to Confidentiality. The privilege of confidentiality can be waived if *all parties involved*, including the mediator agree to waive confidentiality, if a person makes a representation about mediation that prejudices another person but only to the extent for the person to respond to the representation, or if mediation was used to commit or conceal criminal activity [Utah Code Ann. § 78-31c-105 (2006)].

The UUMA also provides for a confidentiality exception "in an agreement evidenced by a record signed by all parties to the agreement" [Utah Code Ann. § 78-31c-106(1)(a) (2006)]. Therefore, if all parties sign the agreement, it is not held confidential. Further, the UUMA provides that there is no privilege of confidentiality if (1) the proceeding is available under public meeting laws to the public, (2) there is a threat of physical harm, (3) it used in a crime of violence, or (4) needed in a claim for professional mediator malpractice [Utah Code Ann. § 78-31c-106(1)(b)-(e) (2006)]. The UUMA also waives confidentiality if "there is a need for the evidence that substantially outweighs the interest in protecting confidentiality" [Utah Code Ann. § 78-31c-106(2)(b) (2006)].

Preparing Clients Before the Mediation. How can attorneys preserve confidentiality in the mediation process, yet reach workable agreements? Clients who are well prepared for mediation seem to more easily come to agreements, saving time and money. Some mediators will send a mediation mapping sheet for the parties to consider all of the issues involved, solutions to the issues, and alternatives to settlement. Mapping is most effective when each party will also consider the *other side's* positions, interests, and options put on the table in mediation. Attorneys should consistently use a form of mapping sheet they find effective. This will help prepare the parties for a reasonable bargaining range and collaborative options within the mediation. Preparation before mediation will set expectations for the party and will allow the mediation process to be productive.

Attorneys who give realistic settlement options before mediation help their clients significantly. Attorneys who tell their clients that their case is a "slam dunk" tend to create clients who are unwilling to make concessions, frustrating the process. A bargaining range that explores best- and worst-case scenarios is best in gauging mediation expectations for the parties.

Helpful Questions to Ask Before the Mediation. It is appropriate and recommended that attorneys coordinate with the mediator before the mediation about expectations in the case. This is essential for confidentiality, especially regarding communication before mediation and the mediation agreement. The following questions may be helpful:

1. Will the mediation have attorneys present?
2. Will the attorneys submit memoranda about issues in the case before the mediation?
3. If attorney memoranda will be provided, will the attorneys drafting them for the other side, or will they be confidential and just for the mediator?
4. Will the process be attorney-driven or party-driven?
5. Will the agreement be drafted during the mediation process?
6. Will the attorneys or the mediator draft the agreement?
7. If the mediator will draft the agreement, can he or she send "standard clauses" (i.e., payment of attorney's fees, future disputes, dispute resolution clauses) to the attorneys before the mediation so they can review them with the

clients?

8. If the agreement will be drafted after the mediation, should a short agreement outlining the future agreement be signed at the mediation?

9. If the attorneys will not be present at the mediation, should the parties sign the agreement?

10. If the attorneys will not be present at the mediation should they be available for a phone conference before any signatures?

Should Attorneys Be Present at the Mediation? Some clients choose to go to mediation without their attorneys because of the increased cost. If the parties sign the agreement in the mediation, but have not conferred with their attorneys, is the agreement binding or is the conference confidential? The UUMA arguably supports that the agreement is binding whether or not parties were able to talk to their attorneys, contemplating "an agreement evidenced by a record signed by all parties to the agreement" [Utah Code Ann. § 78-31c-106(1)(a) (2006)]. Therefore, it is advisable for attorneys to proceed with caution and take preparatory steps as described above if they will not attend the mediation.

Most mediators do different types of mediation forums. Sometimes there will be attorneys, other times only the parties will be present. The genre of the case is important in considering whether attorneys will be present, as well as the conflict-resolution styles of the parties. Parties who are less assertive generally do better with their attorneys present. Best practice dictates that the attorneys should either both attend or both not attend, although occasionally there is a good reason to have only one party's attorney attend.

Suggestions to Avoid Having Unsigned Agreement Protected by Confidentiality of UUMA. Many mediators prefer that the attorneys be present in the mediation. The mediation process can then be either a party-driven process with the parties performing most of the negotiation, or an attorney-driven process with the attorneys in charge. In the party-driven process, attorneys can be helpful in offering options, creating "soft reality checks," and advising clients on their legal rights. Attorneys should be respectful of the other party, and refrain from name-calling and excessive haranguing. If the agreement is signed with the parties and attorneys present, there will be little dispute as to the binding nature of the agreement.

However, if there is no signature in the mediation, the confidentiality dilemma arises [see Utah Code Ann. § 78-31c-106(1)(a) (2006)]. One option includes having the parties sign a short agreement during the mediation with the main agreed points, then having the mediator or attorney draft a formal agreement after the mediation. If the agreement is not signed during the mediation, there is the potential for it to crumble under uncertainty afterward. This is a risk attorneys should discuss with their clients. Sometimes it is best to sign the agreement in the mediation; other times it may be best to give the client time to think about the agreement before signing it. If the agreement is not signed in mediation, there is a possibility for future negotiation and also future deadlock, and the potential agreement may become ensnared in the UUMA confidentiality clause.

If the attorneys are not present at the mediation, counsel should be available for a short phone conference afterward to advise the client before signing the documents. Counsel also may advise the mediator that they would like to review the final documentation before it becomes binding. Most mediators will be flexible and adapt the process given the attorneys' input. Mediators can also begin with the parties and have the attorneys enter the process later at an appropriate time. This can save the client money but ensure the parties have counsels' advice as they make important mediation decisions.

These practical suggestions should help to circumvent the effect of possible confidentiality on potential, yet unsigned, mediated agreements. Attorneys should consider whether they will attend the mediation process and whether the mediation agreement will be signed in the mediation or later, after further consideration. Failure to consider these implications in preparation for mediation can have dire consequences.

For discussion of alternative dispute resolution in Utah, including mediation, see Utah Civil Practice, Ch. 1, *Overview of Utah's Legal System*, § § 1.08 [13] (Matthew Bender).

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ABOUT THE AUTHOR(S):

Tamara A. Fackrell is a Utah attorney mediator. She graduated cum laude from BYU Law School and is part-time faculty at the Law School teaching mediation. She received the Phi Alpha Delta Professor of the Year Award in 2006, and supervises four mediation undergraduate classes at BYU in Marriage Family Human Development, Social Work, Pre-Law, and Psychology. She received a bachelor's degree at BYU magna cum laude in psychology with a minor in communications, and helped start the mediation program at Utah Valley State College.

Ms. Fackrell has had a private mediation practice focusing on divorce and domestic mediation since 1997. She helped initiate the Victim Offender Mediation Program in the Fourth District Juvenile Court and the Provo School District Truancy Program. She is a Master Mediator and Primary Trainer for the State of Utah and performs certifications in mediation for professionals. Tamara has written many curricula to teach youth communication, mediation, and negotiation skills. Ms. Fackrell was director of Community Dispute Resolution Services. She received an honorary award from the Juvenile Justice Services and the Slate Canyon Youth Program in 2004 and 2005 and was a Zion's Wow Award Winner in 2005.

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Grace V.B. Garcia on Powell v. Stevens, 69 Mass. App. Ct. 87 (2007)

2008 Emerging Issues 1134

Grace V.B. Garcia on Powell v. Stevens, 69 Mass. App. Ct. 87 (2007)

By Grace V.B. Garcia

November 27, 2007

SUMMARY: In *Powell v. Stevens, 69 Mass. App. Ct. 87 (2007)*, rev. denied, 449 Mass. 1109 (2007), the Appeals Court held that the filing of a lis pendens memorandum in connection with litigation affecting the title to real estate lie[s] within the absolute privilege afforded judicial proceedings in Massachusetts. This Emerging Issues Analysis discusses the implications of this important decision.

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ARTICLE: In *Powell v. Stevens, 69 Mass. App. Ct. 87 (2007)*, rev. denied, 449 Mass. 1109 (2007), the Appeals Court held that the filing of a lis pendens memorandum in connection with litigation affecting the title to real estate lie[s] within the absolute privilege afforded judicial proceedings in Massachusetts. Thus, although the use of an absolute privilege is a question of law to be decided by the court, practitioners should be aware that an absolute privilege provides a complete defense to a defamation suit, even if the offensive statement is made in bad faith.

Background for the Courts decision. Lis pendens is based on Mass. Gen. Laws. ch. 184, § 15. Pursuant to that statute, in order for a litigation that will affect the title to real property to have any effect on non-parties, a memorandum of lis pendens must be filed with the appropriate registry of deeds to notify prospective buyers or interested parties that the property is part of a litigation.

In *Powell*, the plaintiff brought an action for breach of contract, rescission and other related claims based on a belief that the defendants had obtained a discharge of a property mortgage fraudulently. 69 Mass. App. Ct. at 88. At the same time as filing the complaint, the plaintiff obtained an ex parte lis pendens, which she recorded with the appropriate registry of deeds. 69 Mass. App. Ct. at 88. In response to the complaint, the defendants filed a counterclaim for slander of title due to the filing of the lis pendens. A claim for slander of title is essentially a defamation claim involving a false and malicious statement concerning a persons property. *Minovitch v. Battin, 2005 Mass. Super. LEXIS 351* at *14 (July 15, 2005). At trial, the court granted the defendants motion for a directed verdict on the underlying claims. After the trial, the court granted plaintiffs summary judgment on defendants counterclaim for slander. The Appeals Court reviewed this case to determine whether the absolute privilege applies to slander claims based on the filing of lis pendens, as such question was one of first impression that had had never been reviewed previously by a Massachusetts

appellate court. *Powell*, 69 Mass. App. Ct. at 87-88.

Lis Pendens Hold an Important Role. Lis pendens is not meant to assist either side in the litigation, but rather its primary purpose is to give third parties notice that the property is involved in a lawsuit. *Powell v. Stevens*, 17 Mass. L. Rep. 592 (Mass. Super. Ct. 2004). Lis pendens is appropriate on any action affecting title to real estate. As such, lis pendens may be appropriate in many types of claims such as those involving fraud, breach of contract, rescission, a claim to quiet title, adverse possession, a mechanics lien, or a declaratory judgment claim.

Lis pendens serves an important public policy function in preventing further disputes that could be made by prospective buyers who had no notice of the litigation. Specifically, by giving notice to prospective buyers, mortgagees, tenants, or users of real estate, it prevents further disputes and resulting claims and litigation from those parties who would have acted to purchase, to accept a security interest in, or to lease or use, the contested real estate if they had lacked notice of its prior involvement in litigation. The prevention of such unnecessary conflict and compounding lawsuits furnishes a strong practical purpose for the lis pendens. Exposure of the process to damages liability would tend to chill its use and to harm its purpose. *Powell*, 69 Mass. App. Ct. at 90.

The Absolute Privilege Provides a Complete Defense. Generally, the law provides an absolute privilege to all statements, whether oral or written, that are made during the course of a judicial proceeding, preventing any action based on those statements. See Restat 2d of Torts, §§ 586 and 587. Thus, [a]n absolute privilege provides a complete defense to a defamation claim even if the offensive statements are uttered maliciously or in bad faith, so long as the challenged remarks are relevant or pertinent to the judicial proceeding. *Powell v. Stevens*, 17 Mass. L. Rep. 592 (Mass. Super. Ct. 2004). Defendants opposed the protection of the absolute privilege, arguing that the privilege only attaches to statements made as part of the litigation. The filing of a lis pendens, which is optional, is not significantly connected to litigation, as it is not necessary to the judicial proceeding itself. Plaintiff, on the other hand, argued that the filing of a lis pendens is nothing more than a reiteration of the information already set forth in the case. In its decision, the court determined that the filing of lis pendens is so close to the underlying litigation that it falls within the protections provided by the judicial proceedings. *Powell*, 69 Mass. App. Ct. at 90.

Massachusetts has now followed many other jurisdictions that have faced this question. Alaska, Florida, California, Mississippi, Montana, New Jersey, New Mexico, Rhode Island, Texas and Utah have all concluded that the absolute privilege extends to the filing of a lis pendens memorandum. 69 Mass. App. Ct. at 89 n.5. In holding the absolute privilege applies, these courts have used the following justifications:

(1) with few exceptions, any publication made in judicial proceedings enjoys an absolute privilege from subsequent claims of defamation; (2) the only purpose of recording a notice of lis pendens is to put prospective buyers on constructive notice of the pendency of the litigation; (3) the notice of lis pendens is purely incidental to the action in which it is filed, refers specifically to that action, and has no existence apart from that action; and (4) the recording of a notice of lis pendens is in effect a republication of the proceedings in the action and is, therefore, accorded the same absolute privilege as any other publication in that action.

69 Mass. App. Ct. at 89-90. Thus, these courts, like Massachusetts have found a connection between lis pendens and the judicial proceeding it refers to.

Strategic Consideration. When there is a claim involving the title to real property, plaintiff should always obtain a lis pendens and file it with the appropriate registry of deeds in order to give notice to prospective purchasers. The lis pendens itself must include a legal description of the real property and give a specific description of the lawsuit in

which the property is involved. Practitioners should be careful to ensure that they include all material facts in their complaint underlying the lis pendens.

If defendant takes the position that the lis pendens has been filed wrongly, the best course of action is not to file a counterclaim based on slander, but first to determine whether it is appropriate to move for dissolution of the lis pendens and seek dismissal of the underlying claim. *See* Mass. Gen. Laws ch. 184, § 15(c). If the defendant is successful, the defendant is entitled to reasonable attorney fees and costs. Mass. Gen. Laws ch. 184, § 15(c). If dismissal is not appropriate, a defendant should consider whether there are other theories of law, such as interference with contact, abuse of process, malicious prosecution, or frivolous or bad faith claims, that are appropriate counterclaims for the particular fact pattern. With these alternative defense strategies, the defendant may be able to recover attorney fees. Mass. Gen. Laws ch. 184, § 15(c). *See also* Mass. Gen. Laws ch. 231, § 6F. The attorney should be aware, however, that in some cases the action may be brought by a judgment proof plaintiff. Thus, although defendants may be able to obtain fees, they should evaluate the plaintiffs ability to pay.

Thus, while *Powell* has effectively foreclosed counter-claims for slander of title based on the contents of a lis pendens, other remedies are available to defendants who believe the lis pendens is inappropriate. At the same time, the court reiterated the value of lis pendens by affording plaintiffs the opportunity to protect a potential resource from which to satisfy a judgment and put the public on notice of actions that may affect title.

Cross References. MA Pleading and Practice §§ 3.1, 83.1.2.

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Stevens on Trends in E-Discovery

2008 Emerging Issues 2949

Sandra Tvarian Stevens on Trends in E-Discovery One Year After the Amendment of the Federal Rules of Civil Procedure

By Sandra Tvarian Stevens

November 26, 2007

SUMMARY: In her analysis of Trends in E-Discovery One Year After the Amendment of the Federal Rules of Civil Procedure, Wiley Rein, LLP litigation partner, Sandra Tvarian Stevens, Esq., discusses e-discovery "best practices" and provides practical advice for corporate litigants, including insurers, on topics such as: knowing your preservation obligations, understanding the consequences of failing to Meet E-Discovery obligations..

PDF LINK: Premium Emerging Issues Commentary (\$)

ARTICLE: December 1, 2007 will mark the first anniversary of the amendments to the Federal Rules of Civil Procedure that relate to the production of electronically stored information (ESI). While corporate litigants and their counsel have responded to the amendments in different ways, with some companies attempting to re-evaluate and streamline their existing records management and retention processes in advance of future litigation, and others responding to electronic discovery (e-discovery) issues as they have arisen in the context of particular cases, a consensus has started to emerge with respect to certain best practices that corporate litigants should follow to comply with their e-discovery obligations.

Like other businesses, insurance companies have undertaken to make sense of, and comply with, the new requirements in the past year. Unlike other businesses, however, insurers are often in the unique position of having to address electronic discovery issues on two separate fronts: (1) in the context of litigation in which they themselves are parties; and (2) when defending, or funding the defense of lawsuits brought against their policyholders by third parties. Thus, unlike many other corporate litigants, some insurers are finding themselves monitoring not only their own compliance with the new e-discovery rules, but also their policyholders ability to abide by the amended rules.

Knowing Your Preservation Obligations. Any discussion of e-discovery best practices must begin with an understanding that while the e-discovery rules may be new, the duty to preserve information that is at the heart of these requirements is not. In fact, courts have long imposed certain preservation obligations on litigants. [See, e.g., *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (quoting *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001) (additional citations omitted) ("The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation."); *Silvestri v. GMC*, 271 F.3d 583, 591 (4th Cir. 2001) ("The duty to preserve material evidence arises not

only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.".)] Therefore, because the duty to preserve attaches when litigation reasonably can be anticipated, it may arise even before the formal filing of a lawsuit. "While a litigant is under no duty to keep or retain every document in its possession, it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request." *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003), quoting *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 (D.N.Y. 1991) (additional citations omitted).]

Although the amended Federal Rules do not change this preservation obligation, the increased focus on electronically stored information has caused corporate litigants, including insurers, to be more sensitive to the manner in which they manage their electronically stored information. As a result, many businesses have responded to the amendments by undertaking an evaluation of their existing records management and retention processes in advance of litigation. However, others, including insurance companies who were in the midst of ongoing litigation at the time the amendments were enacted, often have not been afforded the opportunity to address many of these issues proactively. The good news is that by now, many corporate litigants have completed their e-discovery compliance analysis, and as a result should be better prepared to respond to future e-discovery requests.

Understanding the Consequences of Failing to Meet Those Obligations. Much of the current case law addressing e-discovery focuses on the imposition of sanctions on parties who have failed to retain documents or institute litigation holds. While corporate litigants understand that the stakes of failing to meet their e-discovery obligations can be high, they are also coming to the realization that courts view sanctions as a measure of last resort for particularly egregious conduct.

Generally speaking, when existing document retention policies are applied consistently, courts will not penalize a company if electronically stored information is deleted pursuant to a good faith document retention policy that was in effect prior to the time that litigation began. [See, e.g., *Floeter v. City of Orlando*, 2007 U.S. Dist. LEXIS 9527 (D. Fla. Feb. 9, 2007) (refusing to impose sanctions against defendant and finding no bad faith destruction of information where destruction was pursuant to pre-existing procedures that allowed for over-writing of back up tapes and hard drives).] However, once litigation begins, parties must review and assess their document retention policies to ensure that information that may be relevant to the litigation is not lost. As one federal court recently explained, [w]hile the new amendment to *Rule 37 of the Federal Rules of Civil Procedure* indicates that, absent exceptional circumstances, a court may not impose sanctions on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system, it is clear that this Rule does not exempt a party who fails to stop the operation of a system that is obliterating information that may be discoverable in litigation. [*Disability Rights Council of Greater Wash. v. Wash. Metro. Transit Auth.*, 242 F.R.D. 139, 146 (D.D.C. 2007)].

Thus, courts have imposed sanctions on parties who have neglected to suspend routine document retention and destruction policies in a timely fashion, or who have failed to disable default e-mail deletion settings on their computers once litigation is reasonably anticipated. [See, e.g., *Quantum Communs. Corp. v. Star Broad., Inc.*, 473 F. Supp. 2d 1249 (S.D. Fla. 2007) (awarding default judgment and monetary sanctions against defendant for bad faith discovery conduct, including deletion of e-mails defendant asserted was part of its routine deletion practice, that court found hampered the ability of Plaintiff to present its claim on the central issue of this case); *Gordon Partners, et. al. v. Blumenthal (In re NTL, Inc. Sec. Litig.)*, 244 F.R.D. 179 (S.D.N.Y. 2007) (awarding adverse inference and attorneys fees where many requested documents and e-mails previously existed, but never were produced, presumably because they were discarded and because certain employees were free to retain e-mails or discard them to suit their needs).]

Once litigation is reasonably anticipated or has begun, it also is crucial to institute a litigation hold that identifies

the sources of information that must be preserved. Courts have long required companies to ensure that the litigation hold is communicated to key employees likely to have information relevant to the dispute or litigation and have further required companies to issue periodic reminders during the course of the litigation. [*Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 437 (S.D.N.Y. 2003)]. Courts have sanctioned parties who have failed to institute appropriate litigation holds. See, e.g., *Reino de Espana v. Am. Bureau of Shipping*, 2006 U.S. Dist. LEXIS 81415, at *14 (S.D.N.Y. 2006) (partys belated issuance of a litigation hold, particularly where [i]ndividual users determine how long emails are preserved led to the conclusion that relevant evidence had been lost).

Because insurers can be involved in litigation not only on their own behalf, but also in third-party litigation where they are defending or funding the defense of their policyholders, some insurers have responded to the amended rules by first reviewing their own document retention practices and litigation hold policies, and then by taking the additional step of monitoring the document retention practices and litigation hold policies that their policyholders have instituted.

Getting the Answers Early. Another emerging point of agreement with respect to electronic discovery is that the meet and confer requirements set forth in *Fed. R. Civ. P. 26(f)*, which obligate parties to meet and confer about issues such as disclosure and discovery of electronically stored information at their initial meet and confer conference, mean that it is never too early to address issues relating to electronically stored information. This early identification requirement has received much attention because the discovery agreed to by the parties at the *Fed. R. Civ. P. 26(f)* conference may be incorporated into a scheduling order that will set the parameters for the parties discovery obligations. [See, e.g., *In re Celexa & Lexapro Prods. Liab. Litig.*, 2006 U.S. Dist. LEXIS 91590, at *10 (E.D. Mo. Nov. 13, 2006) (entering parties agreed order that responsive electronically stored information will be obtained only from an active IT environment, and that absent some exceptional circumstance and a demonstration by plaintiffs of some substantial need, defendants [would] not be required to restore any backup tapes.).] The need to identify electronically stored information early is further underscored by *Fed. R. Civ. P. 26(a)(1)(B)* which requires that each party produce any electronically stored information in its possession, custody or control which it may use to support its claims or defenses at the time it makes its initial disclosures.

Using Your IT Department and Outside Vendors Wisely. Corporate litigants would also tend to agree that the increase in e-discovery has given rise to a growing litigation role for information services departments, and in some cases, outside vendors specializing in e-discovery. Unlike paper files, electronically stored information can exist in many different formats. This can include, on the one hand, active or online data such as data residing on a computer hard drive; near-line data, such as CD-ROMs that are used to store removable data; and archived data, including magnetic tape data often used to store additional copies of data in the event of a disaster. It can also include, on the other hand, back-up tapes that contain vast volumes of data typically organized in a manner that is not conducive to easy retrieval; and erased or damaged data that can only be recovered at a significant cost or expense.

Given the broad range of media on which electronic information is stored, parties are finding that in order to comply with discovery obligations they need the assistance of technology specialists to answer questions such as:

- . Where is the information stored?
- . What format is used to store the information?
- . How easy or difficult will it be to retrieve the information?
- . What are the system settings and defaults?

. What archiving and backup systems are being used?

. In what format will the information be produced?

As technology continues to evolve, it seems likely that a company's internal IT role, as well as that of outside e-discovery vendors will continue to expand.

While it is advisable to decide early into the litigation whether it will be necessary to use an outside e-discovery vendors services to ensure that the vendor has adequate time to retrieve and process the electronic information, it is not always possible to know at the outset how simple or complex the search for, and retrieval of, electronic information may be in a particular case. Sometimes a party may not know until after it has started the process of searching for and retrieving the requested information whether the assistance of an outside e-discovery vendor will be needed. In that regard, parties should be aware that courts have not been sympathetic to situations where a party has decided to hire an outside vendor late in the litigation and has failed to provide a reason why it did not do so sooner. [See, e.g., *Synergy Tech & Design, Inc. v. Terry*, 2007 U.S. Dist. LEXIS 34463, at *15 (N.D. Cal. May 2, 2007) (finding that [t]here is no explanation in the record justifying the substantial delay in initiating the forensic search for responsive documents which was begun shortly before submission of defendants opposition to the motion to compel; and awarding costs for the motion to compel against defendant).]

In addition, courts are growing increasingly less tolerant of vendor errors, particularly where parties and their counsel have failed to properly monitor the vendors work. As one federal court recently noted, the [u]ltimate responsibility for ensuring the preservation, collection, processing, and production of electronically stored information rests with the party and its counsel, not with the non-party consultant or vendor." [See, e.g., *In re Seroquel Prods. Liab. Litig.*, 2007 U.S. Dist. LEXIS 61287, at *49 n.14 (M.D. Fla. Aug. 21, 2007) (citations omitted).] Thus, where outside vendors are used, parties and their counsel need to ensure that they adequately supervise the vendors efforts to locate, retrieve or produce responsive electronically stored information.]

Determining Whats Reasonably Accessible and Whats Not. The Federal Rules of Civil Procedure recognize [] that the right to conduct discovery is not absolute. [See, e.g., *Cache La Poudre Feeds, LLC v. Land O'Lakes Farmland Feed, LLC*, 244 F.R.D. 614 (D. Colo. 2007).] In that regard, *Fed. R. Civ. P. 26(b)(2)(B)* recognizes that electronically stored information may have differing levels of accessibility and allows parties to seek to limit production of electronically stored information from sources that are not reasonably accessible because of undue burden or cost. As the *Cache La Poudre* Court explained, [a]s of December 2006, a party responding to discovery requests must identify but need not produce electronically stored information that is not reasonably accessible because of under burden or cost. [*Cache La Poudre Feeds, LLC v. Land O'Lakes Farmland Feed, LLC*, 244 F.R.D. 614 (D. Colo. 2007).] Thus, corporate litigants and their counsel increasingly are coming to the realization that in assessing the scope of potentially relevant information, it is important to determine at the outset whether that information is reasonably accessible. If an agreement can be reached with opposing counsel that data that is not reasonably accessible does not need to be produced, the potential exists for significant costs savings because resources will not need to be devoted to restoration of such relatively inaccessible data.

However, the assertion of undue burden or cost by one side does not bar the other from continuing to seek discovery of the requested information. Rather, *Fed. R. Civ. P. 37(a)(2)(B)* requires the parties to attempt to meet and confer about the requested information before seeking court intervention. [See, e.g., *Emmerick v. Penley/Groseclose*, 2007 U.S. Dist. LEXIS 59147 (E.D. Tenn. Aug. 6, 2007) (denying motion to compel electronic discovery where parties had failed to meet and confer about the requested discovery). As one court has noted, [i]t is vitally important that counsel confer with one another in good faith, and so represent to the Court, before taking up Court time. [See, e.g., *In re Presto*, 358 B.R. 290, at *6 (Bankr. S.D. Tex. 2006) (denying motion to compel where counsel had pointed out flaws in written deposition answers to opposing counsel, but had failed to meet and confer with opposing counsel prior to

filing the motion).] The responding party bears the burden of demonstrating that the information is not reasonably accessible because of undue burden or cost. [*Fed. R. Civ. P. 26(b)(2)(B)*.]

Even if the responding party meets its burden and demonstrates undue burden or cost, the court may nonetheless order discovery from such sources if the requesting party shows good cause. [*Fed. R. Civ. P. 26(b)(2)(B)*.] However, in making that determination, the court must consider the limitations of Rule 26(b)(2)(C) which requires the Court to limit discovery based on a number of factors. Those include, *inter alia*: (1) whether the information is available from other less burdensome or less expensive sources; (2) whether the requesting party has had ample opportunity to obtain the information sought; or (3) whether the burden or expense would outweigh the likely benefit of the proposed discovery, taking into account the importance of the information, the needs of the case, and the parties resources.

In reviewing these factors, some courts have instructed parties and their counsel to report back to the court with specific information about the discovery sought prior to making any ruling as to whether the requested information should be produced. For example, in *Apsley v. Boeing Co.*, 2007 U.S. Dist. LEXIS 5144, at *22 (D. Kan. Jan. 17, 2007), the plaintiffs argued that the benefits of the electronic discovery they had requested from the defendants outweighed the defendants burden argument. The court advised the parties that it would set the matter for a hearing because it required additional information to better evaluate the requested discovery. In so doing, the court ordered the parties, at a minimum, to address issues such as:

- . The manner in which plaintiffs formulated a proposed search protocol for the e-mails;
- . The number of persons the e-mail search would involve;
- . Whether the number of search terms used would increase the costs of discovery;
- . The estimated costs associated with locating and searching for the requested e-mails;
- . The specific benefits that the requested discovery would provide;
- . Who should bear the costs of the requested discovery; and
- . Whether the requested discovery could be obtained in some other more efficient manner.

[*Apsley v. Boeing Co.*, 2007 U.S. Dist. LEXIS 5144, at *22 (D. Kan. Jan. 17, 2007)].

Courts are also looking closely at whether a party has failed to take timely and adequate steps to preserve the disputed electronic information in easily accessible form. [See, e.g., *Disability Rights Council of Greater Wash. v. Wash. Metro. Transit Auth.*, 242 F.R.D. 139, 147 (D.D.C. 2007) (While the newly amended Federal Rules of Civil Procedure initially relieve a party from producing electronically stored information that is not reasonably accessible because of undue burden and cost, I am anything but certain that I should permit a party who has failed to preserve accessible information without cause to then complain about the inaccessibility of the only electronically stored information that remains.). [See also *Quinby v. WestLB AG*, 2006 U.S. Dist. LEXIS 64531, at *29-30 (S.D.N.Y. Sept. 5, 2006)] (finding that where a party has create[d] its own burden or expense by converting into an inaccessible format data that it should have reasonably foreseen would be discoverable material, it should not be permitted to take unfair advantage of a self-inflicted burden by attempting to shift[] part of the costs of [the] undoing to the other side).]

The amended federal rules do not define what is or is not reasonably accessible. Thus, courts increasingly are being asked to assist parties in determining whether a particular category or type of electronically stored information is reasonably accessible or not. These decisions have held generally that a finding of inaccessibility must be premised upon the existence of undue burden or cost. [See, e.g., *Pipefitters Local No. 636 Pension Fund v. Mercer Human Res. Consulting, Inc.*, 2007 U.S. Dist. LEXIS 52169, at *4-5 (E.D. Mich. July 19, 2007) (Under the electronically stored

information amendment to *Fed. R. Civ. P. 26(b)(2)(B)*, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost.). See also *Semsroth v. City of Wichita*, 239 F.R.D. 630, 637 (D. Kan. 2006) (the Amendment to [*Fed. R. Civ. P. 26(b)(2)(B)*] makes clear that any inaccessibility must be because of undue burden or cost.); *Cache La Poudre Feeds, LLC v. Land O'Lakes Farmland Feed, LLC*, 244 F.R.D. 614 (D. Colo. 2007) (stating that back-up tapes containing archived data may be one source of information that is not reasonably accessible because of undue burden or cost); *Ameriwood Indus., Inc. v. Liberman*, 2007 U.S. Dist. LEXIS 10791, at *6 (E.D. Mo. Feb. 13, 2007) (denying broad discovery request for all documents and communications regarding plaintiff's business during the relevant time period based on its finding that "the information is not reasonably accessible because [defendant's] request is unduly burdensome").]

Like other businesses attempting to keep up with the pace of changing technology, insurance companies periodically update their computer systems and software. Some insurers may store data on a legacy computer system, or other system that uses software and/or hardware that has become obsolete. At least one court has recognized that as computer systems and software continue to evolve it may become more difficult to retrieve electronic information stored in an earlier legacy system. [See, e.g., *In re Seroquel Prods. Liab. Litig.*, 2007 U.S. Dist. LEXIS 5877, at *12 (M.D. Fla. Jan. 26, 2007) (equating legacy electronically stored information with data that is inaccessible; entering case management order governing [i]naccessible and/or legacy electronically stored information; and requiring parties to confer regarding inaccessible electronically stored information prior to seeking intervention from the court). As old software and systems become obsolete and new software and applications evolve, it appears likely that courts increasingly will be asked to tackle the issue of whether or not particular data is reasonably accessible.

Conclusion. A year after the enactment of the amended Federal Rules of Civil Procedure, parties, their counsel and even courts continue to grapple with the ever-expanding role that electronically stored information plays in today's litigation environment. Most companies, insurers included, have now assessed or re-evaluated their existing records management and retention processes, either in advance of litigation, or while in the midst of it. In the process, corporate litigants have discovered not only that they need to understand their preservation obligations and the consequences of their failure to meet their discovery obligations, but also that practical limitations on the extent of permissible electronic discovery exist and that the Federal Rules provide parties with reasonable means to impose those limitations. However, while certain best practices are beginning to emerge with respect to how e-discovery should be conducted, the changing nature of technology makes it a near certainty that those practices will need to be periodically reviewed in order to keep pace with advances in technology.

For additional information about electronic discovery issues of particular interest to insurers, see Sandra Tvarian Stevens, *E-Discovery: Competing Considerations for Insurers and Policyholders*, published in *Coverage*, LexisNexis, Vol. 17, No. 4 (March/April 2007).

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Sandra Tvarian Stevens is a partner with the law firm of Wiley Rein LLP in Washington, DC, and a member of the firm's insurance and litigation practice groups. Ms. Stevens has particular expertise in complex litigation before state and federal courts and in alternative dispute resolution and arbitration proceedings involving insurance and reinsurance claims. She regularly counsels clients with respect to preservation and production of electronically stored information. Ms. Stevens is a frequent author and speaker on insurance, reinsurance and electronic discovery issues. She received her B.A. from American University *magna cum laude* and her J.D. from American University's Washington College of Law *summa cum laude*.



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Douglas R. Richmond on Defense Lawyers Malpractice Liability to Excess Insurers

2008 Emerging Issues 2951

Douglas R. Richmond on Defense Lawyers Malpractice Liability to Excess Insurers

By Douglas R. Richmond

November 26, 2007

SUMMARY: In his analysis of Defense Lawyers' Malpractice Liability to Excess Insurers, Senior Vice President of Aon Risk Services, Douglas R. Richmond, Esq., discusses the rise in malpractice suits by excess insurers against defense counsel hired by liability insurers when verdicts exceed primary insurance policy limits.

PDF LINK: Premium Emerging Issues Commentary (\$)

ARTICLE: INTRODUCTION

When their policyholders are sued, liability insurers typically appoint defense counsel to represent them. If a case turns out badly, the defense lawyers conduct may be unfavorably scrutinized in the insurance defense context as in all others. Malpractice claims by insurance companies against defense attorneys are now common. While primary insurers have for some time been willing to sue defense attorneys they hire, and their right to sue defense counsel for malpractice is widely acknowledged, ⁿ¹ excess insurers are increasingly willing to sue defense counsel when verdicts exceed primary policy limits. Excess insurers have sued defense counsel on both direct duty and equitable subrogation theories.

In some ways malpractice claims by excess insurers against defense counsel make little sense. An excess insurer has no direct relationship with the defense attorneys it sues; it did not retain them, nor did it pay for their services. An excess insurer typically does not share an attorney-client relationship with the defense attorneys that a primary carrier hires. Yet this very detachment may actually encourage malpractice claims, for an aggrieved excess carrier may have no continuing business relationship with defense counsel, such that loyalty and the perspective that comes with judging many cases as compared to one are no bar to litigation. Additionally, as cost-conscious insurers have seen their litigation expenses rise, the possibility of recovering some portion of an excess verdict or settlement from other sources has driven both primary and excess insurers to look to defense counsel in certain circumstances. ACTIONS BY EXCESS CARRIERS ALLOWED

American Centennial Insurance Co. v. Canal Insurance Co. Because excess insurers generally do not share an attorney-client relationship with defense lawyers hired by a primary insurer, they generally cannot sue those lawyers on any sort of direct duty theory because of a lack of privity. ⁿ² Accordingly, courts that allow an excess insurer to sue defense counsel hired by a primary insurer for malpractice typically hold that the excess insurer is equitably subrogated to the insured's rights against the attorneys. ⁿ³ The leading case in this area is *American Centennial Insurance Co. v.*

Canal Insurance Co. n4

In *American Centennial*, General Rent-A-Car was sued for injuries and death allegedly attributable to a defective tire on one of its rental cars. General was insured under three policies. Canal Insurance provided primary coverage up to \$100,000. A first level excess insurer, First State, insured General from \$100,000 up to \$1 million. American Centennial provided an additional \$3 million in excess coverage above the First State policy. Canal defended the suit and hired counsel for General. Because defense counsel allegedly mishandled the suit, the insurers were forced to settle for \$3,700,000. First State and American Centennial then sued Canal and its chosen defense counsel on a number of theories, including negligence. n5

The trial court granted summary judgment for the defendants, holding that all of the excess carriers claims were barred by the statute of limitations, and further finding that defense counsel owed no duty to First State or American Centennial. A lower appellate court affirmed the trial courts judgment on the malpractice claims based on the attorneys statute of limitations defense. The Texas Supreme Court granted review.

The *American Centennial* court determined that the excess insurers malpractice claims against defense counsel were not time barred, thus opening inquiry into whether an excess insurer could even bring such an action. Under Texas law, attorneys ordinarily cannot be held liable to non-clients because there is no privity of contract. n6 Privity as a prerequisite to malpractice liability is the product of judicial reluctance to permit malpractice actions by non-clients because of the potential interference with attorneys duties to their clients. n7 This concern is heightened in the insurance defense context, where attorneys must be especially sensitive to the varying interests of the insured and the insurer which produce complex and often conflicting relationships. n8

The Texas Supreme Court reasoned that recognizing an equitable subrogation action by an excess insurer against defense counsel would not interfere with the attorney-client relationship, however, nor would it create additional conflicts of interest. Equitable subrogation would only permit an insurer to enforce defense counsels existing duties to the insured. Further, the interests of the insured, its primary insurer and its excess insurer generally overlap when it comes to ensuring that a defense attorneys malpractice does not prevent the presentation of a meritorious defense. Insureds and insurers interests converge in expectations of competent representation. n9

The *American Centennial* court observed that those considerations compelling its recognition of an excess insurers right to bring an equitable subrogation action against a primary insurer for failing to settle a claim within policy limits also supported an excess insurers right to sue defense counsel hired by a primary insurer.

No new or additional burdens are imposed on the attorney, who already has the duty to represent the insured Defense counsel should not be relieved of these obligations merely because the insurer, rather than the client, must pay the claim. If the asserted malpractice has resulted of a judgment or settlement within the excess carriers policy limits, the insured has little incentive to enforce its right to competent representation. Refusal to permit the excess carrier to vindicate that right would burden the insurer with a loss caused by the attorneys negligence while relieving the attorney from the consequences of legal malpractice. Such an inequitable result should not arise simply because the insured has contracted for excess coverage. n10

The supreme court thus reversed the court of appeals for failing to allow the excess insurers to pursue their malpractice claims against defense counsel. n11

Practice Insight: If called upon to defend lawyers hired by a primary insurer against allegations of malpractice by an excess insurer, resist any direct duty allegations based on a lack of privity. Because the existence of a duty is a question of law, it should be capable of resolution on a motion to dismiss--there is no reason to wait for summary judgment. If an excess carrier has only pleaded a direct duty, however, it may be advisable to wait until any deadline for amending the pleadings has passed before moving to dismiss or for judgment on the pleadings, so that the carrier cannot

simply amend its pleadings to assert an equitable subrogation claim.

National Fire Insurance Co. v. Dowd & Dowd. The courts embrace of equitable subrogation as a vehicle for excess insurers potential recovery from negligent defense attorneys hired by a primary insurer while declining to impose a direct duty is nicely illustrated by *National Union Fire Insurance Co. v. Dowd & Dowd*.ⁿ¹² In *Dowd & Dowd*, an Illinois federal court was forced to apply Illinois law in the absence of any guidance from the states appellate courts.

Schneider National Carriers hired the law firm of Dowd & Dowd to defend it and its driver, Henry Howard, in a personal injury action brought by John Miksis. Miksis was catastrophically injured when Howard drove a Schneider tractor-trailer rig into a stationary lift truck on which Miksis was working. At the time of the accident, Schneider was self-insured up to \$3 million with a \$5 million dollar National Union excess policy above its self-insured retention (SIR).ⁿ¹³

The case went to trial and Miksis recovered an \$8 million verdict. Schneider paid \$3 million and National Union paid the remaining \$5 million. National Union then sued Dowd & Dowd for malpractice. Dowd & Dowd moved to dismiss National Unions complaint, arguing that an excess insurer cannot maintain a malpractice claim against the insureds defense attorney.

Dowd & Dowd asserted that National Union could not state a cause of action for legal malpractice because it could not establish the first prerequisite, that being an attorney-client relationship with the law firm. Under Illinois law, the fiduciary relationship between attorney and client is jealously guarded as personal and confidential, and only a client can assert a malpractice claim against an attorney. National Union argued that an attorney-client relationship did exist and, alternatively, that it was equitably subrogated to Schneiders legal malpractice action against Dowd & Dowd. The case was one of first impression under Illinois law.

In arguing for a direct claim against Dowd & Dowd, National Union first asserted that the Illinois Supreme Court should take an expansive view of the tripartite relationship that exists between an insured, a primary insurer, and defense counsel to recognize that a defense attorney also owes a fiduciary duty to an excess insurer. Illinois law clearly provides that a defense attorney hired by a primary insurer owes a fiduciary duty to both the insured and the insurer, and that either can sue the attorney for malpractice. National Union argued that Illinois law would permit a direct action because there is no logical reason to distinguish between a primary insurer and an excess carrier in determining when an insurer may sue for malpractice.ⁿ¹⁴

The court rejected National Unions argument because it ignored the fact that a primary insurer actually contracts with a defense attorney to represent the insured.

Since the primary insurer contracts with the attorney, pays the attorneys legal fees, and directs the litigation or settlement of the claim, it stands to reason that the primary insurer is one of the attorneys clients Excess insurers, on the other hand, do not have the duty to defend the insured Thus, unlike a primary insurer, an excess insurer has no direct relationship with the attorney retained to defend an action against the insured.ⁿ¹⁵

The Illinois courts recognition of the tripartite relationship is premised upon a primary insurers legal duty to retain and pay for an attorney to defend an action against its insured. Thus, the *Dowd & Dowd* court reasoned, the Illinois Supreme Court would be unlikely to enlarge the tripartite relationship to include an excess insurer. National Union acknowledged that it did not retain Dowd & Dowd to defend Schneider and Howard; Schneider made that decision. The insurers tripartite relationship argument for the existence of an attorney-client relationship had no basis in fact or law. Dowd & Dowd owed no fiduciary duty to National Union, and the court dismissed that portion of the insurers complaint.ⁿ¹⁶

National Union next contended that Schneider retained Dowd & Dowd for the insurers direct or primary benefit. Accordingly, it was a third-party beneficiary to the contract between Schneider and the law firm.ⁿ¹⁷

Under Illinois law, an attorney generally only owes his or her client a duty to exercise requisite skill and care in the course of a representation. There is an exception, however, for intended third-party beneficiaries. This exception is narrowed in cases of an adversarial nature. In such cases, there must be a clear indication that the attorneys representation of the client is intended to directly confer a benefit on the third-party. n18

The *Dowd & Dowd* court did not believe that the Illinois Supreme Court would find that Schneider entered into its relationship with its defense attorneys for National Unions benefit. Schneider hired Dowd & Dowd to benefit itself and Howard. Although National Union also benefitted from the firms engagement through its harmonious relationship with its insureds, its incidental benefit was not sufficient to support a direct duty of care on defense counsels part. n19

The court finally reached National Unions equitable subrogation argument. The court was convinced that the Illinois Supreme Court would recognize an excess liability insurers right to be subrogated to its insureds rights unless the nature of the subrogated claim and public policy considerations dictated a different conclusion. n20

Legal malpractice claims are not assignable in Illinois. The policy considerations that cut against assignment arguably apply equally in the equitable subrogation context. Subrogation opponents might argue, for example, that permitting an excess insurer to sue defense counsel strains the tripartite relationship, a point that was not lost on the court. n21 Nonetheless, the court was persuaded to permit an excess insurers equitable subrogation to its insureds rights against defense counsel because it does not entail any additional burdens. n22

[Equitable subrogation] merely allows an excess insurer, who pays for any excess liability, to enforce the duties that the attorney already owes to the insured, who might have little incentive to sue his attorney since he has excess insurance coverage Evidently, if the insured had not contracted for excess insurance coverage, the attorney would have to be similarly concerned about being sued by the insured for any excess liability Malpractice attorneys should not enjoy a windfall merely because the insured contracted for excess insurance coverage. Further, the social costs of legal malpractice [are] best borne by the malpracticing attorneys. n23

Additionally, in the equitable subrogation context, there is less concern that malpractice claims will become a commodity to be exploited by strangers to the attorney-client relationship. n24 Basic subrogation principles strictly limit the right to be subrogated to a legal malpractice claim to a non-client who, pursuant to a legal duty, has paid the clients debt or loss attributable to the malpractice. Any concerns about an uncontrollable flow of baseless malpractice actions by excess insurers is speculation. Finally, the court noted, while excess insurers possess the sophistication necessary to protect themselves in many situations, that ability or capability does not preclude the application of the equitable subrogation doctrine. n25 ACTIONS BY EXCESS CARRIERS NOT RECOGNIZED

Continental Casualty Co. v. Pullman, Comley, Bradley & Reeves. Other courts have declined to allow excess insurers to sue defense counsel for malpractice even on an equitable subrogation theory. n26 This is not surprising, for a number of courts have generally rejected equitable subrogation in the legal malpractice context. n27 These courts tend to view equitable subrogation as the assignment of a legal malpractice claim and such assignments are generally impermissible. n28

The leading case favoring defense counsel is *Continental Casualty Co. v. Pullman, Comley, Bradley & Reeves*, n29 decided by the Second Circuit under Connecticut law. *Pullman* arose out of a medical malpractice action against Griffin Hospital. The hospital was insured by Aetna at the primary level, with Continental Casualty its excess insurer. Aetna hired the law firm of Pullman, Comley, Bradley & Reeves to defend the malpractice action. The case went to trial and resulted in a staggering verdict against the hospital. Continental paid over \$10 million under its excess policy to satisfy the judgment. Continental then sued the Pullman firm for legal malpractice for failing to adequately defend the underlying tort case.

Pullman moved for judgment on the pleadings, arguing that Continental had no standing to sue because it was Aetna that retained the firm. Continental argued that it had standing to sue because (1) it was an intended and

foreseeable beneficiary of the Pullman firms services for the hospital, such that it shared an attorney-client relationship with Pullman; (2) it was equitably subrogated to Griffin Hospitals right to sue Pullman; and (3) it shared an actual attorney-client relationship with Pullman. n30 After Continental unsuccessfully pursued an interlocutory appeal and amended its complaint, the district court granted a motion to dismiss by the law firm. Continental then appealed to the Second Circuit, raising the same arguments in support of its claim against Pullman that it made in the district court below. n31

The *Pullman* court first addressed Continentals claim that because it was an intended and foreseeable beneficiary of Pullmans legal services for the hospital, Pullman owed it a duty of care. n32 Under Connecticut law, attorneys are not liable to persons other than their clients except in will cases. n33 Only in estate work may a third-party beneficiary sue an attorney for malpractice. The court declined to equate an attorneys dual representation of an insured and its insurer with that of a testator and his beneficiary. Moreover, Continental was free to monitor the defense of the medical malpractice action through its own attorneys to assure itself that Aetna was living up to its responsibilities as the primary insurer. Under these circumstances, it seemed implausible that the primary or direct purpose of the transaction at issue (Aetnas engagement of Pullman to defend Griffin Hospital) was intended to benefit a third-party (Continental). n34

Continental next argued that once it satisfied the judgment against Griffin Hospital, it was subrogated to its insureds rights, and it could therefore bring any legal malpractice claims against Pullman that the hospital should have brought. n35 The *Pullman* court gave this argument short shrift, rejecting it as running contrary to Connecticut public policy. n36 The court presumably feared that permitting non-clients to sue attorneys via equitable subrogation would potentially interfere with attorneys ethical obligations to their clients. n37

Continental's final argument for a direct duty owed to it by the Pullman law firm came in for harsh treatment by the Second Circuit. The *Pullman* court was especially critical of Continentals attempts to plead a direct duty in the district court, describing Continentals amended complaint as [r]esonating . . . with bald conclusions. n38 In its amended complaint Continental alleged that it shared an attorney-client relationship with Pullman because the law firm communicated with it about the progress of the medical malpractice action, advised it with respect to settlement, and served as its counsel on the appeal of the underlying action. Continental never pleaded--nor could it--that it retained Pullman, a fact the *Pullman* court found interesting, but not dispositive.

It is clear beyond cavil, the *Pullman* court observed, that in the insurance context the attorney owes his allegiance, not to the insurance company that retained him but to the insured defendant. n39 Though a defense attorney may be retained and paid by the insurer, and informs the insurer about the progress of the case he is defending, the attorney owes his allegiance to the insured. n40 Accordingly, the district court did not err in dismissing Continentals amended complaint for pleading insufficient facts to support an attorney-client relationship.

Although some courts may find *Pullman* persuasive, the last portion of the opinion may not travel well. Connecticut is a single client state in the insurance defense context, meaning that the law considers the insured to be the defense attorneys sole client. n41 Many jurisdictions follow the dual client doctrine, n42 which holds that so long as the insureds interests and the insurers interests are aligned, they both are the defense attorneys client and he owes each an equal duty of loyalty. Of course, even in dual client states it remains that the primary insurer hired the defense attorney, and it is the *primary* insurer and the insured to whom the attorney must be faithful. It is the primary insurer with which the defense attorney shares an attorney-client relationship. The excess insurer remains a step removed.

Federal Insurance Co. v. North American Specialty Insurance Co. Most recently, a New York appellate court rejected equitable subrogation theory in *Federal Insurance Co. v. North American Specialty Insurance Co.* n43 The court there reasoned that subrogation was unavailable to the excess insurer, Federal, because the insured had not been harmed by the defense lawyers malpractice in failing to raise a critical affirmative defense to cross-claims; the insureds liability was attributable to its own negligence. n44 Thus, Federal's payment of the loss within its limits was not attributable to a third-party against whom it could subrogate through its insured. n45

The *Federal Insurance* courts reasoning is a bit strained and the case is best limited to its somewhat unusual facts. There will be an underlying tort allegedly attributable to the insured in every case in which an excess insurer sues defense lawyers hired by a primary insurer. That does not relieve the defense lawyers of their duty to defend the underlying action responsibly. If the defense lawyers conduct falls below the standard of care and an excess insurer is damaged as a result, equitable subrogation ought to afford the excess insurer with a remedy.

American Continental Insurance Co. v. Weber & Rose. A Kentucky court rejected an excess insurers equitable subrogation claim against defense counsel hired by the insured under its SIR in *American Continental Insurance Co. v. Weber & Rose*.ⁿ⁴⁶ The *American Continental* court was convinced that permitting an excess insurer to sue defense attorneys under an equitable subrogation theory would be inimical to the preservation of traditional and longstanding concepts associated with [the] attorney-client relationship.ⁿ⁴⁷ Allowing excess insurers to sue their insureds defense attorneys would undermine the traditional view of the attorney-client relationship as both personal and fiduciary.

The *American Continental* court also rejected the insurers claim that it was an intended and foreseeable beneficiary of the defense attorneys services to the insured.ⁿ⁴⁸ Unlike *Pullman*, in which defense counsel were hired by the primary insurer, the defense attorneys in this case were hired by the insured, as was its right under its SIR.ⁿ⁴⁹ Accordingly, there was even less of a basis for the court to conclude that the defense attorneys were hired to represent the excess carrier. The insured hired the defense attorneys for its sole benefit, and American Continental was at most an incidental beneficiary of their contract. The defense attorneys did not owe American Continental a duty that could form the basis for a malpractice action.ⁿ⁵⁰ CONCLUSION

The development of excess insurers rights against defense attorneys hired by primary carriers is far from complete. The law in many states is uncertain, and there are good arguments both for and against recognizing excess insurers right to sue defense attorneys they did not hire for malpractice. It is, for example, difficult to refute the *American Centennial* and *Dowd & Dowd* courts conclusions that allegedly negligent defense lawyers should not be able to escape liability simply because an insured prudently purchased excess insurance. At the same time, excess insurers are far from helpless when it comes to protecting their interests. They can employ their own attorneys to work with the defense attorneys hired by the primary insurer, and often do just that. In some cases an excess insurer actually may be able to take over the defense and direct counsel, control defense and settlement strategy, and so on.

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ⁿ¹ See, e.g., *Gen. Sec. Ins. Co. v. Jordan, Coyne & Savits, LLP*, 357 F. Supp. 2d 951, 956-957 (D. Va. 2005) (stating that despite sharp doctrinal differences regarding the relationship between the insurer and the firm it retains, nearly all jurisdictions in the United States permit some form of legal malpractice action by an insurer against the firm it retains to defend an insured) (footnote omitted); see, e.g., *American Int'l Adjustment Co. v. Galvin*, 86 F.3d 1455 (7th Cir. 1996) (applying Indiana law); *Mutuelles Unies v. Kroll & Linstrom*, 957 F.2d 707 (9th Cir. 1992); *St. Paul Fire & Marine Ins. Co. v. Birch, Stewart, Kolasch & Birch, LLP*, 379 F. Supp. 2d 183, 190-196 (D. Mass. 2005) (predicting Massachusetts law); *Bohna v. Hughes, Thorsness, Gantz, Powell & Brundin*, 828 P.2d 745 (Alaska 1992); *State Farm Mut. Auto. Ins. Co. v. Fed. Ins. Co.*, 72 Cal. App. 4th 1422, 1428-1429 (Cal. Ct. App. 1999); *Pennsylvania Ins. Guaranty Ass'n v. Sikes*, 590 So. 2d 1051 (Fla. 3rd DCA 1991); *Mid-America Bank & Trust Co. v. Commercial Union Ins. Co.*, 224 Ill. App. 3d 1083 (Ill. App. Ct. 1992); *Atlanta Int'l Ins. Co. v. Bell*, 438 Mich. 512 (Mich. 1991).

n2 *Federal Ins. Co. v. North Am. Specialty Ins. Co.*, 2007 NY Slip Op 8391 (N.Y. App. Div. 2007).

n3 See, e.g., *National Union Ins. Co. v. Dowd & Dowd, P.C.*, 2 F. Supp. 2d 1013, 1019-1027 (D. Ill. 1998) (interpreting Illinois law); *Allstate Ins. Co. v. American Transit Ins. Co.*, 977 F. Supp. 197 (D.N.Y. 1997) (interpreting New York law); *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 173-175 (N.Y. App. Div. 2004); *American Centennial Ins. Co. v. Canal Ins Co.*, 843 S.W.2d 480 (Tex. 1992).

n4 843 S.W.2d 480 (Tex. 1992).

n5 *American Centennial Ins. Co. v. Canal Ins Co.*, 843 S.W.2d 480, 481 (Tex. 1992).

n6 *American Centennial Ins. Co. v. Canal Ins Co.*, 843 S.W.2d 480, 484 (Tex. 1992).

n7 *American Centennial Ins. Co. v. Canal Ins Co.*, 843 S.W.2d 480, 484 (Tex. 1992) (citing Texas Disciplinary Rules of Professional Conduct).

n8 *American Centennial Ins. Co. v. Canal Ins Co.*, 843 S.W.2d 480, 484 (Tex. 1992).

n9 *American Centennial Ins. Co. v. Canal Ins Co.*, 843 S.W.2d 480, 484 (Tex. 1992) (quoting *Atlanta Int'l Ins. Co. v. Bell*, 438 Mich. 512, 521 (Mich. 1991)).

n10 *American Centennial Ins. Co. v. Canal Ins Co.*, 843 S.W.2d 480, 484-485 (Tex. 1992).

n11 *American Centennial Ins. Co. v. Canal Ins Co.*, 843 S.W.2d 480, 485 (Tex. 1992)

n12 2 *F. Supp. 2d* 1013 (D. Ill. 1998).

n13 *National Union Ins. Co. v. Dowd & Dowd, P.C.*, 2 *F. Supp. 2d* 1013, 1015 (D. Ill. 1998).

n14 *National Union Ins. Co. v. Dowd & Dowd, P.C.*, 2 *F. Supp. 2d* 1013, 1016 (D. Ill. 1998) (quoting National Unions response).

n15 *National Union Ins. Co. v. Dowd & Dowd, P.C.*, 2 *F. Supp. 2d* 1017-1018 (D. Ill. 1998) (citations and footnotes omitted).

n16 *National Union Ins. Co. v. Dowd & Dowd, P.C.*, 2 *F. Supp. 2d* 1013, 1018 (D. Ill. 1998).

n17 *National Union Ins. Co. v. Dowd & Dowd, P.C.*, 2 *F. Supp. 2d* 1013, 1019 (D. Ill. 1998).

n18 *National Union Ins. Co. v. Dowd & Dowd, P.C.*, 2 *F. Supp. 2d* 1013, 1019 (D. Ill. 1998) (quoting *Pelham v. Griesheimer*, 92 Ill. 2d 13, 21 (Ill. 1982)).

n19 *National Union Ins. Co. v. Dowd & Dowd, P.C.*, 2 *F. Supp. 2d* 1013, 1019 (D. Ill. 1998).

n20 *National Union Ins. Co. v. Dowd & Dowd, P.C.*, 2 *F. Supp. 2d* 1013, 1022 (D. Ill. 1998).

n21 *National Union Ins. Co. v. Dowd & Dowd, P.C.*, 2 *F. Supp. 2d* 1013, 1023 (D. Ill. 1998).

n22 *National Union Ins. Co. v. Dowd & Dowd, P.C.*, 2 F. Supp. 2d 1013, 1023 (D. Ill. 1998) (citing *American Centennial Ins. Co. v. Canal Ins Co.*, 843 S.W.2d 480 (Tex. 1992)).

n23 *National Union Ins. Co. v. Dowd & Dowd, P.C.*, 2 F. Supp. 2d 1013, 1023-1024 (D. Ill. 1998) (citations omitted).

n24 *National Union Ins. Co. v. Dowd & Dowd, P.C.*, 2 F. Supp. 2d 1013, 1024 (D. Ill. 1998).

n25 *National Union Ins. Co. v. Dowd & Dowd, P.C.*, 2 F. Supp. 2d 1013, 1024 (D. Ill. 1998).

n26 See, e.g., *Continental Casualty Co. v. Pullman, Comley, Bradley & Reeves*, 929 F.2d 103 (2d Cir. 1991) (interpreting Connecticut law); *St. Paul Ins. Co. v. AFIA Worldwide Ins. Co.*, 937 F.2d 274 (5th Cir. 1991) (applying Louisiana law); *Essex Ins. Co. v. Tyler*, 309 F. Supp. 2d 1270, 1274 (D. Colo. 2004) (predicting Colorado law); *Querrey & Harrow, Ltd. v. Transcon. Ins. Co.*, 861 N.E.2d 719, 721-725 (Ind. Ct. App. 2007); *American Continental Ins. Co. v. Weber & Rose*, 997 S.W.2d 12 (Ky. Ct. App. 1998).

n27 See, e.g., *Fireman's Fund Ins. Co. v. McDonald*, 30 Cal. App. 4th 1373 (Cal. Ct. App. 1994) (rejecting claim by primary insurer); *National Union Fire Ins. Co. v. Salter*, 717 So. 2d 141 (Fla. 5th DCA 1998) (prohibiting subrogation by primary insurer); *Bank IV Wichita v. Arn, Mullins, Unruh, Kuhn & Wilson*, 250 Kan. 490 (Kan. 1992) (rejecting banks claim against debtors attorney); *Great Am. Ins. Co. v. Perry*, 1994 Minn. App. LEXIS 276 (Minn. Ct. App. Mar. 29, 1994); (rejecting claim by surety on a guardianship bond against guardians attorney). But see *Chemical Bank of New Jersey Nat. Ass'n v. Bailey*, 296 N.J. Super. 515 (App. Div. 1997) (permitting subrogation); *General Accident Ins. Co. of Am. v. Schoendorf & Sorgi*, 202 Wis. 2d 98 (Wis. 1996) (permitting subrogation).

n28 See, e.g., *Querrey & Harrow, Ltd. v. Transcon. Ins. Co.*, 861 N.E.2d 719, 723-724 (Ind. Ct. App. 2007) (rejecting equitable subrogation claim by excess insurer).

n29 929 F.2d 103 (2d Cir. 1991).

n30 *Continental Casualty Co. v. Pullman, Comley, Bradley & Reeves*, 929 F.2d 103 (2d Cir. 1991) (citing *Continental Casualty Co. v. Pullman, Comley, Bradley & Reeves*, 709 F. Supp. 44, 46 (D. Conn. 1989)).

n31 *Continental Casualty Co. v. Pullman, Comley, Bradley & Reeves*, 929 F.2d 103, 104-105 (2d Cir. 1991).

n32 *Continental Casualty Co. v. Pullman, Comley, Bradley & Reeves*, 929 F.2d 103, 105 (2d Cir. 1991).

n33 *Continental Casualty Co. v. Pullman, Comley, Bradley & Reeves*, 929 F.2d 103, 105 (2d Cir. 1991).

n34 *Continental Casualty Co. v. Pullman, Comley, Bradley & Reeves*, 929 F.2d 103, 106 (2d Cir. 1991).

n35 *Continental Casualty Co. v. Pullman, Comley, Bradley & Reeves*, 929 F.2d 103, 106 (2d Cir. 1991).

n36 *Continental Casualty Co. v. Pullman, Comley, Bradley & Reeves*, 929 F.2d 103, 107 (2d Cir. 1991) (citing *Krawczyk v. Stingle*, 208 Conn. 239 (Conn. 1988)).

n37 *Continental Casualty Co. v. Pullman, Comley, Bradley & Reeves*, 929 F.2d 103, 106 (2d Cir. 1991) (citing and quoting *Krawczyk v. Stingle*, 208 Conn. 239 (Conn. 1988)).

n38 *Continental Casualty Co. v. Pullman, Comley, Bradley & Reeves*, 929 F.2d 103, 108 (2d Cir. 1991).

n39 *Continental Casualty Co. v. Pullman, Comley, Bradley & Reeves*, 929 F.2d 103, 108 (2d Cir. 1991).

n40 *Continental Casualty Co. v. Pullman, Comley, Bradley & Reeves*, 929 F.2d 103, 108 (2d Cir. 1991).

n41 *Higgins v. Karp*, 239 Conn. 802 (Conn. 1997).

n42 See, e.g., *Home Indem. Co. v. Lane Powell Moss & Miller*, 43 F.3d 1322, 1331 (9th Cir. 1995) (interpreting Alaska law); *Gulf Ins. Co. v. Berger*, 79 Cal. App. 4th 114, 125-127 (Cal. Ct. App. 2000); *Pennsylvania Ins. Guaranty Ass'n v. Sikes*, 590 So. 2d 1051, 1052 (Fla. 3rd DCA 1991); *Mobil Oil Corp. v. Maryland Cas. Co.*, 288 Ill. App. 3d 743, 755-756 (Ill. App. Ct. 1997); *Cincinnati Ins. Co. v. Wills*, 717 N.E.2d 151, 161 (Ind. 1999); *Moeller v. American Guar. & Liab. Ins. Co.*, 707 So. 2d 1062, 1070 (Miss. 1996); *Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court of Nev.*, 152 P.3d 737, 742 (Nev. 2007); *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 601-604 (N.C. Ct. App. 2005); *Spratley v. State Farm Mut. Auto. Ins. Co.*, 2003 UT 39, at *P9-*P12 (Utah 2003); *In re Illuzzi*, 159 Vt. 155 (Vt. 1992); *Barry v. USAA*, 98 Wn. App. 199, 202-204 (Wash. Ct. App. 1999).

n43 2007 NY Slip Op 8391 (N.Y. App. Div. 2007).

n44 *Federal Ins. Co. v. North Am. Specialty Ins. Co.*, 2007 NY Slip Op 8391, at *7 (N.Y. App. Div. 2007).

n45 *Federal Ins. Co. v. North Am. Specialty Ins. Co.*, 2007 NY Slip Op 8391, at *7-*8 (N.Y. App. Div. 2007).

n46 997 S.W.2d 12 (Ky. Ct. App. 1998).

n47 *American Continental Ins. Co. v. Weber & Rose*, 997 S.W.2d 12, 13 (Ky. Ct. App. 1998).

n48 *American Continental Ins. Co. v. Weber & Rose*, 997 S.W.2d 12, 14 (Ky. Ct. App. 1998).

n49 *American Continental Ins. Co. v. Weber & Rose*, 997 S.W.2d 12, 12-13 (Ky. Ct. App. 1998).

n50 *American Continental Ins. Co. v. Weber & Rose*, 997 S.W.2d 12, 14 (Ky. Ct. App. 1998).

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Patrick A. Cathcart on The Oakland Raiders v. National Football League

2008 Emerging Issues 1106

Patrick A. Cathcart on The Oakland Raiders v. National Football League

By Patrick A. Cathcart

November 22, 2007

SUMMARY: Patrick A. Cathcart discusses the CA Supreme Courts decision in *The Oakland Raiders v. Nat'l Football League*, how that decision interprets the standard for appellate review of a trial courts grant of a motion for a new trial when the trial court does not provide an adequate specification of its reasons for granting a new trial as required by Code Civ. Proc. § 657.

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ARTICLE: California Supreme Court Rules on Necessity of Specifying Explicitly the Reasons for a Grant of a New Trial

In a striking decision, the California Supreme Court held in *The Oakland Raiders v. National Football League* (2007) 41 Cal. 4th 624; 61 Cal. Rptr. 3d 634; 2007 Cal. LEXIS 6863 (July 2, 2007) that an order granting a new trial, under the limitations of Code Civ. Proc. § 657, is subject to independent review when the order lacks an adequate specification of reasons for granting a new trial, rather than the normal review for abuse of discretion. Amendments to Code Civ. Proc. § 657 enacted in 1965 (modified slightly in 1967) require the trial court to state not only the ground upon which the motion is granted, but also the reasons for granting the motion on that ground. In this case, the trial court's order did not specify its reason or reasons for granting a new trial on each ground stated in the order [see *Diamond v. Superior Court* (1922) 189 Cal. 732, 736, 210 P. 36].

The striking aspect of the decision is not the basic holding, but rather its rationale and application. The holding means that a grant of a new trial that does not satisfy Code Civ. Proc. § 657 will be reversed on that ground if the evidence warranting a new trial is controverted. The application of the holding means that in an independent review of the evidence, there is practically no review beyond a determination of whether or not the evidence is in conflict.

Practitioners should endeavor to make sure that a motion for a new trial that contains *any* controverted evidence is accompanied by a plea to the court that the reasons supporting any grant of the motion be specified in the order. If the order does not specify the reasons, then the prevailing party must act to obtain a specification in writing of the court's reasons within 10 days, as required by Code Civ. Proc. § 657.

Grounds for Trial Court's Grant of New Trial

The trial court granted the Raiders' motions for a new trial and for judgment notwithstanding the verdict, stating only:

The motion for new trial is granted. The Court finds that the objectively ascertainable acts of juror misconduct were prejudicial to the Oakland Raiders' right to a fair trial [*The Oakland Raiders v. National Football League* (2007) 41 Cal. 4th 624, 632; 61 Cal. Rptr. 3d 634].

The trial court did not specify any reasons for its conclusion. With respect to the other grounds raised by the motion, the court stated:

While some of the objections in the motion for new trial premised on erroneous and/or prejudicial jury instructions raise serious questions concerning their use, and hav[e] given the Court some pause, having granted the motion for new trial on other grounds, we have not reached these issues [*The Oakland Raiders v. National Football League* (2007) 41 Cal. 4th 624, 632-633; 61 Cal. Rptr. 3d 634].

Absence of Stated Reasons to Support Order Granting New Trial Shifts Burden of Proof to Party Seeking to Uphold Order

The Supreme Court, citing *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal. 4th 826, 850, 107 Cal. Rptr. 2d 841, 24 P.3d 493, noted that ordinarily the appellant would bear the burden of persuading the appellate court that the order granting a new trial should be overturned [see also *Yarrow v. State of California* (1960) 53 Cal.2d 427, 434, 2 Cal. Rptr. 137, 348 P.2d 687]. However, when a party is appealing from an order granting a new trial that is defective under *Code Civ. Proc.* § 657, the moving party (the respondent in the appellate court) bears the burden of persuading the appellate court to uphold the order.

The *Raiders* court was concerned that the absence of specified reasons for a new trial necessarily would mean that the reviewing court would be speculating on the basis for the new trial. The court noted that a specific statement of "reasons" would facilitate appellate review and avoid any need for inference or speculation [*Mercer v. Perez* (1968) 68 Cal. 2d 104, 112-115, 65 Cal. Rptr. 315, 436 P.2d 315; see also *Scala v. Jerry Witt & Sons, Inc.* (1970) 3 Cal. 3d 359, 370, 90 Cal. Rptr. 592, 475 P.2d 864; *Meiner v. Ford Motor Co.* (1971) 17 Cal. App. 3d 127, 136, 94 Cal. Rptr. 702].

If Trial Court Provides Specification of Reasons, Standard of Review Is "Abuse of Discretion"? But Use of That Standard Is Improper In Absence of Specification of Reasons

When the trial court provides a statement of reasons as required by *Code Civ. Proc.* § 657, the reviewing court defers to the trial court's evidentiary determination and only reviews whether the court's decision was an abuse of discretion [see, e.g., *Lane v. Hughes Aircraft Co.* (2000) 22 Cal. 4th 405, 409, 412, 93 Cal. Rptr. 2d 60, 993 P.2d 388; *In re Marriage of Beilock* (1978) 81 Cal. App. 3d 713, 728, 146 Cal. Rptr. 675]. When there is no statement of reasons, however, an abuse of discretion standard of review would subvert the purposes of *Code Civ. Proc.* § 657, which are (1) "to promote judicial deliberation before judicial action" [*Mercer v. Perez* (1968) 68 Cal. 2d 104, 113, 65 Cal. Rptr. 315, 436 P.2d 315] and (2) "to make the right to appeal from the order more meaningful" [*Mercer v. Perez* (1968) 68 Cal. 2d 104, 113, 65 Cal. Rptr. 315, 436 P.2d 315]. Nor are "ultimate facts" in the court's order sufficient, since that "frustrates rather than promotes the legislative purpose of facilitating meaningful appellate review of the order granting a new trial..." [*Scala v. Jerry Witt & Sons, Inc.* (1970) 3 Cal. 3d 359, 370, 90 Cal. Rptr. 592, 475 P.2d 864].

Interestingly, in his concurrence, Justice Baxter seems concerned that the holding too strongly implies that the absence of specification will mean that no grant of a new trial, in violation of *Code Civ. Proc.* § 657, can be sustained. He says:

[O]ur decision to review this new trial order under a nondeferential standard is 'a narrow one'.. in that the trial court's failure to file a statement of reasons made it impossible for us to determine 'whether the trial court's ruling was based on the bias of Joseph A., the misconduct of Linda H., or both.' .. Our decision today thus does not preclude the possibility of deference to the trial court, despite its failure to supply a statement of reasons, when the record leaves no room for doubt as to the trial court's reasons for granting a new trial and its resolution of conflicting evidence supporting those reasons?as may be the case where the motion for new trial alleged only a single, specific instance of juror misconduct. [*The Oakland Raiders v. National Football League* (2007) 41 Cal. 4th 624, 643; 61 Cal. Rptr. 3d 634].

Application of Independent Review Standard to Facts of Case

The motion for a new trial in the *Raiders* case was based principally on alleged juror misconduct, supported by declarations from jurors. An "independent review" as discussed above would seem to require reviewing the evidence presented and the arguments made for and against a new trial and then deciding whether *substantial* evidence supports a conclusion that there was juror misconduct. (In contrast, an abuse of discretion standard would limit the inquiry to whether *any* evidence supports the decision to grant a new trial.) However, the Supreme Court's review concluded that the violation of *Code Civ. Proc.* § 657 meant that the order granting the motion must be reversed, since the appellate court could not determine the basis for the trial court's decision.

In its "independent review" the Supreme Court found, in sum, that the testimonial evidence submitted by the parties in the form of juror declarations was "sharply conflicting on every material issue," and the Raiders had submitted no other evidence to support their motion for a new trial. "Consequently, upon independent review of the record, we conclude that the Raiders have failed to discharge their burden to persuade us of jury misconduct warranting the grant of a new trial" [*The Oakland Raiders v. National Football League* (2007) 41 Cal. 4th 624, 642; 61 Cal. Rptr. 3d 634].

For general discussions of motions for a new trial, see Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 21, *Motion for New Trial*, and California Forms of Pleading and Practice, Ch. 371, *Motions After Trial*.

For discussion of juror misconduct issues generally, see Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 17, *Dealing With the Jury*, § 17.18 et seq.

For discussion of juror misconduct as the basis for a new trial, see Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 21, *Motion for New Trial*, § 21.09[2], and California Forms of Pleading and Practice, Ch. 371, *Motions After Trial*, § 371.63[4].

For discussion of appellate review of motions for new trial, see California Forms of Pleading and Practice, Ch. 371, *Motions After Trial*, § 371.74.

For discussion of the standards of review on appeal, see Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 21, *Motion for New Trial*, § 21.26 et seq., and California Forms of Pleading and

Practice, Ch. 41, *Appeal: Review Standards and Appellate Rules of Law*, § 41.10 et seq.

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Sinclair on the Impact of Marcus, Santoro & Kozak, P.C. v. Hung-Lin Wu

2008 Emerging Issues 1069

Sinclair on the Impact of Marcus, Santoro & Kozak, P.C. v. Hung-Lin Wu

By Prof. Kent Sinclair

November 20, 2007

SUMMARY: In the case of *Marcus, Santoro & Kozak, P.C. v. Hung-Lin Wu*, the Supreme Court holds that a circuit court judge correctly determined that the lien of a writ of fieri facias under Va. Code Ann. § 8.01-501 required two Virginia law firms to cease disbursing funds from their trust accounts in satisfaction of accrued legal fees and related costs and to pay those funds to a judgment creditor effective upon the issuance of the writ of fieri facias.

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ARTICLE: Attorney Trust Accounts: Creditors of a Client can Grab Retainer Deposits to Satisfy the Client's Judgment Debts. Timing of "Fee Payments" and Service of the Fieri Facias Writ.

In an important ruling in the case of *Marcus, Santoro & Kozak, P.C. v. Hung-Lin Wu*, the Supreme Court has announced that creditors of a client can reach trust account funds provided by the client and not yet consumed by legal fees of the attorney. The Court holds that a circuit court judge correctly determined that the lien of a writ of fieri facias under Va. Code Ann. § 8.01-501 required two Virginia law firms to cease disbursing funds from their trust accounts in satisfaction of accrued legal fees and related costs and to pay those funds to a judgment creditor effective upon the issuance of the writ of fieri facias.

Key Topics

- The decision charts important provisions governing trust account funds, both in light of traditional trust principles and in light of the particular mechanisms contained in the garnishment provisions of Va. Code Ann. Title 8.01. It construes the proper scope of collection efforts, garnishments directed to law firms, the effectiveness of writs of fieri facias, whether service of the writ on the debtor plays any role in triggering the obligation to make trust fund deposits available to satisfy the creditor's claims, and the mechanical requirements of Va. Code Ann. § 8.01-501 and Va. Code Ann. § 8.01-502.
- The opinion invalidates, for garnishment avoidance purposes, payments of legal fees by the law firms to themselves *after* the date on which they receive notice of the issuance of a writ of fieri facias, even absent service of the writ upon

the client, and prior to the issuance of a garnishment summons directed to the law firms.

Factual Context

The Court's landmark garnishment case involving client trust accounts arose upon facts in which a judgment debtor hired two different Virginia law firms to contest judgments entered against him and a number of business entities with which he was affiliated. This client paid each of the firms a retainer, pursuant to representation agreements that permitted each firm to place the retainer funds into trust accounts and periodically disburse funds to themselves from these accounts as legal fees and costs were incurred over the course of the representation.

A key goal of the client in engaging the firms was apparently to resist enforcement of judgment efforts by the judgment creditor. Undeterred, the creditor set about efforts to collect on the judgments. The judgment creditor caused writs of fieri facias to be delivered to the sheriff pursuant to Va. Code Ann. § 8.01-466, and on the same day served it upon the law firms, but not initially on the judgment debtor. About one week later, the judgment creditor caused separate garnishment summonses to be issued against each of the firms that contained new writs of fieri facias and notices of the liens arising therefrom, and the judgment debtor was also served. It was not disputed by the law firms that by the time of service of the second writs and the garnishment summonses, which were served both upon the client and the law firms, the effectiveness of the writs' asset capture mechanisms was triggered. However -- *after the initial service of fieri facias only upon the law firms and prior to the dates on which the law firms and the judgment debtor were served with the second wave of summonses and notices* -- both law firms took the occasion to disburse accrued legal fees and expenses from the trust accounts to themselves for work previously done.

On the return date of the garnishment summonses, both firms tendered checks to the circuit court representing the full amount of retainer funds remaining in their trust accounts as of the dates that they and the judgment debtor were served with the garnishment summonses in the second wave of writs. The firms also filed separate motions to dismiss the garnishment and motions for summary judgment, contending that -- by operation of Va. Code Ann. § 8.01-502 -- the liens created under Va. Code Ann. § 8.01-501 were not perfected at the time the initial papers were served and thus did not obligate the firms, as "person[s] making a payment to the judgment debtor," to refrain from disbursing funds from the trust accounts until the dates that they and the judgment debtor were both served with the garnishment summonses containing the new writs of fieri facias and notices of the liens arising therefrom. The circuit court disagreed and found in favor of the judgment creditor, ruling that the law firms were not "person[s] making a payment to the judgment debtor" under Va. Code Ann. § 8.01-502 and thus it found that they were personally liable for any amounts disbursed out of the trust funds after the dates that they were served with the initial notices of liens of fieri facias (without regard to whether the client was served with the writs at that time). The law firms appealed.

Arguments and Analysis

The law firms took the position that the client's interest in the trust accounts, into which he deposited his funds under the retainer agreements, was only a bare contract right. They contended that he had no property right or ownership interest in the trust account funds. The Supreme Court promptly and unequivocally rejected the argument that the firms had only had a legally enforceable contractual obligation to repay the client the unearned and unused retainer deposits. Spelling out for the first time in Virginia case law some principles previously only articulated in federal court decisions, the Court noted that an attorney who receives funds from a client for the future payment of legal fees for services not yet rendered holds those funds in trust. It holds that he funds are the corpus of a trust of which the attorney is the trustee and the client the beneficiary.

Applying *Broadbush v. Gresham*, 181 Va. 725, 26 S.E.2d 33 (1943) and other older law on the general nature of the fiduciary relationship, and its distinction from a debtor/creditor relationship, the Court made it clear at the outset that the law firms were in a fiduciary relationship with the judgment debtor, holding his property (the funds he tendered to the firms) as the corpus of a trust of which he was the beneficiary. It noted that nothing in either representation agreement evidenced any other type of relationship.

The firms were thus under a fiduciary duty to, among other things, return the funds in the fiduciary trust account to the client upon his request. The Court found that this obligation did not convert the parties' relationship to that of debtor and creditor as to the trust funds although the client could have sought many of the same remedies as a creditor had the firms failed to discharge their fiduciary duty.

Since client funds deposited in an attorney's trust account are funds held in trust, a claim of the client for return of funds is more than merely a personal claim against the attorney for the payment of the sum of money on deposit: the Court observed that clients *retain both an equitable or beneficial ownership interest in the funds*. The deposit of one client's funds in an account with funds of other clients does not destroy the beneficial interest of the clients in the funds so deposited. The Court held that the clients are entitled to those funds to the extent their equitable ownership interests can be traced. Thus, for all relevant purposes in this context, the trust account funds were the client's property.

Review of Enforcement Mechanisms Basics

Under Va. Code Ann. § 8.01-474, a writ of fieri facias commands "the officer . . . to make the money therein mentioned out of the goods and chattels of the person against whom the judgment is." Garnishment is the process by which a judgment creditor may enforce the lien of his writ of fieri facias against any debt or property due his judgment debtor that is held by a third party, the garnishee. The creditor can assert no greater rights against the garnishee than the judgment debtor, himself, possesses. In *Marcus, Santoro* the Supreme Court emphasized that a garnishment summons does not create a lien itself, but, instead, is a means of enforcing the lien of an execution placed in the hands of an officer to be levied.

The Court holds that a garnishment reaches *any intangible property interest* of a debtor, a scope that is not limited to the "narrow category of a debtor-creditor obligation." Thus, the Court holds that if it appears upon proof or upon confession of the garnishee that he owes the judgment debtor any debt or property, the court may give judgment against him.

Applied in the law firm context in the *Marcus, Santoro* decision, the Court found that the firms, as garnishees, held the intangible equitable property interest of the judgment debtor in their trust accounts and were under a fiduciary duty not only to hold that interest but to return the property to him when the trust obligation ended.

The key result of this analysis is that the judgment debtor's interest in the trust accounts could be attached in garnishment by the judgment creditor, who enforces the lien of his execution against property of the judgment debtor in the hands of a third person, the garnishee (here, the firms).

Persons Making Payment. Perhaps the central argument of the law firms in the *Marcus, Santoro* case was the claim that with respect to the retainer deposits in trust accounts each firm was "a person making a payment to the judgment debtor" under Va. Code Ann. § 8.01-502 such that no liability under the writ of fieri facias attached until the notice requirements of the statute had been met. This argument was flatly rejected by the Supreme Court of Virginia.

Starting from the standard premise that garnishment, like other lien enforcement remedies authorizing seizure of property, is a creature of statute unknown to the common law, the principle of strict satisfaction of requirements is applied. The Court called the "person making a payment" theory "attenuated, if not illusory:"

If [the client] were a plumber and provided plumbing services to the Firms, then their payment to Tseng for those services would clearly be a Va. Code Ann. § 8.01-502 "payment to the judgment debtor." In that case, the lien of fieri facias would not cause a liability on the part of the Firms for making the plumbing payment to Tseng until he had been properly served with notice of the lien. However, the Firms' claim of a statutory payment in this case is far more attenuated, if not illusory, than the foregoing example.

The Court found "no hint in Va. Code Ann. § 8.01-502 that any artifice or legal fiction is contemplated by the plain language of the statute." Proceeding on the *plain meaning canon of construction* that the words of the statute mean

simply what they say, and that words cannot be interpolated into clear statutory provisions, the Court held:

The service requirements of Va. Code Ann. § 8.01-502 apply only where the garnishee actually makes a payment to the judgment debtor. Simply put, the firms never made a payment to the judgment debtor; they paid themselves. When the firms withdrew their client's property from the trust accounts, they made no payment to the client, the judgment debtor. Instead, the firms put his money into their pockets or the pockets of their nominees, but never the judgment debtor. Consequently, the firms are not persons making a payment to the judgment debtor within the intentment of Va. Code Ann. § 8.01-502 and the notice requirements of that statute cannot be claimed by them. Therefore, the failure to make service upon the judgment debtor under that statute has no effect on the firms' liability to the judgment creditor under the garnishments.

Open Issues Remaining.

- Because there was no error assigned to the circuit court's factual finding that the firms were served on the same date the first fieri facias writs were delivered to the sheriff, the Court in *Marcus, Santoro* had no occasion to comment on whether *failure* to have made service upon the firms on the same day that delivery of the writ was made to the sheriff would have changed the effectiveness -- or the effective date -- of the lien under Va. Code Ann. § 8.01-501.

- Additionally, the Court's repeated mention of the absence of any provision in the retainer agreements prepared by both firms that would make provisions altering the general treatment of the retainer deposit as trust account funds under long-established law leaves open the issue of to what extent express provisions might be crafted by Virginia lawyers to address -- or head off -- the sort of enforcement efforts attempted here. However, the strength of the Court's rejection of the theory that the firms are "persons making a payment to the debtor" suggests that any such provisions will not have this easy avenue to follow.

Conclusion

The *Marcus, Santoro* decision provides not only a roadmap to the operations of two key sections in the garnishment article of Va. Code Ann. Title 8.01, but also a red flag for lawyers about the timing of fee and expense draws against retainer deposits held in trust funds. Where the possibility exists that the client has a judgment creditor in the hunt for assets against which to enforce the judgment lien, prompt and regular accounting for fees and expenses incurred will minimize the risk that a garnishment summons and writ of fieri facias will intervene to capture trust account moneys intended to compensate the attorney for work already undertaken in the pending engagement.

Virginia Cross-References. For further analysis of the topics of Virginia law addressed herein, please consult the following sources:

With respect to general issues concerning the procedures and mechanisms for creation and enforcement of judgment liens in Virginia, see Enforcement of Judgments and Liens in Virginia § 1.2 (Virginia's Statutory Scheme); Chapter 2 (Collection of Money Judgments from Personal Property: Execution Fi. Fa); § 3.8 (Other Property Subject to Garnishment). *See also* Virginia Civil Benchbook §10-III (Garnishment).

Complete overviews of the relevant tools for enforcement of judgments in Virginia may be found in Kent Sinclair & Leigh Middleditch, Virginia Civil Procedure, Chapter 15: Execution of Judgments and Related Proceedings, and in Charles E. Friend & Kent Sinclair, Friend's Virginia Pleading and Practice Chapter 32: Enforcement of Judgments and § 22.03 (Enforcement of Judgment Liens), § 22.04 (Execution: Writ of Fieri Facias, Etc.) and § 22.08 (Garnishment).

For a complete discussion of the related topic of attachment, including the "harmonization" in recent years of the Virginia remedies of Attachment, Detinue, Seizure, and Distress, the recognized grounds for attachment, procedures for issuance of the writ, mechanics of service, levy, and return on the writ, as well as the guidelines for the defendant's response, applicable bond provisions, and post-judgment procedures, see Kent Sinclair & Leigh Middleditch, Virginia Civil Procedure, Chapter 16: Attachment.

For a brief overview of the equitable and remedial aspects of lawyers' trust accounts, see John L. Costello, Virginia Remedies § 19.11 (The Lawyer's Office Trust Fund(s)).

The contempt remedy in connection with writs of attachment is discussed in John L. Costello, Virginia Remedies § 15.03 (Contempts (Writ of Attachment)).

See generally Michie's Jurisprudence of Virginia and West Virginia, ATTACHMENT AND GARNISHMENT, and TRUSTS AND TRUSTEES (2007).

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Professor Kent Sinclair, an active member of the Virginia Bar, teaches the program in Virginia Law & Practice at the University of Virginia School of Law. He is Professor of Law and served for many years as Associate Dean of the Law School. He has written more than a dozen books, and is the author of Sinclair & Middleditch, Virginia Civil Procedure (4th ed. 2003 and annual supplements), and co-author of Friend & Sinclair, Virginia Pleading and Practice (2nd ed. 2007 with annual supplements). He is Chair of the Advisory Committee on Rules of Court for Virginia, and has served as Reporter for the Virginia Model Jury Project for a number of years. He has served on the Board of Governors of the Litigation Section of the Virginia Bar Association and the Boyd-Graves Conference on Virginia Law. He edits the Virginia Court Rules and Practice Service for Lexis Law Publishing and is a frequent lecturer at continuing education programs for attorneys and Virginia judges.

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Sinclair on the impact of Billips v. Commonwealth

2008 Emerging Issues 1070

Sinclair on the impact of Billips v. Commonwealth

By Prof. Kent Sinclair

November 20, 2007

SUMMARY: One of its Senior Justices, rendered in a specialized--one is tempted to say arcane--criminal practice context, the Supreme Court of Virginia has issued a general statement about the application of the "reliability standard" for admission of expert proof in the Commonwealth, and has made that standard applicable in at least some aspects of the sentencing process in criminal cases, over a pointed concurring opinion by two Justices of the Court.

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ARTICLE: Broad Impact from a Narrow Ruling: "*Daubert*," the Adequacy of the Basis for Expert Proof, and the Application in Virginia of the Burden to Show the Reliability of Expert Proof-Whose Job is it and What is the Standard? Does the same standard apply in Civil and Criminal Cases, and to All Phases of a Criminal Case?

In a short opinion by one of its Senior Justices, rendered in a specialized-one is tempted to say arcane-criminal practice context, the Supreme Court of Virginia has issued a general statement about the application of the "reliability standard" for admission of expert proof in the Commonwealth, and has made that standard applicable in at least some aspects of the sentencing process in criminal cases, over a pointed concurring opinion by two Justices of the Court who argued that the general reliability doctrine should not have been addressed and was being applied in a context inconsistent with at least some aspects of Virginia's sentencing statutes and procedures in which inadmissible hearsay can be used.

On depressing facts, the decision in *Billips v. Commonwealth* demonstrates that Virginia's "reliability" standard for admission of expert proof has continuing vitality. This doctrine, enunciated in Virginia decisions well *prior* to the United States Supreme Court's celebrated decision in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), and the thousands of trial and appellate decisions applying "*Daubert*" thinking to flesh out analysis about the admission of scientific and expert proof, is "alive and well" in Virginia and has a well-established burden of proof. At least with new technologies, as exemplified in the present sex-crimes context, that burden rests on the proponent of the scientific proof-not on the objector-to show the reliable scientific basis for the proffered evidence.

Narrow Context-Broad Issue

On one level, the *Billips* decision presents the issue of the admissibility of a form of proof unique to sex-crime

sentencing procedures: "penile plethysmograph testing." According to the dictionary that every Virginia practitioner should have on his or her shelf (because it is *the* standard to which the Supreme Court of Virginia has recourse every year in large numbers of cases), Webster's Third New International Dictionary (1993, the latest edition), a "plethysmograph" is "an instrument for determining and registering variations in the size of an organ or limb and in the amount of blood present or passing through it."

The distressing reality is that such an instrument is used by social workers and psychological professionals in forming an assessment of the tendency of an individual to be aroused by images of a sexual nature, often focusing on the age or developmental stage of the persons depicted in the images. The present case demonstrates the prospective use of this technology.

The defendant in *Billips*, who was himself a juvenile, was charged with two counts of forcible sodomy of a child under the age of 13 years, and one count of soliciting a child to commit sodomy. The juvenile and domestic relations district court certified the case to the circuit court, where he was found guilty of all three offenses in a jury trial. The circuit court continued the case for a presentence evaluation. By the time of trial, this defendant had attained his majority. The circuit court, before sentencing, ordered a presentence report containing a psychosexual evaluation pursuant to Va. Code Ann. § 19.2-300.

As recounted by the Supreme Court in its appellate opinion, at the initial sentencing hearing in circuit court, defense counsel objected to the presentence report and to the testimony of a licensed clinical social worker who explained the report, on the grounds that the report was based in part on inadmissible polygraph test results, and also was based in part on plethysmograph testing. Advancing an argument that has been made in several states as this technology became more well-known in recent years, defense counsel in this Virginia case argued that the plethysmograph was "conceptually similar" to the polygraph in that both allow an operator to draw inferences from the body's physical responses to emotional stimuli.

Interestingly, in *Billips* the trial court *sustained* the defense objection to any testimony based on polygraph testing, but not to plethysmograph testing. The court ordered a new risk assessment report excluding any consideration of polygraph testing, but ruled that the plethysmograph results could remain a part of the report.

At the final sentencing proceeding in the circuit court, over the defendant's objection, the judge considered a revised risk evaluation report and heard the testimony of the licensed clinical social worker who participated in preparing it. The report stated that this defendant had been subjected to a "penile plethysmograph assessment" to evaluate the presence or absence of "deviant sexual arousal." The report further stated:

Research has demonstrated that deviant sexual arousal is one of the best indicators of risk to sexually re-offend. As used by our agency, the penile plethysmograph is designed to measure sexual responsiveness to a variety of stimuli. Males and females ranging in age from infant to adult are represented in the stimuli. Visual stimuli are accompanied by audio stimuli describing behavior across a range of different sexual activity.

The report concluded that the defendant's responses to various scenarios, including those involving children, placed him "in the highest re-offense risk category."

Defendant's objections to the report's continued inclusion of the plethysmograph test results and the witness's testimony about such tests focused on the need for a "threshold finding of fact with respect to reliability of the scientific method used." As is often the case in disputes concerning expert or scientific proof in the Commonwealth, this argument relied on language in *Spencer v. Commonwealth*, 240 Va. 78, 393 S.E.2d 609 (1990), one of the earliest references to the need for reliability in scientific proof in Virginia. The circuit court overruled the foundational objection and then imposed sentences of life imprisonment for each of the sodomy convictions and five years confinement on the solicitation conviction. After affirmance in the Court of Appeals, the Supreme Court awarded this defendant an appeal limited to an assignment of error concerning admission of evidence based on plethysmograph

testing.

Legal Landscape

Seventeen years ago the Supreme Court of Virginia in *Spencer* (1) confirmed its rejection of the so-called "Frye test" (a prominent but minority rule, nationally requiring "general acceptance" of a technology in the relevant scientific discipline), and (2) stated a general "reliability approach" which the Court in the present *Billips* decision calls *the "rule governing the admissibility of scientific evidence"*:

We have declined to adopt the "Frye test" in Virginia. When scientific evidence is offered, the court must make a threshold finding of fact with respect to the reliability of the scientific method offered, unless it is of a kind so familiar and accepted as to require no foundation to establish the fundamental reliability of the system, such as fingerprint analysis; or unless it is so unreliable that the considerations requiring its exclusion have ripened into rules of law, such as "lie-detector" tests; or unless its admission is regulated by statute, such as blood-alcohol test results.

Criminal Cases. When *Billips* was heard in the Court of Appeals, that court held the *Spencer* standard inapplicable because a "relaxed standard of admissibility [applies] at sentencing hearings" and concluded that, at the sentencing stage, all that is required is that the proffered evidence bear "some indicia of reliability." The Court of Appeals found such indicia of reliability in the testimony of the probation officer and the licensed clinical social worker who had prepared the defendant's presentence report.

Referring again to the *Spencer* language as the "rule," the Supreme Court observed that neither witness qualified before the trial judge as an expert in the field of plethysmograph testing and the circuit court made no "threshold finding of fact that the system was reliable." While the Court of Appeals noted that the defendant had offered no evidence at the sentencing hearing to support his contention that the plethysmograph testing method was unreliable, the Supreme Court rejected that allocation of the burden to lay the necessary evidentiary foundation. Further, the Supreme Court flatly rejects the view expressed by the Court of Appeals that no threshold finding of reliability was necessary and that the admission of the evidence was within the circuit court's discretion.

The Supreme Court explained that the "rule" spelled out in *Spencer* has very broad application:

Although *Spencer* was a case in which scientific evidence was offered at the guilt phase of a capital murder trial, we said nothing there to limit the applicability of its rule to that phase alone. Rather, the *Spencer* rule applies to the use of scientific evidence in judicial proceedings generally.

Recognizing that "advancements in the sciences continually outpace the education of laymen . . . judges, jurors and lawyers," the Supreme Court warned in the present case that reliability is not to be presumed for new technology, citing the landmark polemic, Peter W. Huber, *Galileo's Revenge: Junk Science in the Courtroom* 206-209 (1991), the Court said:

[T]here is a risk that those essential components of the judicial system may gravitate toward uncritical acceptance of any pronouncement that appears to be "scientific," and the more esoteric the field, the more difficult it becomes for laymen to greet it with skepticism. That tendency has given rise to frequent complaints of "junk science" in the courts.

Given this "risk" and inherent power of baseless science to mislead, the Court concluded:

To guard against that risk, we continue to require a "threshold finding of fact with respect to the reliability of the scientific method offered," subject only to the exceptions [mentioned] in *Spencer*.

The "exceptions" adverted to in the Court's 1990 decision in *Spencer*, 240 Va. 78, 97, 393 S.E.2d 609, 620, 621, are illustrative, and important. They are:

- techniques or science that are so familiar and accepted as to require no foundation to establish fundamental reliability of the system (the Court gave the example of fingerprint identification).
- tests that are so unreliable that the exclusion of such proof has "ripened into rules of law." (The Court gave the example of polygraph proof).
- categories of proof the admissibility of which is directed by statute. (The Court referred to legislative provisions concerning blood-alcohol test results as one example).

Burden of Laying The Foundation

Rejecting the implication in the lower courts' decisions that the defendant had the obligation to show affirmatively that there was a problem with plethysmograph proof, the Court stressed that *the proponent of new scientific evidence has the burden to establish its reliability*:

As with any evidence requiring a preliminary foundation, the burden of making a prima facie showing of that foundation rests upon the proponent of the evidence, subject to the opponent's opportunity for cross-examination and refutation. Here, the Court of Appeals erred in reversing that burden, requiring Billips to introduce evidence of unreliability instead of requiring that the Commonwealth first make out a prima facie case of "the reliability of the scientific method offered."

In the *Billips* case itself, the Commonwealth failed to offer *any* proof of the general scientific reliability of the particular technique involved. Hence the Supreme Court concluded that the plethysmograph evidence, lacking foundation, was inadmissible in the sentencing proceeding. Since this was not a "harmless" error, the case was remanded for resentencing.

Relaxed Standards in Phases of a Criminal Case?

One of the backdrops for the discussion in this recent *Billips* decision is a longstanding confusion among some practitioners and judges about a "relaxed" standard of evidentiary admission in criminal cases, or certain phases of a criminal case. The key point made by the two judges who chose in *Billips* to concur specially rather than join the Court's broad opinion, was that this case concerned only the admissibility of evidence contained in a pre-sentence report prepared in accordance with the provisions of Va. Code Ann. §§ 19.2-299 and Va. Code Ann. 19.2-300. Under these provisions, and also under Va. Code Ann. § 19.2-301, such a pre-sentence report is considered only by a trial court in its sentencing decision. The two concurring Justices refer to this doctrine with great precision, noting that it is a relaxed standard governing admissibility of evidence that is contained in a pre-sentence report, in accord with these cited statutes and decisions such as *O'Dell v. Commonwealth*, 234 Va. 672, 701, 364 S.E.2d 491, 508 (1988), which noted that after the jury has fixed the sentence the court may consider hearsay evidence contained in pre-sentence report.

This is a far cry from there being a "relaxed standard" for admission of proof in a criminal case, or even in sentencing proceedings where the jury is still functioning. There is nothing in the cited statutes or cases like *O'Dell* that could properly be read as relaxing admissibility of proof in the jury phase of sentencing under the bifurcated procedure. Rather, these items address the range of the trial judge's discretion to consider all helpful sources after the jury has completed its work and has been discharged.

References by Virginia courts over the last 20 years to the permitted use of postsentence reports containing hearsay has caused some confusion in the bar about admissibility standards. Most of the prior cases, including *O'Dell*, use the term "postsentence" reports, keyed off of Va. Code Ann. § 19.2-264.5. Much of the problem may be due to the application in modern bifurcated sentencing cases of the older United States Supreme Court Cases, and of mixing the questions of admissibility standards for proof to the jury in the sentencing phase of a bifurcated case with the freedom a trial judge has to consider unadmitted material and hearsay in the presentence or postsentence report.

In the Court of Appeals' decision in the *Billips* appeal, there was a long discussion of relaxed evidence standards in sentencing, citing both its own decision in *Harris v. Commonwealth*, 26 Va. App. 794, 497 S.E.2d 165 (1998), and the Supreme Court of Virginia's decision in *McClain v. Commonwealth*, 189 Va. 847, 55 S.E.2d 49 (1949), both of which rely upon the U.S. Supreme Court's older case law. But the general tenor of the latter is to address whether Due Process prevents considering proof that does not meet traditional standards for admission into evidence, *not* whether a state's evidence law could require more of an evidentiary foundation at sentencing.

Beyond the Due Process aspect (which is not a comment on admissibility of ordinary evidence or scientific evidence) there is a second problem. It would be a mistake to reason from the admissibility of unadjudicated prior bad acts in a criminal case, and whether those instances of prior conduct can be established merely by a preponderance of the evidence, to a conclusion that relaxed standards apply for the admissibility of evidence. Rather, those doctrines merely reflect the proposition that while the overall burden of proving guilt in the pending criminal case is beyond a reasonable doubt, any particular bad act does not need to be proven by the higher level of proof. Such authority is not saying, for example, that hearsay is admissible to prove a prior bad act in the jury phase of the bifurcated sentencing, just that the regular preponderance standard need is all that need be satisfied for the judge to allow consideration of the prior act.

The general confusion of the bar on this topic in recent decades has been addressed squarely in two decisions by the Supreme Court. In 2004, when the Court rendered *Powell v. Commonwealth*, 267 Va. 107, 590 S.E.2d 537 (2004), it wrote as follows:

We further reject Powell's contention that there is a "relaxed evidentiary standard" applicable to the penalty determination phase of a capital murder trial in Virginia. To the contrary, Va. Code Ann. § 19.2-264.4(B) expressly provides, and we have consistently held, that the Commonwealth must prove the existence of one or both aggravating factors beyond a reasonable doubt. See, e.g., Clark v. Commonwealth, 220 Va. 201, 212, 257 S.E.2d 784, 791 (1979), cert. denied, 444 U.S. 1049 (1980).

Powell's contention that the introduction of evidence of unadjudicated criminal acts is not admissible because Ring somehow refines the need for "heightened reliability" in capital sentencing is, as the Commonwealth notes, nothing more than a reassertion of the same argument raised in his prior motion and consistently rejected by this Court. *Jackson v. Commonwealth*, 267 Va. 178, 590 S.E.2d 520 (2004) (today decided). Powell's assertion that Code § 19.2-264.4(B) permits the introduction of hearsay evidence not otherwise subject to an exception is simply wrong. n.9. See, e.g., *Lovitt v. Warden*, 266 Va. 216, 259, 585 S.E.2d 801, 806 (2003); *Jackson*, 267 Va. at 536, 590 S.E.2d at 206, 2004.

For these reasons, we hold that the trial court did not err in overruling Powell's motion to have the Virginia capital murder statutes declared unconstitutional.

Footnote No. 9 in *Powell* read: "On brief, the Commonwealth suggests that Powell has confused the evidentiary standard applicable to the penalty determination phase with that applicable to the trial court's consideration of the presentence report. Powell did not respond to this assertion in his reply brief and does not otherwise assert that Ring has any implication to the post-verdict sentencing procedure. Accordingly, we express no opinion on that issue."

And in the *Lovitt* case, cited above, the Court also expressly said:

We also find no merit in Lovitt's claim that the judge at the habeas hearing improperly excluded certain affidavits

by several of Lovitt's family members that Lovitt attempted to introduce into evidence. Assuming, without deciding, that such affidavits are admissible subject to the trial court's discretion in an evidentiary hearing held under Va. Code Ann. § 8.01-654(C), we conclude that the circuit court did not abuse its discretion in refusing to admit them into evidence. The facts alleged in those affidavits were cumulative of the testimony of Taylor, Jones, and Carter.

Lovitt also is incorrect in his assertion that the affidavits at issue would have been admissible in the penalty phase proceeding and, thus, should have been admitted into evidence on that basis at the habeas hearing. Unlike some other jurisdictions, Virginia does not permit the admission of such hearsay evidence during penalty phase proceedings. See Va. Code Ann. § 19.2-264.4(B).

The cited Va. Code Ann. section, § 19.2-264.4(B), in the first paragraph provides that those presentence reports shall not be admitted in a jury case, and in the second, unnumbered paragraph invokes the application of the normal rules of evidence.

Conclusion

Just like hearsay, it would be exceptionally dangerous to suggest that the reliability standard for admission of expert proof is relaxed in the guilt phase of jury proceedings in criminal cases. A computer search back to 1788 for any evidence decision in Virginia using any form of the "relax" concept in a criminal case yields: nothing. At least where the jury has a function, whatever standards the Court ultimately spells out for assuring the reliability of scientific evidence generally would also be applied at that stage. The recent *Billips* decision goes a measurable distance down this road, stressing the universally applicable principle that the proponent of scientific proof (which has not yet attained the level of acceptance of, say, fingerprint analysis) has the burden of laying a finding to support a threshold determination that the principles involved in the proof are reliable.

Virginia Cross-References. For further analysis of the topics of Virginia law addressed herein, please consult the following sources:

With respect to general issues concerning the standards for admission of expert and scientific proof in Virginia, see Charles E. Friend, *The Law of Evidence in Virginia* Chapter 14: Scientific Evidence; § 17-18 (Basis for Expert Opinion). See also the Boyd-Graves Conference (Kent Sinclair, Reporter), *The Guide to Evidence in Virginia* (2007), Section 702 (Experts). See also Sinclair, Kearfott, Sheridan & Imwinkelreid, *Virginia Evidentiary Foundations Guide* (Supp. 2004).

In connection with managing expert proof at trial, see Virginia Civil Benchbook §4-III (Opinion Evidence), and Virginia Criminal Benchbook § 7-III (Opinion Evidence) and § V (Scientific Evidence).

Landmark Virginia decisions on the admission of expert or scientific proof, in addition to the *Spencer* case discussed above would include *Satcher v. Commonwealth*, 244 Va. 220, 244, 421 S.E.2d 821, 835 (1992). The Supreme Court of Virginia has expressly left open for future consideration the issue whether analysis similar to that employed by the federal courts under *Daubert v. Merrell Dow Pharms.*, 516 U.S. 869 (1995), should be applied in Virginia trial courts to determine the scientific reliability of expert testimony. See *John v. Im*, 263 Va. 315, 559 S.E.2d 694 (2000). Concerning "blood spatter" evidence and the testability of scientific proof, see *Smith v. Commonwealth*, 265 Va. 250, 576 S.E.2d 465 (2003).

For an overview of the sentencing process, including discussion of non-capital felony practice, the trial judge's role, general considerations, bifurcated trial aspects, sentencing factors, jury sentencing processes, and suspended sentences, see Virginia Criminal Law and Procedure Chapter 63.

See generally Michie's Jurisprudence of Virginia and West Virginia, EVIDENCE, (2007).

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Dorsaneo on Significant 2007 Texas Legislation

2008 Emerging Issues 1047

Dorsaneo on Significant 2007 Texas Legislation

By William V. Dorsaneo III.

November 19, 2007

SUMMARY: Gain insights and a quick overview of key developments from the 2007 80th Texas Regular Legislative Session. Topics covered include: venue in Jones Act cases; new requirements for all partys first pleadings; and, additional filing fees for Appellate Practice;

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ARTICLE: Overview

The 2007 80th Texas Regular Legislative Session affected many areas of law. Some of the key changes relevant to civil litigation are summarized and analyzed by Professor Dorsaneo below. For detailed coverage, see Dorsaneo, Texas Litigation Guide, at the chapters and sections identified below.

Civil Practice and Litigation

New Identification Requirements for Original Pleadings. In a new pleading requirement, newly added Tex. Civ. Prac. & Rem. Code § 30.014(a) requires a partys first pleading, typically an original petition or original answer, to include the last three numbers of the partys drivers license number (if the party has a drivers license) and the last three numbers of the partys social security number, if the party has been issued a social security number. The remedy for violating these requirements is a court order compelling compliance that is itself enforceable by contempt. *See* Tex. Civ. Prac. & Rem. Code § 30.014(b).

Increase in Justice and Small Claims Court Jurisdiction. Tex. Gov't Code §§ 26.042, 27.031, and 28.003 have been amended to increase the upper limit of justice and small claims court jurisdiction to \$10,000 from the previous \$5,000. Similarly, Tex. Civ. Prac. & Rem. Code §§ 51.001 and §51.002 have been amended to give county courts appellate jurisdiction over justice court cases if the amount in controversy exceeds \$250, up from \$20 previously. The

higher jurisdictional limits for justice and small claims courts should aid in expediting trials and decreasing the backlog in county level and district courts. *See* Ch. 2, *Jurisdiction*, § 2.01[3][b][e], and Ch. 46, *Justice Court Proceedings*, § 46.01. The increase in the jurisdictional ceiling of justice and small claims courts was one of several recommendations made in a report published in 2007 by the Texans for Lawsuit Reform Foundation entitled *The Texas Judicial System*. A companion change that did not get enacted in the last legislative session would have increased the jurisdictional threshold for a district courts civil jurisdiction to \$10,000. More can be expected on the subject of reforming the structure of Texas trial courts in 2009.

Venue in Jones Act Cases. New 2007 legislation providing for mandatory venue in Jones Act cases in listed counties has been added to Ch. 61, *Venue* [Tex. Civ. Prac. & Rem. Code § 15.0181; *see* § 61.02[7][a]]. Under prior law, venue in Jones Act was proper in the county of the plaintiff's residence at the time the cause of action accrued. *See* former Tex. Civ. Prac. & Rem. Code @ 15.018 (enacted in 1995, eff. 1/1/96). Apparently, blanket authorization for such actions to be filed in the plaintiffs county of residence caused or contributed to an explosion of lawsuits in Texas against dredging companies under the Jones Act. These lawsuits threatened to make dredging in Texas so expensive that projects along the Texas Gulf Coast were arguably placed at serious risk. Accordingly, the new law takes a more nuanced approach by providing special mandatory venue rules for cases in which a substantial part of the events giving rise to a claim occurred on inland waters in Texas, outside Texas, ashore in Texas, in another Gulf Coast state, or during the course of an erosion response project.

Business Entities and Relationships

Continuation of Partnership After Event Requiring Winding Up. If a domestic general partnership does not have a period of duration, is not for a particular undertaking, and is not required under its partnership agreement to wind up the partnership on the occurrence of a specified event, an event requiring the winding up of the partnership occurs on the 60th day after the date on which the partnership receives notice of a request for the winding up of the partnership from a partner, unless a majority in interest of the partners deny the request for winding up or agree to continue the partnership. *See* Tex. Bus. Org. Code § 11.057(d), covered in Ch. 181, *Withdrawal of Partners and Winding Up*, § 181.21[7].

Real Estate Litigation

Trespass to Try Title Actions. In an important change, Tex. Civ. Prac. & Rem. Code § 37.004(c) permits a declaratory judgment action and an award of attorney's fees when the sole issue concerning title to real property is the determination of the proper boundary line between adjoining properties. This overrules the Texas Supreme Court's decision in *Martin v. Amerman*, 133 S.W.3d 262 (Tex. 2004) and provides a more user friendly alternative method of resolving title disputes concerning boundary lines. *See* Ch. 250, *Adverse Possession*, § 250.101[1]; Ch. 251, *Trespass to Try Title*, §§ 251.01[2], 251.05[1], 251.101[1]; Ch. 257, *Suit to Quiet Title*, §§ 257.01[3], 257.110[1]; Ch. 280, *Adjoining Landowners*, §§ 280.01[2], 280.51, 280.60, 280.100[1], 280.101[1].

Statute of Limitations in Suits to Recover Title. Tex. Civ. Prac. & Rem. Code § 16.033(c) enacts a two-year statute of limitations for suits to recover title to or an interest in real property based on several kinds of technical defects in a property instrument recorded with the county clerk in the county where the property is located. *See* Ch. 251, *Trespass to Try Title*, § 251.04[3]; Ch. 257, *Suit to Quiet Title*, § 257.05[1]).

Condemnation Bill of Rights. A condemning authority must provide to the owner of property affected a landowner's bill of rights statement, which describes condemnation procedures, including both the authority's

obligations to the owner and the owner's rights to object to and appeal the amount of damages awarded [Tex. Prop. Code § 21.0112; Tex. Gov't Code § 402.031]. *See* Ch. 261, *Condemnation*, §§ 261.02[1], 261.100[1].

Personal Injury Litigation

Right to Use Force in Defense. Amendments to Tex. Civ. Prac. & Rem. Code § 83.001 and corresponding sections to the Penal Code greatly expand the right of a person to use force or deadly force in self-defense, in defense of another, or in defense of property. As to causes of action that accrued on or after Sept. 1, 2007, Tex. Civ. Prac. & Rem. Code § 83.001 provides civil immunity from liability for personal injury or death that results from any use of force or deadly force that is justified under Chapter 9 of the Penal Code. *See* Ch. 292, *Death Actions*, § 292.02[1]; Ch. 330, *Assault and Battery*, §§ 330.07, § 330.110.

Settlements Against State of Texas. New Chapter 111 of the Civil Practice and Remedies Code requires legislative consent or approval of certain settlements of claims or actions against the State of Texas when the settlement was entered into on or after June 15, 2007. *See* Ch. 102, *Settlement*, § 102.04[5]; Ch. 293, *Claims Against Governmental Entities*, § 293.16[6].

Architect Immunity. New Tex. Civ. Prac. & Rem. Code § 150.003 provides that an architect or engineer who voluntarily (and without compensation or the expectation of compensation) performs professional services during and in response to a declared emergency or disaster is not liable for civil damages unless the act, error, or omission constitutes gross negligence, or wanton, willful, or intentional misconduct. *See* Ch. 322, *Professional Malpractice*, §§ 322.04[2], 322.102[1].

Insurance Litigation

Parent's Worker's Compensation Benefits. Tex. Lab. Code § 408.182 is amended to authorize an eligible parent to collect worker's compensation death benefits, even if not dependent on the deceased employee, when the employee has no other legal beneficiary otherwise entitled to the benefits. *See* Ch. 340, *Worker's Compensation*, § 340.12.

Life Insurance. New Tex. Ins. Code § 1114.001 et seq. requires that if an existing life insurance policy or annuity is replaced by different coverage on or after January 1, 2008, the replacing insurer and any insurance agent must ascertain whether the insured has existing coverage and, if so, to provide notice to the insured of the effects of replacing the existing coverage, including whether the proceeds or value of the existing coverage will be used to finance the replacement coverage. These notices may aid in preventing unethical practices such as "twisting," which involves a failure to make complete comparisons of insurance contracts for the purpose of persuading an insured to surrender an existing contract and to purchase another insurance contract, or "churning," which involves persuading a life insurance policy holder to purchase a policy with a higher death benefit, even though these transactions do not benefit the policy holder. *See* Ch. 344, *Life, Health and Accident Insurance*, § 344.01[2][b].

Family Code Litigation

Annulment Based on Mental Incapacity. A marriage may be declared void based on a party's lack of mental capacity if the application to declare the marriage void was pending on the date of the party's death or the decedent had been married for less than three years and the application is filed within one year of the death. *See* Tex. Prob. Code §

47A; *see also* Tex. Fam. Code § 6.108(a)(c); *see* Ch. 361, *Annulment and Suit To Declare Marriage Void*, § 361.02[6][e]. In such cases, a court must declare that a decedent's marriage is void if it finds that, on the date the marriage occurred, the decedent did not have the mental capacity to consent to the marriage and understand the nature of the marriage ceremony. The court may not declare the marriage void, however, if it finds that after the marriage occurred, the decedent gained the mental capacity to recognize the marriage relationship and did recognize that relationship. *See* Tex. Prob. Code § 47A(d)(e), covered in Ch. 394, *Will Construction*, § 394.02[7]. This new law was passed in order to void those marriages entered into as a result of mendacious caretakers who sought to take advantage of individuals who were mentally incapable of entering into marriages.

Obligor's Death Does Not End Child Support. The death of a parent on or after September 1, 2007, who has been ordered to pay child support no longer terminates the support obligation. Now, any remaining unpaid future obligation accelerates and becomes payable on the date of death. *See* Tex. Fam. Code §§ 154.006, 154.015; Ch. 371A, *Child Support*, § 371A.05.

Extended Statute of Limitations for Support Enforcement. The statute of limitations for contempt enforcement of child support orders has been expanded from six months to two years after the child becomes an adult or the support obligation terminates. *See* Tex. Fam. Code § 157.005(c); Ch. 372, *Enforcement of SAPCR Orders*, § 372.02[2][c][i].

Probate Code Litigation

Opposition to Application to Sell Estate Property. Any person interested in the estate may file an opposition to an application for the sale of estate property or may make an application for the sale of other estate property. The clerk of the court in which the application for an order of sale is filed must immediately call to the judges' attention any opposition to the sale that is timely filed, and the court must hold a hearing on the application. *See* Tex. Prob. Code §§ 345 and 345A, covered in Ch. 400, *Managing the Estate*, § 400.03[4][a].

Guardian Ad Litem in Guardianship Proceeding. The guardian ad litem's term of appointment expires, without court order, on the date the court either appoints a guardian or denies the application for appointment of a guardian, unless the court determines that the continued appointment of the guardian ad litem is in the ward's best interest. *See* Tex. Prob. Code § 645(f), covered in Ch. 410, *Appointment of Guardians*, § 410.06[7].

Opposition to Application to Sell Guardianship Property. When an application for the sale of guardianship real property is filed, a citation must be issued to all persons interested in the guardianship, informing them of their right to file an opposition to the sale during the period prescribed by the court as shown in the citation, if they so elect. The clerk of the court in which the application is filed must immediately call to the judges' attention any opposition to the sale that is timely filed, and the court must hold a hearing on the application. *See* Tex. Prob. Code §§ 824 and 824A(a), covered in Ch. 411, *Administration of Guardianships*, § 411.03[2][d][iii].

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Professor Dorsaneo served as the Reporter to the Combined Committee appointed by the Texas Supreme Court, the Court of Criminal Appeals and the Texas Legislature to draft the Texas Rules of Appellate Procedure and for the last fifteen years he has served as the Chairman of the Appellate Rules Subcommittee of the Advisory Committee to the Texas Supreme Court. He is also the Chairman of the Texas Supreme Courts Task Force for Revision of the Texas Rules of Civil Procedure and a member of the American Law Institute.

Professor Dorsaneo is Board Certified in Civil Appellate Law.

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Martin on Nevada Yellow Cab Corp. v. Eighth Judicial District Court

2008 Emerging Issues 981

Martin on Nevada Yellow Cab Corp. v. Eighth Judicial District Court

By Leah A. Martin

November 16, 2007

SUMMARY: While Nevada may still be part of the Wild West in many ways, attorney ethics is not one of them. The Nevada Supreme Court has issued many decisions on attorney behavior, ethics, and disqualification. The most recent Nevada case on attorney disqualification for former client conflicts, *Nevada Yellow Cab Corp. v. Eighth Judicial District Court* [123 Nev. Adv. Op. No. 6, 152 P.3d 737 (2007)], provides useful information, whether an attorney is (1) determining whether to file a motion to disqualify; (2) crafting a persuasive argument concerning disqualification; or (3) attempting to manage the attorneys own practice in a manner that is consistent with Nevadas current ethical standards.

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ARTICLE: While Nevada may still be part of the Wild West in many ways, attorney ethics is not one of them. The Nevada Supreme Court has in recent years issued many decisions on attorney behavior, ethics, and disqualification. The most recent Nevada case on attorney disqualification for former client conflicts, *Nevada Yellow Cab Corp. v. Eighth Judicial District Court* [123 Nev. Adv. Op. No. 6, 152 P.3d 737 (2007)], provides useful information, whether an attorney is (1) determining whether to file a motion to disqualify; (2) crafting a persuasive argument concerning disqualification; or (3) attempting to manage the attorneys own practice in a manner that is consistent with Nevadas current ethical standards.

History of Attorney Disqualification in Nevada. In Nevada, it has been recognized for many years that as part of their inherent authority, district courts have the responsibility to control the conduct of attorneys practicing before them [*Cronin v. Eighth Jud. Dist. Ct.*, 105 Nev. 635, 640, 781 P.2d 1150, 1153 (1989)]. District courts are vested with broad discretion to determine whether conduct is such that disqualification is required [*Cronin*, 105 Nev. at 640, 781 P.2d at 1153]. Over the years, the Nevada Supreme Court has issued only a few decisions on attorney disqualification--particularly in the area of former client conflicts. Among these decisions, *Waid v. Dist. Court* [121 Nev. 605, 119 P.3d 1219 (2005)] was particularly instructive. However, when *Nevada Yellow Cab Corp. v. Eighth Judicial District Court* [123 Nev. Adv. Op. No. 6, 152 P.3d 737 (2007)] was issued in early 2007, the Nevada Supreme Court provided substantial guidance on this subject.

What is a Former Client Conflict? Nevada Rule of Professional Conduct 1.9(a) n1 provides that:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same

or a substantially related matter in which the persons interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

If an attorney provides such representation, it gives rise to a former client conflict.

What Relief is Available? If a client believes that its former counsel has taken on representation that creates a former client conflict, the client can seek disqualification of its former counsel with regard to counsels current conflicting representation.

What Showing is Required for Disqualification?

The Elements for Disqualification

The elements for disqualification are [*Nevada Yellow Cab Corp. v. Eighth Judicial District Court*, 123 Nev. Adv. Op. No. 6, 152 P.3d 737, 741 (2007)]:

- (1) The party seeking disqualification had an attorney-client relationship with the lawyer;
- (2) The former and current matters are substantially related; and
- (3) The current clients interests are materially adverse to those of the party seeking disqualification.

In practice, there is generally little conflict as to whether an attorney-client relationship existed. Such a relationship can be readily proven through an engagement letter, billing statements, correspondence, or simply the affidavit or declaration of the moving party.

Likewise, whether the current clients interests are materially adverse to those of the former client is generally a relatively simple analysis. For example, if the former and current clients are opposing parties in the same action, material adversity is clear.

The Substantially Related Standard

The heart of the disqualification analysis in former client conflict cases is whether the former and current matters are substantially related. In *Nevada Yellow Cab*, the Nevada Supreme Court reiterated its three-part test for determining whether two representations are substantially related. Specifically, a district court presented with a disqualification motion based on a former representation should (1) make a factual determination concerning the scope of the former representation, (2) evaluate whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those matters, and (3) determine whether that information is relevant to the issues raised in the present litigation [*see Nevada Yellow Cab v. Eighth Jud. Dist. Ct.*, 123 Nev. Adv. Op. No. 6, 152 P.3d 737, 742 (2007) (citing *Waid v. Dist. Court*, 121 Nev. 605, 119 P.3d 1219 (2005))].

In determining whether a matter is substantially related to a prior matter, the factual contexts of both representations govern, regardless of whether confidences were in fact imparted to the attorney by the client in the prior representation [*see Waid v. Dist. Court*, 121 Nev. 605, 119 P.3d 1219 (2005)]. This distinction is key in that it protects the attorney-client privilege and duties of confidentiality arising from both the former and current representations.

However, it is important to recognize that the court must focus on the actual relationship between the two matters, rather than any superficial resemblance between the former and current representation [*see Nevada Yellow Cab v. Eighth Jud. Dist. Ct.*, 123 Nev. Adv. Op. No. 6, 152 P.3d 737, 742 (2007) (citing *Waid v. Dist. Court*, 121 Nev. 605, 119 P.3d 1219 (2005))]. While best practice dictates that the moving party provide sufficient information to allow the court to determine the scope of the prior representation, it is not necessary to submit billing statements, attorney-client

communications, or any other specific case materials.

The Balancing Test

In determining whether a disqualification motion should be granted, district courts must weigh the effects or prejudices disqualification would have on the parties and the public interests involved, while discouraging the use of such motions as a strategic tool for harassment and delay [see *Nevada Yellow Cab v. Eighth Jud. Dist. Ct.*, 123 Nev. Adv. Op. No. 6, 152 P.3d 737, 74243 (2007)]. In balancing these factors, doubts should generally be resolved in favor of disqualification [*Nevada Yellow Cab*, 123 Nev. Adv. Op. No. 6, 152 P.3d at 74243].

How Does Waiver of Conflict Occur? When faced with a former client conflict, the most common response is probably that the conflict has been waived. Fortunately for former clients seeking disqualification, waiver is not a simple matter. Rather, [w]aiver requires the intentional relinquishment of a known right [*Nevada Yellow Cab Corp. v. Eighth Jud. Dist. Ct.*, 123 Nev. Adv. Op. No. 6, 152 P.3d 737, 740 (2007)]. One way in which waiver can occur (although it is rare) is the former clients informed written consent to the current representation [see NRPC 1.9(a)]. If waiver is instead to be inferred from conduct, the conduct must clearly indicate the partys intention [*Nevada Yellow Cab Corp.*, 123 Nev. Adv. Op. No. 6, 152 P.3d at 740].

Delay in seeking disqualification is in itself insufficient to establish a waiver [*Nevada Yellow Cab Corp.*, 123 Nev. Adv. Op. No. 6, 152 P.3d at 740]. Nevertheless, best practice dictates that disqualification be sought promptly on discovery of a former client conflict.

What is the Standard of Review? A district courts decision on a motion to disqualify is reviewed under a manifest abuse of discretion standard [*Nevada Yellow Cab Corp. v. Eighth Jud. Dist. Ct.*, 123 Nev. Adv. Op. No. 6, 152 P.3d 737, 742 (2007)].

The Bottom Line. The lesson to be learned from *Nevada Yellow Cab* and its predecessors is the importance of conducting thorough conflict checks before commencing any representation. This is of particular importance in multiple-attorney firms, in which each attorney may not have complete knowledge of all the firms clients and/or matters. If any potential conflict appears, the practitioner is faced with a decision to decline the new representation or seek the informed written consent of its former client to the current representation. If written consent is not obtained from the former client, failure to decline the representation could have dire consequences, including disqualification, disgorgement of fees, and professional discipline. The choice between taking a new case and these potentially serious ramifications should be simple.

In light of the Courts holding in *Nevada Yellow Cab*, clients that feel that their former counsel is engaging in representation substantially related to their prior representation and materially adverse to their interests should seek voluntary withdrawal of their former counsel and, if necessary, file a motion to disqualify at the earliest possible time. While delay itself cannot be deemed a waiver, other conduct taken during the course of the delay could be interpreted as manifesting the intent to waive the conflict. The motion to disqualify should clearly articulate the bases for disqualification and should be supported, at a minimum, by the declaration or affidavit of the moving party.

While some attorneys in Nevada still practice under the Wild West mentality, they are setting themselves up for failure. Legal practitioners in Nevada must carefully follow the professional standards set forth in relevant Nevada authority. Those who fail to do so are now being held accountable by both their peers and the judiciary.

For additional information on conflicts of interest and disqualification, see Nevada Civil Practice Manual, Ch. 2, *Judges and Attorney*, § 2.12 (Matthew Bender).

For comments to the Model Rules of Professional Conduct (on which the Nevada Rules of Professional Conduct are based) and a compilation of relevant case annotations, see Annotated Model Rules of Professional Conduct, Fifth Edition (American Bar Association Center for Professional Responsibility).

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n1 . It should be noted that the Nevada Rules of Professional Conduct (NRPC) went into affect in May 2006. The NRPC adopted, in large part, the language of the former Supreme Court Rules on professional conduct. *Nevada Yellow Cab Corp. v. Eighth Judicial District Court* [123 Nev. Adv. Op. No. 6, 152 P.3d 737 (2007)] involved conduct arising under the earlier Supreme Court Rules. However, the analysis does not differ whether the old Supreme Court Rules or the NRPC applies.

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Jean-Claude Labady on In Re Vioxx Litigation

2008 Emerging Issues 985

Jean-Claude Labady on In Re Vioxx Litigation

By Jean-Claude Labady

November 16, 2007

SUMMARY: The New Jersey Appellate Division in *In Re Vioxx Litigation*, 395 N.J. Super. 358 (App. Div. 2007) recently affirmed the Superior Court ruling dismissing claims brought by plaintiffs that are citizens of the United Kingdom under the infrequently used defense of *forum non conveniens*. This Emerging Issues Analysis examines the Court's ruling and future prospects for foreign citizens bringing civil actions in New Jersey.

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ARTICLE: The Sharp Edge of the *Forum Non Conveniens* Doctrine. Although the recent \$4.85 billion settlement that Merck has agreed to pay to tens of thousands of plaintiffs throughout the country sends a signal to foreign claimants that U.S. courts are attractive forums for the litigation of their claims, entry into U.S. courts is not always easy, however, as New Jersey's Appellate Division has shown in the *Vioxx Litigation* case recently. 395 N.J. Super. 358, 928 A.2d 935 (App. Div. 2007). New Jersey trial courts typically do not keep out a plaintiff that asserts potentially meritorious claims simply on the basis of the *forum non conveniens* doctrine. The prudent defendant often includes in its answer to a complaint the assertion of the doctrine with other more robust affirmative defenses. Moreover, New Jersey is known as a pro-plaintiff state where a defense attorney thinks twice before seeking dismissal of a plaintiff's case on almost any equitable or procedural ground. If the case law tradition in the state's courts favors the adjudication of a plaintiff's claims on the merits, 98 plaintiffs from the United Kingdom and Wales recently felt the sharp edge of the *forum non conveniens* doctrine when their claims were dismissed by a trial court in Atlantic County.

The Trial Judge Turned Away U.K. Plaintiffs. Even trial court judges in New Jersey tread cautiously in deciding defendants' motions to dismiss plaintiffs' claims on procedural or equitable grounds. Judge Carol E. Higbee of the New Jersey Superior Court in Atlantic County was selected as the single judge to manage cases that have been filed against Merck whose headquarter is located in New Jersey. Merck became the target of mass-tort personal injury cases after it recalled Vioxx, a well used drug in the treatment of arthritis. The recall came about when studies were released showing a possible correlation between the drug and an increased risk of heart attack.

In 2005, 98 plaintiffs from the U.K. filed a complaint asserting claims for product liability, breach of express warranty, wrongful death and survivorship, loss of consortium, and breach of the New Jersey Consumer Fraud Act (N.J. Stat. § 56:8-1). The plaintiffs also sought compensatory and punitive damages, attorney's fees and costs. 395 N.J. Super. 363 (successful plaintiffs are also entitled to treble damages under the Consumer Fraud Act, N.J. Stat. § 56:8-1.)

Merck's counsel filed in the same year a motion to dismiss the plaintiffs' complaint on the basis of *forum non conveniens*. Judge Higbee granted Merck's motion and dismissed the complaint. She, however, issued a conditional order permitting the U.K. plaintiffs to return to New Jersey to assert their claims if somehow they could not be pursued in the U.K. for various reasons given in her decision. The Appellate Division affirmed her decision.

The Doctrine Is Hinged on Established Federal Precedents. The Appellate Division sought support for the application of the *forum non conveniens* doctrine in well settled principles established in federal cases. The doctrine ultimately stands for considerations of convenience and justice. 395 N.J. Super. 364. The appellate panel deferred to the sound discretion of Judge Higbee as the trial judge and would reverse her decision only if she abused that discretion. Not unlike the approach followed in federal jurisdictions, Merck as a defendant bore the burden of proof in evoking the equitable doctrine. Yet, while New Jersey has a strong tradition of according deference to its residents, less deference was to be accorded to U.K. residents.

The Two-Step Analysis. In rejecting the plaintiffs' arguments, the Appellate Division utilized a two-step analysis. Counsel facing *forum non conveniens* issues should first ask whether there is a suitable alternative forum. The test here is whether the defendant is "amenable to process" elsewhere. Only in "rare circumstances" where the process is so lacking will the test not be satisfied. 395 N.J. Super. 363. In *Vioxx Litigation*, there was evidence that product liability and wrongful death causes of action exist in the U.K. It is true that substantive laws there do not exactly mirror New Jersey laws. For instance, there is no real match in the U.K. for the Consumer Fraud Act, and breach of express warranty and loss of consortium are not recognized there. Nonetheless, the lack of some specific causes of action will not preclude the application of the doctrine. If some of the causes of action are available, the alternative forum is satisfactory.

Accordingly, the lack of the loss of consortium cause of action in the U.K. does not give rise to jurisdiction in New Jersey. Likewise, the absence of punitive damages does not convey jurisdiction in the state. This consideration is not peculiar to *Vioxx Litigation* since the assertion of a measure of damages is a *sine qua non* to every complaint. Practitioners should be aware that the absence of *particular* measures of damages in the alternative jurisdiction is not sufficient to award their clients jurisdiction in New Jersey. Further, the absence of generous discovery in the U.K. and the inability to obtain jury trial do not suffice. Here again, it is very tempting for practitioners to place undue weight on discovery and jury trial considerations in seeking a forum. However, the *Vioxx Litigation* court clarifies that these considerations alone will not grant jurisdiction. Ultimately, the Appellate Division determined that there were sufficient safeguards in procedural and substantive laws in the U.K. to support at least the plaintiffs' product liability action in that forum. 395 N.J. Super. 370. This finding is not disturbed by the plaintiffs' argument that public funding for mass-tort litigation is not easy to come by in the U.K. Although litigation funding and upfront cash are not readily available there, and the famous "loser pays" system is a further deterrent to lawsuit initiation, the court still found that the availability of some funding avenues makes cost recovery adequate enough for the plaintiffs' cases to be litigated in that forum.

The second part of the analysis in the application of the *forum non conveniens* doctrine is the assessment of private and public factors that relate to a plaintiff's choice of a forum. Private factors include easy access to sources of proof; compulsory processes to ensure that witnesses attend proceedings; "whether a view of the premises is appropriate to the action"; and the need to avert practical problems post-trial, including judgment enforcement, can be "easy, expeditious and inexpensive." 395 N.J. Super. 374. The court found that evidence was geographically divided between the U.K. and New Jersey, but it opted for U.K. jurisdiction because it is more likely for a court there to use compulsory processes to ensure the attendance of Merck employees to trial in the U.K. than it is under the "cumbersome procedures" of the Hague Convention to bring independent witnesses to a New Jersey court.

The public factors in turn include the need to avoid piling up cases in a "congested center;" the imposition of duty on jury members that have no relation with the litigation; the local interest in the subject matter of the litigation; and the local interest in having local matters decided in its courts. 395 N.J. Super. 376. The court found the U.K. to be a suitable

forum because it provided the regulatory standards for the use of Vioxx in that country. New Jersey would have no interest in determining how the applicable regulations pertain to the plaintiffs' use of the product. The more important factor, according to the court, is the avoidance of the administrative difficulties that, if not thwarted by the proper application of the *forum non conveniens* doctrine, would continue to make U.S. courts attractive forums to foreign citizens. The Appellate Division thus agreed with Judge Higbee's position that, while cases from different U.S. states are being managed in tandem, a burden would be imposed on the New Jersey courts if they have to manage foreign cases, which depend on the interpretation of foreign laws.

Practical Considerations

The decision of the trial court, as affirmed by the Appellate Division, to keep out such a large number of plaintiffs prompts a litigator to consider the following practical considerations:

Is the Gate Closed to Foreign Plaintiffs? Judge Higbee's managerial fear is an omen to foreign litigants. The message is clear to a practitioner contemplating bringing mass-tort actions in the representation of foreign plaintiffs in New Jersey's liberal courts that the gate is not wide open. In light of the court's decision in *Vioxx Litigation*, prior to embarking on the highly expensive road of mass-tort litigation in New Jersey, alternative forums of the practitioner's clients must be scrutinized for adequacy. The practitioner should err on the side of establishing jurisdiction in New Jersey an exception rather than the norm when there is a suitable forum elsewhere. Even such lofty considerations as lack of certain causes of action, generous discovery rules, jury trial and fee payment feasibility will not confer jurisdiction in New Jersey to the practitioner's clients.

Will U.S. Litigants Be Kept Out of New Jersey Courts? The decision seems to warn litigants from other U.S. states to stay away from New Jersey. That warning carries some weight on its face since the typical litigant in any state in the United States has an available arsenal of procedural and substantive safeguards. Nonetheless, where mass-tort U.S. litigants can pinpoint some reasons for jurisdiction to lie in New Jersey, e.g., Merck's residence in the state, it is unlikely that they will be turned away. Considering New Jersey's industrial past (or present for that matter), its court system has an established tradition of consolidating mass-tort cases filed by its citizens and other states' citizens in one single venue, usually under the supervision of a single judge, for effective administrative management. Yet, the practitioner representing U.S. clients from states other than New Jersey should perform the usual long-arm analysis before seeking New Jersey jurisdiction.

A Doctrine with a Sharp Edge? *Vioxx Litigation* is a strong reminder that even a dormant equitable doctrine at times can be lethal, even in a state like New Jersey that has a strong tradition of permitting claimants to pursue their substantive claims. It is not that the doctrine is not often evoked in the appropriate cases; rather, experience dictates that practitioners often shy away from utilizing it even in circumstances where its application might be warranted. *Vioxx Litigation* is a stern reminder that *forum non conveniens* is no longer to be taken for granted.

Practice Tips

§ Foreign litigants seeking mass-tort jurisdiction in New Jersey should not be completely deterred by the current decision. Rather, they should work with counsel from the country where the tort arose to determine the availability or non-availability of procedural and substantive processes and remedies in that country. *Vioxx Litigation*, in a sense, can be a *fluke* in that not all cases will arise out of the U.K. where sufficient remedies are available to claimants. But it can be a *trend setter* where causes of action arise in foreign states where sufficient processes and substantive remedies are available to claimants.

§ Practitioners should keep in mind that the result obtained in *Vioxx Litigation* has a lot to do, as expressed in the end of the decision, with the administrative burden thousands of *Vioxx* cases have imposed on New Jersey. While the propositions stated in the opinion should be heeded, their impact may be lessened in mass-tort cases involving a different product, a different country, or both.

§ Although U.S. litigants from other states normally will not be turned away in New Jersey, they should not assume that entry is automatic. The *Vioxx Litigation* decision, for instance, starts with the indication that mass-tort designation was given to the litigation by the New Jersey Supreme Court. It behooves a practitioner thoroughly to be familiar with the mass-tort procedures and administration before selecting the state as a preferred jurisdiction.

§ Practitioners in mass-tort cases or otherwise should continue to assert the applicability of *forum non conveniens* as an affirmative defense. One is not penalized in New Jersey's courts for asserting in pleadings defenses that ultimately are not used in litigation. Once the *forum non conveniens* defense is asserted, the practitioner should not hesitate to base dispositive motions on its application where that is warranted.

For a Further Discussion on Class Actions and Mass Torts in New Jersey, see *LexisNexis Practice Guide New Jersey Pretrial Practice, Chapter 1 -- Class Actions & Mass Torts Strategy*, 1-1 LexisNexis Practice Guide NJ Pretrial Practice § 1.01.

For a Further Discussion on the Doctrine of *Forum Non Conveniens*, see *LexisNexis Practice Guide New Jersey Pleadings, Chapter 1, Part III -- Determining Appropriate Forum*, 1-1 LexisNexis Practice Guide NJ Pleadings § 1.08 and *Federal Litigation Guide, Chapter 3 -- Rule 12 Motions*, 1-3 Federal Litigation Guide P 3.61.

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Grace V.B. Garcia on Hanover Ins. Co., v. Rapo & Jepsen Ins. Serv., Inc.

2008 Emerging Issues 946

Grace V.B. Garcia on Hanover Ins. Co., v. Rapo & Jepsen Ins. Serv., Inc., 449 Mass. 609 (2007)

By Grace V.B. Garcia

November 15, 2007

SUMMARY: Massachusetts, in *Hanover Insurance Company v. Rapo & Jepsen Insurance Services, Inc.*, has now officially recognized the common interest doctrine, and thus the validity of what many refer to as "joint defense agreements." The common interest doctrine allows for confidential attorney-client communications to be shared by counsel or a party with other interested parties to their mutual benefit without waiving the attorney-client privilege.

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ARTICLE: Massachusetts, in *Hanover Insurance Company v. Rapo & Jepsen Insurance Services, Inc.*, 449 Mass. 609 (2007), has now officially recognized the common interest doctrine, and thus the validity of what many refer to as "joint defense agreements." The common interest doctrine allows for confidential attorney-client communications to be shared by counsel or a party with other interested parties to their mutual benefit without waiving the attorney-client privilege. Although the common interest doctrine, which is often put into effect through the use of joint defense agreements, has been used for a number of years by practitioners, the decision in *Hanover Insurance Company* is the first time that Massachusetts' highest court has given the doctrine its official stamp of approval. Now attorneys and clients can be sure that when they enter into common interest or joint defense agreements, such agreements will ensure that shared communications do not waive the attorney-client privilege.

Background for the Court's Decision. This case arises from an interlocutory appeal from the lower court's discovery order. In this case, Hanover Insurance Company's ("Hanover") asserted claims against an insurance company and two insurance service providers based on an argument that they wrongfully conspired to transfer high risk motor vehicle insurance from Arbella Mutual Insurance Company ("Arbella") to Hanover. During the course of discovery, Hanover served a request for production of documents to Arbella. In response to some of the requests, Arbella refused to produce certain documents based on an assertion that they were privileged under a joint defense privilege. In answer to Hanover's motion to compel, the lower court ordered Arbella to produce the requested documents finding that Massachusetts had not officially recognized the joint defense privilege. In taking the appeal, the Supreme Judicial Court's interest may have been perked as the joint defense agreement in this case was not written, but only an oral agreement.

Attorney-Client Privilege is a Fundamental Privilege. In evaluating the common interest doctrine, which gives rise to joint defense agreements and the like, the Supreme Judicial Court examined the importance of the attorney-client privilege. The attorney-client privilege is one of the oldest privileges in common law and it is considered a fundamental privilege to which courts show great deference. The attorney-client privilege "shields from the view of third parties all confidential communications between a client and its attorney undertaken for the purpose of obtaining legal advice." *Suffolk Construction Co., Inc. v. Division of Capital Asset Management*, 449 Mass. 444, 448 (2007). It protects information that is not only shared with an attorney in confidence, but also those shared with necessary agents of the attorney or the client, such as experts consulted for advising the client. *Cavallaro v. United States*, 284 F.3d 236, 247 (1st Cir. 2002). The attorney-client privileged is owned by the client, not the attorney. In order to be protected, however, the privilege cannot be waived meaning one cannot disclose the confidential communication to a third-party. *Town of Norfolk v. U.S. Army Corp of Eng'rs.*, 968 F.2d 1438, 1457 (1st Cir. 1992). One major exception to the waiver of the attorney-client privilege, however, is the common interest doctrine.

The Common Interest Doctrine Protects Against Waiver of the Attorney-Client Privilege. The common interest doctrine is a recognized exception to the attorney-client privilege that has been in existence for more than 225 years. The common interest doctrine "extends the attorney-client privilege to any privileged communication shared with another represented party's counsel in a confidential manner for the purpose of furthering a common legal interest." *Hanover Insurance Company*, 449 Mass. at 612. The initial reasoning behind the common interest doctrine is that to the extent two defendants could have engaged the same counsel to represent them, their communications with that attorney, either jointly and severally, would be protected by the attorney-client privilege. There is no reason to waive the privilege if two defendants choose to obtain different counsel but still want to confer in order to effect a common interest. Indeed, it has been determined that "there is no reason to treat confidential client communications differently when shared with an attorney representing a client having a common interest where the purpose for sharing is to provide a free flow of information essential to providing the best available legal services to the client." 449 Mass. at 616.

The common interest doctrine is very broad and is not just limited to criminal or civil defendants. Rather, the doctrine has been applied to cases involving co-plaintiffs, jointly interested individuals who may be part of a pending litigation, documents shared between plaintiff's and defendant's counsel, as well as to shared work-product. 449 Mass. at 613. In fact, the common interest doctrine is not limited to litigation or impending litigation, but applies to those involved in business transactions as it applies to anyone who is seeking legal advice for a common interest. 449 Mass. at 614.

Practitioners must remember that the common interest doctrine is not a privilege, but simply provides an exception to waiver of the attorney-client privilege when otherwise the disclosure of such confidential communications would act as a waiver.

Strategic Consideration. In order to use the common interest doctrine, whether by means of a joint defense agreement, a joint prosecution agreement, or other agreement that expresses a similar understanding, the clients' interests do not need to be identical, they just need to be shared. Massachusetts supports an expanded definition of "common interest" in that an interest is considered to be "common" "where two or more parties share a sufficiently similar interest and attempt to promote that interest by sharing privileged communication." 449 Mass. at 619. For example, parties may be deemed to have a common interest in defending against a toxic tort case, although the parties may be of different types, such as a manufacturer, distributor, and employer, and may have their own separate agendas, in addition to the common interest they share.

The common interest doctrine is easy to use. For instance, the common interest doctrine does not require any type of writing to enforce it. Indeed, a practitioner does not necessarily need to inform his or her client of its use. As the attorney-client privilege is owned by the client, and can only be waived by a client, attorneys are allowed to disclose confidential information to the extent "impliedly authorized in order to carry out the representation." 449 Mass. at 618. Best practice, however, is for the practitioner to inform his or her client about disclosure based on the common interest doctrine, obtain consent, and put the agreement in writing.

Both practitioners and clients should be wary before moving precipitously into a joint defense agreement. Although on first blush the opportunity to share information with others for the purpose of furthering and strengthening one's position seems like a great idea, sometimes it may not be the best option for either the practitioner or for the client. For example, in some cases, a post-agreement conflict of interest may arise that was not foreseeable. Such a conflict may affect both the client and the practitioner due to potential claims for disqualification. If the dispute causes the disqualification of the practitioner, not only does he lose the ability to represent the client, he may face future disqualification from representation depending on the nature of the conflict. Also, if an attorney is disqualified, the client loses out on his or her first choice of counsel.

Practitioners Should Draft Common Interest or Joint Defense Agreements Carefully. Prior to disclosing information, if parties decide to enter into a common interest agreement, or a joint defense agreement, such agreement should be written. In drafting the agreement, practitioners need to evaluate what they are seeking from the common interest agreement, and ensure that the agreement is drafted appropriately. For example, in drafting a joint defense agreement, practitioners may wish to consider including some or all of the following clauses:

? A statement declaring the purpose of the agreement. For example, practitioners may want to state something such as: "Counsel have agreed to disclose and exchange Defense Materials between themselves in order to further their clients' common interests."

? A description of the parameters of the agreement.

? A disclaimer that the joint defense agreement does not create any actual attorney-client relationship between the attorneys and the clients of the other attorneys who are signatories to the agreement. An example of such a clause is as follows:

Nothing contained in this agreement is intended to create any attorney-client relationship, for the purposes of conflicts or otherwise, between a counsel and a party which is represented by other counsel. Each undersigned counsel understands that it is their sole responsibility to represent his, her or their respective client and that none of the other signatories to this agreement have in any way assumed any such responsibility. Nothing in this agreement shall be construed to affect the separate and independent representation of each party by its respective counsel.

? A representation that all counsel who are signatories to the agreement have performed a conflict check.

? A representation that all counsel have discussed the agreement with their clients.

? A clause that prohibits all counsel and parties who are signatories to the agreement from disclosing any information they receive through the agreement to any other person or entity unless they obtain written consent from all signatories of the agreement

? A clause indicating how parties may withdraw from the joint defense agreement. It should be noted that any party should be able to freely withdraw from the agreement upon proper notice to the other parties.

Cross References. See Massachusetts Pleading and Practice § 26.14.1.

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Grace V. B. Garcia is a Partner in the Boston office of Morrison Mahoney LLP. Ms. Garcia's practice is concentrated in the areas of commercial litigation, construction law, product liability and premises liability. In 2005, 2006, and 2007, she was recognized by Boston Magazine and Law & Politics as a "Super Lawyer Rising Star." Ms. Garcia is admitted to the bars of the Commonwealth of Massachusetts and the State of New York. She is actively involved in several bar associations and serves on the Massachusetts Bar Association's Litigation Section Council. Previously, Ms. Garcia served as a member of the MBA's Business Law Section Council (2003 -- 2006), New Lawyer Section Council (2000 -- 2003), co-chair of the Boston Bar Association's New Lawyer's Section (2002 -- 2004), and the BBA's Task Force on Pro Bono and New Lawyers (2002 -- 2003). Ms. Garcia is a part of the Massachusetts Associated General Contractors Safety Committee. Additionally, after being on the Executive Committee for several years, Ms. Garcia is the co-director for the Boston Chapter of the Downtown Women's Club for the 2007-2008 year. Ms. Garcia is the author of the Massachusetts Litigation Blog. In addition, Ms. Garcia has authored several articles including: Fundamentals of Electronic Discovery, Boston Bar Journal (March/April 2003) and Achieving Equitable Balance: Justice Wilkins and Chapter 93A, Boston Bar Journal (Nov./Dec. 2000) (co-author). She has lectured for various continuing legal education programs on electronic discovery, document retention, and deposition techniques.

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James J. Walsh on Michigan Citizens for Water Conservation, 479 Mich. 280 (2007)

2008 Emerging Issues 942

James J. Walsh on Michigan Citizens for Water Conservation, 479 Mich. 280 (2007)

By James J. Walsh

November 14, 2007

SUMMARY: This Emerging Issues Analysis, written by James J. Walsh, focuses on the implications of the decision in *Michigan Citizens for Water Conservation v. Nestle Waters North America Inc.*, 737 N.W.2d 447, 479 Mich. 280 (2007). The Michigan Supreme Court held that standing to pursue even a statutory cause of action requires injury in fact.

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ARTICLE: In *Michigan Citizens for Water Conservation v. Nestle Waters North America Inc.*, 737 N.W.2d 447, 479 Mich. 280 (2007), the Michigan Supreme Court held that standing to pursue even a statutory cause of action requires injury in fact. A 4-3 majority overturned the Michigan Court of Appeals' decision in the case (*see Michigan Citizens for Water Conservation v. Nestle Waters North America Inc.*, 709 N.W.2d 174 269 Mich. App. 25 (2005)), and found that because the plaintiffs failed to allege any actual injury from Nestle Water's actions with respect to a particular body of water and wetland areas, they lack standing to bring that portion of their claim. The majority made this ruling despite the presence of a statutory section that purported to grant "any person" the ability to bring a claim under the Michigan Environmental Protection Act. *See* MCLS § 324.1701(1) ("The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.") (emphasis added).

Background. The plaintiffs in *Michigan Citizens for Water Conservation* were a non-profit corporation concerned with environmental issues, along with two individual members who owned land on a body of water called the Dead Stream, and two members who owned land on a body of water called Thompson Lake. They brought a single claim under the Michigan Environmental Protection Act to temporarily and permanently enjoin Nestle Corporation's water pumping activities in the entire Tri-Lakes area of Mecosta County. The Michigan Supreme Court divided their single claim into multiple causes of action, and held that although the riparian landowners had standing with respect to the Dead Stream and Thompson Lake, they did not have standing with respect to nearby Osprey Lake and certain wetlands, because none of them actually owned or used any land bordering those particular areas. Furthermore, because the non-profit corporation's members had standing with respect to those two bodies of water, the non-profit corporation did as well, and likewise did not have standing with respect to Osprey Lake and the wetlands. *See, e.g., Trout Unlimited, Muskegon White River Chapter v. White Cloud*, 489 N.W.2d 188 (1992); 195 Mich. App. 343, 348 (1992).

MCLS § 324.1701(1) Insufficient to Confer Automatic Standing. In *Michigan Citizens for Water Conservation*, the Michigan Supreme Court found MCLS § 324.1701(1) insufficient to confer automatic standing on the parties. The Court held that despite the existence of MCLS § 324.1701(1), which on its face purportedly grants anyone the ability to bring a lawsuit under the Act, potential plaintiffs still must satisfy the traditional constitutional standing requirements.

Michigan courts recently have adopted federal standing requirements. See *Lee v. Macomb County Board of Commissioners*, 629 N.W.2d 900; 464 Mich. 726 (2001) (adopting the standing requirements as set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)). Thus, before a Michigan court will adjudicate a plaintiff's claim under the Michigan Environmental Protection Act (or indeed any other statute), the plaintiff must first demonstrate that he has suffered an actual, concrete injury that is "fairly . . . traceable" to the defendant, and that it is "likely" that the injury will be "redressed by a favorable decision" of the court. *Lee* at 907 (quoting *Lujan*, 504 U.S. at 560-561).

The Michigan Supreme Court's holding in *Michigan Citizens for Water Conservation* is harmonious with other recent cases that have emphasized the need for plaintiffs to satisfy the traditional constitutional standing test, in addition to meeting any applicable statutory requirements, even if a statute purportedly grants an individual the specific ability to bring a suit. See, e.g., *Rohde v. Ann Arbor Public Schools*, 737 N.W.2d 158, 479 Mich. 336 (2007) (holding that plaintiff taxpayers did not have standing to challenge defendant public school district's granting of benefits to employees' same-sex partners because plaintiffs did not allege that they suffered any actual injury from the school district's actions); *Tingley v 900 Monroe L.L.C.*, 733 N.W.2d 440, 274 Mich. App. 335 (2007) (holding that plaintiffs must satisfy constitutional standing requirements in addition to statutory requirements in order to bring a claim under the Michigan Hazardous Waste Management Act); *City of Detroit Downtown Development Authority v. U.S. Outdoor Advertising Inc.*, 2007 Mich. App. LEXIS 1002 (2007) (holding that former MCLS § 125.585(11) is insufficient to confer standing to plaintiff in the absence of traditional standing requirements); *American Family Association of Michigan v Michigan State University Board of Trustees*, 2007 Mich. App. LEXIS 1499 (2007), lv. den. 2007 Mich. LEXIS 2797 (holding that plaintiff association lacked standing to challenge defendant's policy which granted benefits to employees' same-sex partners because plaintiffs failed to establish that it suffered any actual injury from defendant's benefit policy). As the Michigan Supreme Court noted in *Rohde*, it is clear that "no court rule or statute can eliminate the injury requirement for constitutional standing." *Rohde*, 737 N.W.2d at 166. These holdings in these recent cases reaffirm the importance of separation of powers, as expressed in the state constitution. See MCLS Const. Art. III, § 2; see also MCLS Const. Art. IV, § 1 (legislative power), MCLS Const. Art. V, § 1 (executive power), MCLS Const. Art. VI, § 1 (judicial power).

Because the decision in *Michigan Citizens for Water Conservation* has recognized that there are additional hurdles any potential plaintiff first must cross before Michigan courts will adjudicate his or her claims under the Michigan Environmental Protection Act, practitioners should be aware of the implications of its holding.

Considerations. One of the lessons to be learned from *Michigan Citizens for Water Conservation* is that plaintiffs suing under the Michigan Environmental Protection Act cannot gain standing to bring a claim related to activities impacting an entire region unless they can allege sufficient interests to claim that they suffered injuries throughout the entire region. Although the plaintiffs in *Michigan Citizens for Water Conservation* owned riparian property only on two bodies of water, they attempted to bring a claim against Nestle Water for its pumping activities in the entire Tri-Lakes area of Mecosta County. Although the Court did not dismiss their entire case, the Court did, in its own word, "refine" their single claim into multiple claims, and found that while the plaintiffs had standing to bring the claims related to the two bodies of water, the plaintiffs failed to allege sufficient facts to confer standing upon them for the claims related to the other areas.

Similarly, this case also reiterated that a potential plaintiff must be able to show a concrete injury. Practitioners should note that Michigan courts will not allow a plaintiff to bring claims based on any injuries only tenuously related to a potential defendant's conduct, or any hypothetical injuries. A plaintiff only has standing to sue for his own injuries, even if defendant's activities allegedly caused widespread harm. Accordingly, the Michigan Supreme Court in *Michigan*

Citizens for Water Conservation specifically rejected the Court of Appeals' "interconnectedness" theory as insufficient to confer standing upon the plaintiffs. *See also Lujan v. Defenders of Wildlife*, 504 US 555 (1992) (rejecting "ecosystem," "animal nexus" and "vocational nexus" theories as insufficient to grant plaintiffs standing under the federal Endangered Species Act). Thus, a potential plaintiff must do more than simply allege that a potential defendant's activities in one area may harm the potential plaintiff's interests in another area simply due to the connectedness of the ecosystem.

It is important that practitioners recognize that options still remain for potential plaintiffs. First, although individual plaintiffs may have standing only to challenge conduct that injures their particular property or other interests, class actions can be considered as a vehicle to challenge defendant's conduct that affects a larger region. *See* MCLS § 3.501 (Michigan court rule governing class actions). Second, it is also important for practitioners to remember that in a suit under the Michigan Environmental Protection Act, standing does not require actual ownership of real property affected by a defendant's activities. Plaintiffs can gain standing if they merely used or had access to a piece of affected property, and the defendant's activities allegedly threatened their recreational, aesthetic or economic interests in the property, even if the plaintiffs do not hold title to the property. *See National Wildlife Federation & Upper Peninsula Wildlife Council v Cleveland Cliffs Iron Co*, 684 N.W.2d 800; 471 Mich. 608 (2004) (holding that plaintiffs who "birdwatched, canoed, bicycled, hiked, skied, fished, and farmed in the area" had standing to challenge defendant's mining activities). This remains true even after *Michigan Citizens for Water Conservation*. In this case, the Court noted that the plaintiffs failed to allege that they used or had access to Osprey Lake or the wetlands, or that Nestle Water's pumping activities threatened whatever recreational or aesthetic interests plaintiffs had in those areas. Michigan courts' recognition of a plaintiff's protectable aesthetic and recreational interests in land not owned by plaintiff is in line with federal case law. *See Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 183 (holding that the existence of injury to plaintiffs' aesthetic and recreational interests in land was sufficient to confer standing on the plaintiffs bringing suit under the federal Clean Water Act). Finally, practitioners should be aware that we may receive further guidance on the issue from the Michigan Supreme Court if it grants leave to appeal in *City of Detroit Downtown Development Authority v. U.S. Outdoor Advertising Authority, Inc.*, 2007 Mich. App. LEXIS 1002 (2007).

Cross References

For information on standing in Michigan, *see* Michigan Law & Practice 2d ACTIONS § 7.

For more background on "citizen suit" provisions under the Michigan Environmental Protection Act and federal law, *see* Heather Terry, *Comment: Still Standing but "Teed Up": The Michigan Environmental Protection Act's Citizen Suit Provision after National Wildlife Federation v Cleveland Cliffs*, 2005 Mich. St. L. Rev. 1297 (2005).

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Hauser on Proper Motion Filing for Attorney's Fees

2008 Emerging Issues 881

Hauser on Proper Motion Filing for Attorney's Fees

By James C. Hauser

November 7, 2007

SUMMARY: Attorneys are generally aware of the necessary procedures and filings to obtain attorneys fees. James Hauser, expert on Florida attorneys fees and civil procedure, explains the important implications of recent decisions in the *Saia*, *AmerUs* and *Gulf Shores* cases on preserving your entitlement to attorneys fees.

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ARTICLE: Motion Filing Requirements for Attorneys Fees Under *Saia* & Florida Rule of Civil Procedure 1.525.

Fla. R. Civ. P. 1.525 states: Any party seeking a judgment taxing costs, attorneys fees, or both shall serve a motion no later than 30 days after the filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal.

Prior to the adoption of Fla. R. Civ. P. 1.525, a party seeking attorneys fees had to serve their motion within a reasonable period of time after the final judgment. *Folta v. Bolton*, 493 So. 2d 440 (Fla. 1986). What constituted a reasonable time period created confusion and led to unnecessary litigation. For example in *Folta*, the Florida Supreme Court held that a 60 day delay in serving the motion for attorneys fees was reasonable. The Florida Supreme Court cited with approval the United States Supreme Court decision of *White v. New Hampshire Dept of Emp. Sec.*, 455 U.S. 445, 102 S. Ct. 1162, 71 L. Ed. 2d 325 (1982) which held that a four month delay was not unreasonable. On the other hand, the 2nd DCA held that an 80 day delay was unreasonable and denied attorneys fees. *Wunderlee v. Fruits, Nuts & Bananas, Inc.*, 715 So. 2d 325 (Fla. 2d DCA 1998).

In *Saia Motor Freight Line, Inc. v. Reid*, 930 So. 2d 598 (Fla. 2006) (Pariente, Anstead and Lewis dissenting) the Florida Supreme Court ruled that even though the final judgment stated that the trial court retained jurisdiction to decide whether a party is entitled to attorneys fees, the party seeking attorneys fees must still serve a Fla. R. Civ. P. 1.525 motion to recover attorneys fees. The majority in *Saia* held that the purpose of Fla. R. Civ. P. 1.525 was to create a bright line time requirement for a party seeking attorneys fees to serve its motion to recover attorneys fees. That bright line was that the motion must be served no later than 30 days after the final judgment. That being the case, a mere reservation in the final judgment to decide the issue of attorneys fees did not relieve the party seeking attorneys fees from filing the motion. To hold otherwise would not correct the problem created by *Folta*, since it could be months before a court set a hearing on the issue of entitlement to attorneys fees. Justice Pariente, in dissent, joined by Justices Anstead and Lewis, would have ruled that a reservation in the final judgment of jurisdiction was procedurally an

enlargement of time under Fla. R. Civ. P. 1.090(b), for to hold otherwise, would make the trial courts reservation not only a nullity, but create a procedural trap.

Fundamentally, the purpose of a Fla. R. Civ. P. 1.525 motion is to put the other side on notice that a party is seeking to recover attorneys fees from the opposing party and the basis for such recovery. *Gulf Landings Assn. v. Hersberger*, 845 So. 2d 344 (Fla. 2d DCA 2003). However, if that issue has already been decided in the final judgment it seems incongruous that a rule 1.525 motion is still necessary.

It is also important to note that Fla. R. Civ. P. 1.525 does not require that the party seeking attorneys fees include a reference as to the amount of attorneys fees in the motion. *Silver Springs Properties, L.L.C. v. ERA Murray Realities, Inc.*, 874 So. 2d 712 (Fla. 4th DC 2004); *P & R Smith Corp. v. Goyarrola*, 864 So. 2d 584 (Fla. 3d DCA 2004). The 3d DCA explained in *P & R Smith Corp.* that because Fla. R. Civ. P. 1.525 is silent on when supporting documentation for the amount of attorneys fees is required it is unnecessary to include it in the motion for attorneys fees.

Does *Saia* Extend to Cases Where the Final Judgment Decides that a Party is Entitled to Attorneys Fees?

This issue is actually one step removed from *Saia*. If the final judgment not only reserves jurisdiction to award attorneys fees, but it also states that the prevailing party is entitled to attorneys fees, the only remaining issue for the trial court to decide should be the amount of attorneys fees. *Chamizo v. Forman*, 933 So. 2d 1240 (Fla. 3d DCA 2006), which was decided after the Florida Supreme Court decision in *Saia*, stated succinctly that once the decision of entitlement was decided, serving of a rule 1.525 motion became a non issue. The 5th DCA agreed by stating in dicta that it would be superfluous to require such a motion since the issue of entitlement has already been decided. *Hart v. City of Groveland*, 919 So. 2d 665 (Fla. 5th DCA 2006). Not only is it pointless to require a party file a motion on an issue that has already been decided, it will create confusion, since it will be unclear what the motion is intended to resolve.

In *Nicoletti v. Nicoletti*, 902 So. 2d 215 (Fla. 2d DCA 2005) the trial court held that the wife was entitled to attorneys fees in a contempt action against her former husband and reserved jurisdiction to determine the amount. The 2d DCA held, however, that the decision on entitlement did not waive the necessity of serving the 1.525 motion in order to preserve the bright line rule. *See also Caldwell v. Finochi*, 909 So. 2d 976 (Fla. 2d DCA 2005).

In *Gulf Shores, L.L.C. v. Riverwood Community Development District*, 927 So. 2d 246 (Fla. 2d DCA 2006) the parties stipulated that the Riverwood District was entitled to attorneys fees. As a result Riverwood never served a Fla. R. Civ. P. 1.525. The trial court ruled that such a motion was not necessary because Gulf Shores had conceded that Riverwood was entitled to attorneys fees. The 2d DCA reversed holding that because Gulf Shores had not agreed in the stipulation to the waiver of the rule 1.525 motion, it still required that the motion be filed in order enforce the bright line requirement created by the rule.

The result in *Gulf Shores* can be pointed to as an example of gotcha tactics although this sort of conduct has been universally condemned by both the Florida Supreme Court and appellate courts, including the 2d DCA. *Mosher v. Anderson*, 817 So. 2d 812 (Fla. 2002); *Mourning v. Ballast Nedam Construction, Inc.* 32 Fla. L. Weekly d2292 (Fla. 4th DCA 2007); *Cuertas v. Cuertas*, 951 So. 2d 980 (Fla. 3d DCA 2007); *VonDrasek v. City of St. Petersburg*, 777 So. 2d 989 (Fla. 2d DCA 2000); *Gulf Shores, L.L.C. v. Riverwood Community Development District*, 927 So. 2d 246 (Fla. 2d DCA 2006). Instead of decrying gotcha tactics, *Gulf Shores* could be viewed as approving them.

The 5th DCA in *Reddell v. Reddell*, 900 So. 2d 670 (Fla. 5th DCA 2005) has also ruled that despite the fact that the final judgment held that the wife was entitled to attorneys fees, she still needed to serve the Fla. R. Civ. P. 1.525 motion. It reasoned that the motion was needed to resolve any uncertainty as to when post judgment motions for attorneys fees need to be served in order to bring the case to a timely conclusion.

The 5th DCA recently went one step further in *AmerUs Life Ins. Co. v. Lait*, 32 Fla. L. Weekly D 2395 (Fla. 5th DCA 2007). In that case the trial court entered an amended final judgment deciding the issues of entitlement and amount as to both attorneys fees and costs. Only after the amount of both attorneys fees and costs was decided, did the losing

party make an oral motion to strike the award of attorneys fees and costs, because the prevailing party had not complied with rule 1.525. The trial court granted the motion and the 5th DCA affirmed.

In *AmerUs* the initial final judgment stated that the plaintiff was entitled to attorneys fees. The plaintiff did not serve a rule 1.525 motion based on the final judgment. Eight months later the trial court decided the amount of attorneys fees and costs and a few weeks after that the court signed a second amended judgment to correct a few scrivener's errors. One month later the plaintiff sought to amend the final judgment yet again. It was only at this point, more than nine months after entitlement to attorneys fees and six weeks after the amount of attorneys fees had been decided, did the losing party make an oral motion to strike the award of attorneys fees and costs because the plaintiff had failed to comply with Fla. R. Civ. P. 1.525. In affirming the trial court's decision to deny attorneys fees and costs, the 5th DCA did not rely upon its prior decision in *Reddell* or distinguish its earlier decision in *Hart*. The 5th DCA did not certify conflict with *Chamizo v. Foreman*, 933 So. 2d 1240 (Fla. 3d DCA 2006).

The *AmerUs* decision creates two additional important issues: *AmerUs* never discussed the question of whether the losing party waived its right to object to the award of attorneys fees by not timely filing a motion to strike plaintiff's entitlement to attorneys fees until ten months after the issue of entitlement was resolved. Secondly and more importantly, *AmerUs* creates a jurisdictional Catch-22 for practitioners. If the final judgment decides the issue of the amount of attorneys fees and costs, when is the losing party supposed to file its motion to strike attorneys fees? Any motion to strike attorneys fees and costs filed prior to 30 days after the final judgment is signed would be premature. On the other hand, because all post judgment issues have been resolved, the losing party may not file a motion to strike attorneys fees after 30 days because the trial court no longer retains jurisdiction to hear any issue.

When to File Fla. R. Civ. P. 1.525 Motion?

Two important filing scenarios to consider:

. **Final Judgment Retains Jurisdiction to Decide Whether a Party is Entitled to Attorneys Fees** -- *Saia* stands for the proposition that if a final judgment states that it retains jurisdiction to decide attorneys fees the party seeking attorneys fees must still serve a Fla. R. Civ. P. 1.525 motion. (*Saia* never addressed the primary issue discussed in this EC on whether the final judgment states that a party is entitled to attorneys fees.)

. **Final Judgment Where Court Rules that a Party is Entitled to Attorneys Fees but Amount Undecided** no rule 1.525 motion should be necessary. First, the primary reason for enacting Fla. R. Civ. P. 1.525 was to establish a bright line time period when the motion to decide entitlement to attorneys fees must be served. This was to correct the uncertainty created by *Folta* of when such a motion must be filed. Secondly, the motion informs the losing party of the basis upon which attorneys fees is being sought. Once a final judgment decides entitlement to attorneys fees, both of these policy considerations have been resolved. At that stage, the only issue remaining is for the trial court to decide the amount of attorneys fees. The service of a Fla. R. Civ. P. 1.525 motion will not help a trial court to resolve that issue. In fact it will only create confusion, since upon filing the motion it is unclear what issue the court is supposed to resolve. The 2nd and 5th DCAs have provided limited explanation or policy considerations for their decisions but as mentioned below prudence dictates that the attorney should file the rule 1.525 motion to preserve the right to Attorneys fees.

Practice Tips:

. Again, unless the amount of fees has been specifically decided counsel should serve Fla. R. Civ. P. 1.525 motions no later than 30 days on the opposing party out of an abundance of caution, even if the final judgment states that your client is entitled to attorneys fees.

. The motion must clearly state the basis for entitlement to attorneys fees. *Gulf Landings Assn. v. Hersberger*, 845 So. 2d 344 (Fla. 2d DCA 2003).

. Finally, the motion need not contain any supporting affidavits as to the amount of attorneys fees.

For Further discussion on Filing Requirements for Attorneys Fees: see, James C. Hauser, *Attorneys Fees in Florida*.

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Hon. James C. Hauser is a recently retired Circuit Court Judge for the Ninth Judicial Circuit of the State of Florida where he had served since 1990. Previously, he was County Judge in Orange County, in which capacity he was named Jurist of the Year by the Young Lawyers Division of the Florida Bar in 1989. He is a graduate of Boston University School of Law and the Wharton School of Finance at the University of Pennsylvania. Judge Hauser lectures frequently before the bench, bar, and public on the subject of attorney's fees. He is the author for Floridas foremost authority on attorneys fees, *Attorneys Fees in Florida*, Second edition. He is also the author of *Florida Residential Landlord-Tenant Manual*. Judge Hauser is available for personal consultations or to lecture on obtaining and maximizing attorney fees and can be reached at 407-951-6685, 9012 Summit Centre Way 102, Orlando, Fla. 32810 or by email at hauserjim@gmail.com.



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Joseph B. McDonnell on Longstreet v. Cottrell

2008 Emerging Issues 879

Joseph B. McDonnell on Longstreet v. Cottrell, Inc., 374 Ill. App. 3d 549, 871 N.E.2d 72, 312 Ill. D

By Joseph B. McDonnell

November 6, 2007

SUMMARY: Where a party to a case dies prior to trial but after his discovery deposition is taken, may all or any part of his discovery deposition be introduced in evidence? The Fifth District Appellate Court has determined that Illinois practice and procedure bars the use of a deceased partys discovery deposition as former testimony at the trial. In doing so, the Court reviews the historical distinction made in Illinois between discovery and evidence depositions and rejects the invitation to rule that the death of a party makes him unavailable as a witness and allows the use of his deposition at trial, as permitted under the Federal Rules of Evidence. This commentary, written by Joseph McDonnell, discusses the import and potential extensions of this important change.

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ARTICLE: Where a party to a case dies prior to trial but after his discovery deposition is taken, may all or any part of his discovery deposition be introduced in evidence? The Fifth District Appellate Court has determined that Illinois practice and procedure bars the use of a deceased partys discovery deposition as former testimony at the trial. In doing so, the Court reviews the historical distinction made in Illinois between discovery and evidence depositions and rejects the invitation to rule that the death of a party makes him unavailable as a witness and allows the use of his deposition at trial, as permitted under the Federal Rules of Evidence.

Background. In *Longstreet v. Cottrell, Inc.*, 374 Ill. App. 3d 549, 871 N.E.2d 72, 312 Ill. Dec. 672 (Ill. App. Ct. 2007), the plaintiff, a truck driver hauling cars for a Missouri-based employer, claimed bodily injuries as a result of several incidents with the rigs chain ratchet system. He filed suit for his injuries in the Circuit Court of Madison County, Illinois and his wife also sued for loss of consortium.

James Longstreets discovery deposition was taken on October 27, 2004. He was subsequently diagnosed with cancer and, on May 26, 2005, James died. His attorneys then filed a suggestion of death and petitioned to have his widow, Jean Longstreet, substituted as the plaintiff in her capacity as administrator of her deceased husbands estate.

Defendant Cottrell, Inc., anticipating that the plaintiff will attempt to use the discovery deposition of Mr. Longstreet as an evidence deposition in this litigation, moved to bar the use of James Longstreets discovery deposition for that purpose. After a hearing, the trial judge granted the motion and, at the request of the plaintiffs counsel, certified the question pursuant to Supreme Court Rule 308 as involving a question of law about which there is a substantial basis for

difference of opinion.

The Wording of Ill. Sup. Ct., R 212. The Appellate Court granted Jean Longstreets petition for leave to appeal under Ill. Sup. Ct., R 308. The question confronting the Court was whether the estate of a deceased party may introduce the discovery deposition of the party as evidence at trial as an exception to the hearsay rule under Ill. Sup. Ct., R 212(a)(3) in light of the language of Ill. Sup. Ct., R 212(a)(5).

Justice Chapman, speaking for a unanimous panel, noted at the outset that it was undisputed that Ill. Sup. Ct., R 212(a)(5), considered alone, would bar the use of the decedents discovery deposition because, at the time, he was a party to the case. That portion of the rule permits the use of a discovery deposition upon notice where the court finds that the deponent is neither a controlled expert *nor a party*, and that the witness is unable to attend or testify because of death or infirmity.

Is a Discovery Deposition Former Testimony? The plaintiff, however, contended that another paragraph of Ill. Sup. Ct., R 212, considered independently of Ill. Sup. Ct., R 212(a)(5), should permit the use of her deceased husbands discovery deposition as testimony. Ill. Sup. Ct., R 212(a)(3) states in substance that discovery depositions may be used under certain restricted circumstances if otherwise admissible as an exception to the hearsay rule. Ill. Sup. Ct., R 212(a)(3).

The exception applicable here, the plaintiff argued, was the exception for former testimony, as recognized in *Wilkerson v. Pittsburgh Corning Corp.*, 276 Ill. App. 3d 1023, 659 N.E.2d 979 (1995). The test for admissibility, the plaintiff contended, was whether the defendants had competently cross-examined her husband at the time of his discovery deposition. Answering her own question in the affirmative, the plaintiff urged that, the testimony should be admissible at trial.

As to this contention, the Court acknowledged that, since the grammatical conjunction connecting the five subparagraphs of Ill. Sup. Ct., R 212(a) is the word *or* there was some basis for the plaintiffs argument that each subparagraph of the rule operates independently of the others, so that, if admissible under subparagraph (3) (as contended by plaintiff), the outright prohibition contained in subparagraph (5) would be irrelevant.

Nevertheless, the Court rejected the argument. Justice Chapman, speaking for a unanimous panel, said that it was unconvinced that the Illinois Supreme Court had contemplated such an exception to the prohibition of the use of a deceased partys discovery deposition. According to the Fifth District, Ill. Sup. Ct., R 212(a)(5) very clearly and without qualification excludes the use of a deceased partys discovery deposition. In addition, Ill. Sup. Ct., R 212(b)(1) speaks only of evidence depositions in providing for admissibility where the deponent is dead at the time of trial. The Court cited the Fourth Districts decision in *Overcast v. Bodart*, 266 Ill. App. 3d 428, 639 N.E.2d 984 (1994) in support of its position.

The Court also rejected the plaintiffs argument that the Illinois Supreme Court had impliedly adopted *Fed. Rules Evid. R. 804* in *People v. Johnson*, 118 Ill. 2d 501, 517 N.E.2d 1070 (1987). *Fed. Rules Evid. R. 804(b)(1)* of the Federal Rules of Evidence permits the use of a discovery deposition at the trial if the witness is unavailable and if the opposing party had had an opportunity or motive to develop the witness testimony by direct, cross-, or redirect examination. *Fed. Rules Evid. R. 804(a)* includes death as a basis for finding a witness unavailable. Justice Chapman disagreed, saying that it was evident that the Supreme Court in its *Johnson* opinion had not adopted *Fed. Rules Evid. R. 804*, but had simply borrowed the definition of unavailability in determining the reach of its own Ill. Sup. Ct., R 414, governing use of *evidence* depositions in criminal cases. In fact, the Court said, the suggested adoption of the Federal Rule would conflict with Illinois procedural law, which distinguishes between discovery and evidence depositions. Illinois is unique in that respect and has continued to observe the distinction for over 50 years. The distinction is meaningful to practicing attorneys, said the Court, because the discovery format provides a great deal of exploratory freedom. The trade-off for that freedom is the Supreme Courts limitations on the use of discovery depositions at a trial. Again pointing to Ill. Sup. Ct., R 212(a)(5), the Court stated that that subparagraph was added in 2001 to permit a discovery deposition to be

introduced in evidence at trial or hearing under specified circumstances. Those circumstances, which include the death of a witness, expressly and unambiguously exclude the deposition of a party. Given the long-standing and well-understood policy of the Illinois Supreme Court with respect to the differentiation between discovery and evidence depositions, the Court refused to interpret Ill. Sup. Ct., R 212(a)(3) to allow part or all of the deposition of the deceased husband to be admitted as former testimony.

Tips for Practitioners. The problem of the aging or chronically ill litigant is not uncommon. Illinois Code of Civil Procedure provides for preferential trial settings on motion of a party who is 70 years of age or older, or where a party demonstrates good cause for such preference. 735 ILCS 5/2-1007.1. Moreover, it is common practice in asbestos cases, where the plaintiff may suffer from mesothelioma, for example, to schedule the clients evidence deposition soon after the clients discovery deposition has been taken, in order to preserve the testimony for trial. While the *Longstreet* opinion does not indicate when the plaintiffs counsel became aware of his clients terminal condition, some eight months intervened between the date of the discovery deposition and the clients death. One must be careful to monitor the health of ones client (whether plaintiff or defendant) and, where the client is diagnosed with a terminal condition, take steps to preserve the clients testimony for trial by scheduling his evidence deposition at the earliest opportunity. This is particularly important for Illinois lawyers, since the distinction between discovery and evidence depositions remains an integral part of Illinois practice.

Cross References. Parness, Illinois Civil Procedure Second Edition (LexisNexis) Chapter 8, Discovery.

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Lareau on USERRA's Reemployment Rights

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SUMMARY: Most people believe that the American soldier returning from duty in Iraq or elsewhere has an unqualified right to get back the job he or she had when leaving for military service. Generally, they are correct; but the job protection extended to members of our Uniformed Services is not without issues. This Expert Commentary, written by employment law expert, N. Peter Lareau, focuses on whether an individual returning from service has an unqualified right to be reemployed. It examines the requirements to qualify for reemployment and the factors that may lead to disqualification. A checklist that follows the Commentary will be of assistance to the returning G.I. and the employer, as well as their counsel.

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ARTICLE: I. Introduction

Most people believe that the American soldier returning from duty in Iraq or elsewhere has an unqualified right to get back the job he or she had when leaving for military service. Generally, they are correct; but the job protection extended to members of our Uniformed Services is not without chinks. There are some affirmative requirements that must be met before the right accrues. Even if those requirements are met, there are circumstances in which the employer may deny reemployment.

This Commentary discusses only the right to reemployment under Section 4312 of Uniform Services Employment and Reemployment Rights Act (USERRA) (38 U.S.C. 4301-4334), which is violated even if no part of the employers motive for failing to reemploy involves discrimination against service in the military. n1 It covers only briefly discriminatory refusals to reemploy under Section 4311 of USERRA. n2 It does not discuss various perquisites of employment governed by USERRA--the escalator principle, the determination of the position in which the returning employee will be employed, seniority rights upon reemployment, compensation upon reemployment, or the statutory protection against discharge after reemployment--that obtain *upon* reemployment.

The Commentary focuses solely on whether an individual returning from service has an unqualified right to be reemployed. It examines the requirements to qualify for reemployment and the factors that may lead to disqualification.

A checklist that follows the Commentary will be of assistance to the returning G.I. and the employer, as well as their counsel.

II. USERRAs Right to Reemployment

No Discriminatory Denial of Reemployment: 38 U.S.C. § 4311(a)

The Uniformed Services Employment and Reemployment Rights Act (USERRA),ⁿ³ which was enacted in 1994, actually contains two provisions dealing with reemployment rights. Section 4311 (a) states that a person who is a member of . . . [or] has performed . . . service in a uniformed service shall not be denied . . . reemployment . . . by an employer *on the basis of* that membership ⁿ⁴ In other words, a returning service member may not be denied reemployment *because of* his membership or service in the Uniformed Services. Section 4311 (a), therefore, requires the returning service member, seeking to recover the job he once held, to establish that his former employer acted with *discriminatory motive* in denying reemployment.

This section will not be discussed further in this Commentary, which focuses instead on a statutory reemployment right that does not require a showing of discriminatory motive.

Right to Reemployment Even Absent a Showing of Discrimination: 38 U.S.C. § 4312(a)

Generally. Another section of USERRA, 38 U.S.C. § 4312 (a) provides simply that a person who leaves his job to serve in the Uniformed Services is entitled to the reemployment rights of USERRA if the employer has been given notice of that service, the service is for a period of five years (generally) or less, and the employee reports back to work within the time permitted by the statute.ⁿ⁵ There is nothing in the statutory text to suggest that a showing of discriminatory employer motive is a prerequisite to reemployment rights under this sectionⁿ⁶ and it is this section of USERRA that will be the subject of this Commentary.

The difference between the two sections is best demonstrated by an example. Assume that while Joe is gone from his job because he was called up to serve in Iraq, Joes employer hires Bob to fill in during Joes absence. Bob turns out to be a far more productive employee than Joe and the employer decides to hold on to him permanently. When Joe returns home and reports for work, his employer says hes sorry but Bob is such a good worker, he is not going to let him go and he has no other work for Joe. The reason Joe doesnt get his job back is not because the employer discriminates against service in the Uniformed Services; its because he likes Bob as a worker much better than Joe. Therefore, Joe has no claim under 38 U.S.C. § 4311 (a) because there has been no discrimination on account of his service in the Uniformed Services. Because 38 U.S.C. § 4312 (a), however, does not require a showing of discrimination, Joe would have an actionable claim under that section.

The Sixth Circuits Position. In *Curby v. Archon*,ⁿ⁷ the Sixth Circuit held that a person seeking relief under § 4312 must also meet the discrimination requirement contained in § 4311. The courts reasoning was two-fold. First, it noted that one of the goals of USERRA, as set forth in 38 U.S.C. § 4301(a)(3), is to prohibit discrimination against persons because of their service in the uniformed services. Second, the court stated, 38 U.S.C. § 4311 was enacted in response to the Supreme Courts decision in *Monroe v. Standard Oil Co.*ⁿ⁸ There, the Supreme Court held that USERRAs antecedent, the Vietnam Era Veterans Readjustment Assistance Act of 1974 (VRRRA), was enacted for the significant but limited purpose of protecting the employee-reservist against discriminations like discharge and demotion, motivated *solely* by reserve status.ⁿ⁹ According to the Sixth Circuit:

Congress amended the statute in 1994 to provide that a violation occurs when a persons membership in the uniformed services is a motivating factor, even if not the sole factor. Stated otherwise, Congress intended to lessen, but not eliminate, a veterans obligation to show that the employers adverse decision was related to his or her service in the armed forces. n10

Other courts have rejected this interpretation and, after examining the statutory text and the legislative history of USERRA, concluded that, in enacting 38 U.S.C. § 4312 Congress intended to legislate a right of re-employment separate from the right against discrimination enacted as part of Section 4311 and that this entitlement does not depend on proof of discrimination. n11 In the Preamble to the final USERRA regulations, the United States Department of Labor (DoL) expressly adopted this latter interpretation and stated that sections 4311 and 4312 of USERRA are separate and distinct. The final regulation specifically provides that a returning service member is not required to prove that the employer discriminated against him or her because of the employees uniformed service in order to be eligible for reemployment. n12

Although, for the time being, employer counsel in the Sixth Circuit may have an advantage over their brethren in other circuits, this Commentary posits that the position of the Sixth Circuit will not ultimately prevail. The remainder of this Commentary, therefore, will assume that proof of discrimination is not an element of a *prima facie* case under 38 U.S.C. § 4312.

III. Prerequisites for Reemployment under 38 U.S.C. Section 4312.

Character of Separation from Service in the Uniformed Services.

An individual returning from service in the Uniformed Services forfeits the right to reemployment if the character of his or her separation from service offends the purposes of the statute. Section 4304 of USERRA (38 U.S.C. 4304) list four types of separation from service that constitute a forfeiture of the right to reemployment. n13 They are:

- . dishonorable or bad conduct discharge n14
- . "other than honorable" discharge as characterized by the regulations of the appropriate service Secretary n15
- . dismissal of a commissioned officer by general court-martial or Presidential order during a war, n16 and,
- . removal of a commissioned officer from the rolls because of unauthorized absence from duty or imprisonment by a civil authority. n17

Requirement of Notice to Employer upon Entering Uniformed Services

Generally. As a condition of qualifying for reemployment, Section 4312 (38 U.S.C. 4312) requires that a person returning from service in the Uniformed Services must have given his or her employer advance written or verbal notice of such service. The notice may be given by the individual who is reporting for duty or by an appropriate officer of the uniformed service for which the service will be performed. n18 If the person is employed by more than one employer, notice must be given to all employers with whom reemployment might be sought. n19 The requirement applies not only when the employee holds two jobs for different employers but when the employee holds a single job but is employed by joint employers (for example, an employment agency that has referred him or her to one of its clients).

Indeed, the DoL states that, if the employment was obtained through a union hiring hall, notice must be given to both the employer and the hiring hall. n20

Form and Content of Notice. Although notice of intent to leave employment to serve in the military may be oral or written, the United States Department of Defense (DoD) suggests that, as an evidentiary matter, notice be given in writing. n21 DoD regulations include a form notice that may be used for this purpose. n22 The notice need not inform the employer whether or not the employee intends to seek reemployment upon completion of military duty. n23 Indeed, even if, when leaving, the employee tells the employer that he or she does not intend to seek reemployment upon completion of military duty, the DoL takes the position that the employee retains the right to reemployment, because an employee may not waive USERRAs right to reemployment until it has matured, i.e., until the period of service is completed. n24

Timing of Notice. USERRAs text requires no more than that the notice be given in advance. n25 Regulations issued by the DoD strongly recommend[] 30 days advance notice when it is feasible, n26 However, the DoL requires only that notice should be provided as far in advance as is reasonable under the circumstances, n27 and expressly resisted requests that the regulations adopt more specific guidelines. n28

Exceptions to Notice Requirement. Advance notice is not required if the giving of notice is either precluded by military necessity, or impossible or unreasonable under all the circumstances. n29 The determination of military necessity, which is made by the DoD, is not subject to judicial review n30 and includes a mission, operation, exercise or requirement that is classified, or a pending or ongoing mission, operation, exercise or requirement that may be compromised or otherwise adversely affected by public knowledge. n31

The giving of advance notice is deemed otherwise impossible or unreasonable if: an employer representative to whom notice could be given is unavailable; the employee is ordered to report within 48 hours of such notice; or the DoD determines that the circumstances preclude notice. n32 Unlike the determination of military necessity, whether or not notice is impossible or unreasonable under the circumstances is subject to judicial review. n33

Requirement that Cumulative Years of Service-Related Absence Not Exceed Five Years

General Rule. Generally, unless an individuals cumulative service-related absence from the employ of the employer from which he or she seeks reemployment exceeds five years, he or she has a right to reemployment upon separation from service. n34 The period of time used to calculate the five-year period of service-related absence to which the individual is entitled encompasses only the period of time spent performing services in the uniformed services. A period of absence from employment before or after performing service in the uniformed services does not count against the five-year limit. n35 For example, after the employee completes a period of service in the uniformed services, he or she is provided a certain amount of time, depending upon the length of service, to report back to work or to submit an application for reemployment. The period between completing the uniformed service and reporting back to work or seeking reemployment does not count against the five-year limit. n36 For the same reason, travel time to and from the duty station, time to prepare personal affairs before entering the service, delays in activation, and similar circumstances do not count against the five-year limit. n37 The five year leave of absence rule applies separately to each employer. n38

EXAMPLE While working for employer A, Susan is absent for a period of three years to perform services in the uniformed services. Upon separation from service, Susan briefly returns to work for employer A before accepting a job with employer B. While working for employer B, Susan again enters the uniformed services, serving for another three-year period. Upon completion of this second period of service, Susan has reemployment rights with employer B even though her cumulative period of service related absence from employment for all employers exceeds five years, because her period of absence from employer B is only three years.

Moreover, if an individual is employed by more than one employer, a separate five-year period runs as to each employer, independently, even if those employers are joint employers of the individual. n39

EXAMPLE If Jim works for ABC Construction during the day, has a part-time evening job with XYZ Hardware, and enters the uniformed services for a period of two years, upon completion of his service, he will be entitled to reemployment rights with both ABC Construction and XYZ Hardware. Similarly, if, while Melissa is employed by Tech Services (an employee leasing company) and assigned to New Designs, Inc. (which supervises her on a day-to-day basis and controls her hours of work), she enters the uniformed services for a period of two years, upon completion of that service she will enjoy a right of reemployment with respect to both Tech Services and New Designs, Inc.

Service in Uniformed Services Prior to Effective Date of USERRA. The reemployment rights provisions of USERRA govern applications for reemployment on or after December 12, 1994. n40 Whether uniformed service performed before December 12, 1994 counts against the five-year service-related absence limit in USERRA depends on whether that pre-December 12, 1994 service was counted towards the four or five-year service limitations of the VRRRA. n41 If it did, then it also counts against the service limits of USERRA. n42

Statutory Exceptions to General Rule. In calculating years of service-related absence for this purpose, certain periods of service related to military obligations beyond the individuals control are excluded, including any period of service in excess of five years necessary to complete an initial period of obligated service. n43

No Reemployment Rights after Career Military Service. Reemployment rights after service in the uniformed services are applicable only in the case of non-career military service. n44 The determination of whether service in the uniformed services is career or non-career is based on all the facts and circumstances; there is no bright line test. The Supreme Court has held that an individual did not forfeit reemployment rights under the VRRRA by military service of 3 years duration and that it would not impose a reasonable limit on the duration of military service that would still qualify for reemployment rights. n45 Other courts have held that combined military service of 14 years establishes an intention to abandon ones civilian career in favor of a career in the military service. n46

Timely Application for Reemployment

General Rule. An individual seeking reemployment after service must notify his employer in a timely fashion of his intent to return to work. The method of and deadline for such notification varies according to the circumstances of the individual seeking reemployment as discussed below. n47

Service of Less than 31 Days. For periods of service of less than 31 days, the individual may take the time

necessary to safely return home plus eight hours. After that, the individual must report to the employer not later than the beginning of the first full regularly scheduled work period[,] n48 unless, through no fault of the individual, it is impossible or unreasonable to do so, n49 in which case he or she must report as soon as possible. n50

EXAMPLE [I]f the employee completes a period of service and travels home, arriving at ten o'clock in the evening, he or she cannot be required to report to the employer until the beginning of the next full regularly-scheduled work period that begins at least eight hours after arriving home, i.e., no earlier than six o'clock the next morning. If it is impossible or unreasonable for the employee to report within such time period through no fault of his or her own, he or she must report to the employer as soon as possible after the expiration of the eight-hour period. n51

Absence for Purpose of Examination to Determine Fitness for Service. An individual who is absent from a position of employment for the purposes of an examination to determine his or her fitness to perform service in the uniformed services, regardless of the length of the absence, is subject to the same rules regarding notice to the employer as the individual whose period of service in the uniformed services was less than 31 days. n52

Service of More than 30 Days But Less than 180 Days. For periods of service of more than 30 days but less than 181 days, the individual must submit an application (written or oral) for reemployment with the employer not later than 14 days after the completion of the period of service unless doing so is impossible or unreasonable through no fault of the individual. In the latter case, the individual must submit the application on the next full calendar day after it becomes possible to do so. n53

Service of More than 180 Days. For periods of service of more than 180 days, the individual must submit an application for reemployment (written or oral) with the employer not later than 90 days after the completion of the period of service. n54

Periods of Service May Not Be Combined. An individual may not add together days of service from separate but proximate periods of service in the uniformed service to create a longer period within which to apply for reemployment with the employer. n55

EXAMPLE If an individual serves in the uniformed services for a period of 20 days, returns to work and 2 days later is called to a period of service that extends for 170 days, the individual may not combine the two periods of service to create a period of service in excess of 180 days.

Extension of Time for Submission of Notice of Intent to Return to Work. For an individual who is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service in the uniformed services the time for notifying an employer of intent to return to work is extended for the period of recovery, but not to exceed two years. n56 If, upon recovery, the individual is unable to report because of circumstances beyond his or her control the period is extended by the minimum time required to accommodate such circumstances. n57

An employer and an employee may also agree to extend the time within which the employee has to request reemployment. n58

Failure to Report or Submit Timely Application for Reemployment. Failure to report or apply for

reemployment within the specified period specified does not constitute an automatic forfeiture of the right to reemployment. Instead, the individual is subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work. n59

Employment with Another Employer Prior to Deadline for Reporting or Applying for Reemployment.

During the period of time prior to the deadline for reporting for, or submitting application for, reemployment, an individual may generally, without giving up his or USERRA reemployment rights, seek and obtain employment with another employer. n60 The rules caution, however, against accepting employment that would constitute cause for discharge by the original employer (such as accepting employment with a competitor). n61

Contents of Application for Reemployment

An application for reemployment may be oral or written and need not follow any particular format. It should indicate that the employee is a former employee returning from service in the uniformed services and that he or she seeks reemployment with the pre-service employer. It may or may not identify a particular reemployment position in which the applicant is interested. n62

To Whom the Application for Reemployment Must Be Submitted

The application for reemployment must be submitted to an employer with respect to which the individual is entitled to reemployment rights. It may be submitted to an agent or representative of the employer who has apparent responsibility for receiving employment applications. n63

Documentation of Eligibility for Reemployment Rights

If an individual is seeking reemployment under USERRA after a period of service in the uniformed service of more than 30 days or an individual is seeking reemployment after recovering from an illness or injury incurred while in the uniformed services, he or she must, upon the request of the employer from whom reemployment is sought, provide the employer with documentation to establish that:

- . his or her application is timely n64
- . his or her cumulative service-related absence from the employ of the employer does not exceed five years n65
- . his or her separation from service was not for a reason listed under the heading "Character of Separation from Service," *supra*. n66

The documents that satisfy this requirement are listed in the regulations issued by the DoL. n67 They vary depending on the circumstances and not all of the listed documents are available or necessary in every instance. n68

Failure to Provide Documentation

A failure to provide the requested documentation is not a basis for denying reemployment rights or delaying reemployment if the failure occurs because such documentation does not exist or is not readily available at the time the employer requests it. n69 If an individual is reemployed without having provided the documentation and documentation subsequently becomes available that establishes that he or she was not eligible for reemployment rights, the employer may terminate the employment. n70

IV. Circumstances Justifying Employers Refusal to Reemploy

Statutory Defenses Generally

There are four different circumstances, spelled out in the statute in which an employer is not required to reemploy an individual even though that individual has reemployment rights with respect to that employer. n71

Changed Circumstances

If the employers circumstances have so changed as to make reemployment impossible or unreasonable, there is no obligation to reemploy. n72 An example of changed circumstances that would make reemployment impossible or unreasonable is a reduction in force that would have included the individual seeking reemployment. The fact that the employer would be required to terminate the individuals temporary replacement, however, does not constitute changed circumstances. n73

This exception is to be construed narrowly. The change must be in the circumstances of the employer, as distinguished from the circumstances of its employees. n74 Thus, the DoL states that:

the defense of changed circumstances is available where reemployment would require the creation of a useless job or mandate reinstatement where there has been a reduction in the workforce that reasonably would have included the veteran. n75 However, an employer may not establish that it is unreasonable or impossible to reinstate the returning service member solely by showing that no opening exists at the time of the reemployment application or that another person was hired to fill the position vacated by the veteran, even if reemploying the service member would require terminating the employment of the replacement employee. n76

Inability to Perform Job

An employer is not under an obligation to reemploy an individual who, upon completion of service, is not qualified for a position due to disability or other bona fide reason. If reasonable efforts have been made by the employer to help such an individual become qualified, the employer is not required to suffer undue hardship in order to employ the individual. n77

One-time, Temporary Position

An employer is also not required to reemploy an individual who was hired for brief, nonrecurring employment with respect to which there was no reasonable expectation that such employment would continue indefinitely or for a significant period. n78 USERRA does not define significant period; however, under both USERRA and the VRRRA, a

person holding a seasonal job may have reemployment rights if there is a reasonable expectation that the job will be available the next season. n79

Burden of Proof on Employer

The employer has the burden of proving by a preponderance of the evidence each of the elements of the defenses discussed above. n80

V. Right to Prompt Reemployment

An individual entitled to reemployment under USERRA is to be promptly reemployed. n81 USERRA does not define what is meant by prompt reemployment. However, the Regulations provide:

Prompt reemployment means as soon as practicable under the circumstances of each case. Absent unusual circumstances, reemployment must occur within two weeks of the employee's application for reemployment. For example, prompt reinstatement after a weekend National Guard duty generally means the next regularly scheduled working day. On the other hand, prompt reinstatement following several years of active duty may require more time, because the employer may have to reassign or give notice to another employee who occupied the returning employee's position. n82

VI. Conclusion

Speaking of the Selective Service Act of 1940, the Supreme Court stated:

This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. And no practice of employers . . . can cut down the service adjustment benefits which Congress has secured the veteran under the Act. Our problem is to construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits. n83

This admonition has been generally heeded by the federal courts and the DoL has stated that this interpretive maxim apply with full force and effect in construing USERRA and [its implementing] regulations. n84

USERRA also expressly provides that nothing in the statute supersedes, nullifies or diminishes any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in [USERRA]. n85 On the other hand, USERRA supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by [USERRA], including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit. n86

All of the above bodes well for the employee returning from service in the Uniformed Services. The strong statutory and judicial presumption favoring our Uniformed Service personnel is grounded in political and patriotic emotion, as well as sound policy. That fact will not be lost on counsel for the employee. Perhaps more importantly, it should remain prominent in the rendering of legal advice by counsel for the employer. Employer attempts to justify the denial of reemployment should be viewed with suspicion by their counsel (they will almost certainly be so viewed by the judiciary).

Nonetheless, there are specific circumstances in which a refusal to reemploy does not violate the law and counsel must also be aware of those situations. The checklist that follows, when used in conjunction with the discussion in this commentary will enable the advocate to focus clearly on the relative strengths and weaknesses of the client's position.

Checklist

Prerequisites for Reemployment

Character of Separation from Service in the Uniformed Services

- . Was the character of separation from service of the employee seeking reemployment of a kind that constitutes forfeiture of reemployment rights?
 - . dishonorable or bad conduct discharge
 - . other than honorable discharge
 - . dismissal of a commissioned officer by general court-martial or Presidential order during a war, or
 - . removal of a commissioned officer from the rolls because of unauthorized absence from duty or imprisonment by a civil authority..

Notice to Employer upon Entering Uniformed Services

- . Did the individual seeking reemployment give advance written or oral notice to each employer from which he or she is seeking reemployment of his intent to enter the service of the Uniformed Services?
 - . If notice was not given, was notice excused by:
 - . Military necessity?
 - . Circumstances that made the giving of notice impossible or unreasonable?

Cumulative Years of Service-Related Absence

- . Was the individual seeking reemployment absent from that employment on account of service in the Uniformed Services for a cumulative period of five years or less?
 - . If the cumulative service-related absence from employment exceeds five years may the excess period be ignored because it is related to military obligations beyond the individual's control?
 - . Are the years of service-related absence such that the individual will be deemed to have abandoned a civilian career in favor of a military career?

Timely Application for Reemployment

. If the individual seeking reemployment served in the Uniformed Services for less than 31 days, did he report for work at the beginning of the first full regularly scheduled that began more than eight hours after returning home?

. If the answer to the previous question is no, was it impossible or unreasonable for her to do so at that time and, if so, did she report as soon as possible thereafter?

. If the individual seeking reemployment served in the Uniformed Services for more than 30 days but less than 181 days, did he or she submit a written or oral application for reemployment not later than 14 days after the completion of the period of service?

. If the answer to the previous question is no, was it impossible or unreasonable for him to do so at that time and, if so, did he submit the application on the next full calendar day after it became possible to do so?

. If the individual seeking reemployment served in the Uniformed Services for more than 180 days, did he or she submit a written or oral application for reemployment not later than 90 days after the completion of the period of service?

. Was an individual's failure to give timely notice as described above excused because the individual was hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service in the uniformed services?

. If the answer to the previous question is yes, was timely notice given upon completion of the period of recovery (not to exceed two years after separation from service)?

. Even if the employee failed to make a timely application for reemployment, would this constitute grounds for termination under the employer's policies and procedures?

Documentation of Eligibility for Reemployment Rights

. If the individual seeking reemployment served in the Uniformed Services for more than 30 days or is seeking reemployment after recovering from an illness or injury incurred while in the uniformed services, has he or she provided documentation requested by the employer with respect to any of the following factors:

- . timeliness of application for reemployment
- . cumulative service-related absence from employment does not exceed five years
- . character of separation from service

Circumstances Justifying Employers Refusal to Reemploy Changed Circumstances

. Is the employer's denial of reemployment justified by changed circumstances that make reemployment impossible or unreasonable?

Inability to Perform Job

. Is the employers denial of reemployment justified because the individual seeking reemployment is not qualified for a position due to disability or other bona fide reason and have reasonable efforts been made by the employer to help such an individual become qualified.

One-time, Temporary Position

. Is the employers denial of reemployment justified because the job held by the individual seeking reemployment at the time he or she entered the Uniformed Services was for brief, nonrecurring employment with respect to which there was no reasonable expectation that such employment would continue indefinitely or for a significant period?

Right to Prompt Reemployment

Was the individual reemployed promptly under all the facts and circumstances?

*For text of the final USERRA regulation, see *70 FR 75346* (December 19, 2005)

*For text of USERRA, see *38 USC 4301* et seq.

*For further discussion of USERRA, see *Drafting the Union Contract*, Chapter 1-USERRA.

*For labor and employment content, see *Labor and Employment Area of Law Page*

*For up-to-date coverage of USERRA, see related news articles from the most recent two years.

*For USERRA cases, see related opinions from *Labor & Employment Cases and Administrative Materials*

*For law review articles on USERRA, see *Labor Law Review Articles, Combined*

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n1 As discussed below (see heading *The Sixth Circuits Position*), the Sixth Circuit has held otherwise in an opinion which other courts and the United States Department of Labor (DoL) have concluded represents an incorrect interpretation of the statute. This Commentary assumes that the view of the other courts and the DoL is correct.

n2 See heading *USERRAs Right to Reemployment/No Discriminatory Denial of Reemployment: § 4311(a)*, *infra*.

n3 *38 U.S.C. § 4301-4334*. For ease of reference, the various sections of USERRA will be referred to in the

main text of this Commentary simply by their section numbers; viz § 4311, or Section 4311 but not 38 U.S.C. § 4311. In the footnotes the standard citation format, which includes the title number, will be used, e.g., 38 U.S.C. § 4311.

n4 38 U.S.C. § 4311(a) (emphasis supplied).

n5 38 U.S.C. § 4312(a).

n6 The Sixth Circuit, however, has held that 38 U.S.C. § 4312(a) must be read as a subsection of 38 U.S.C. § 4311 and requires a showing of discriminatory intent. That position will be discussed before this Commentary undertakes a more detailed discussion of the notice and other requirements of 38 U.S.C. § 4312(a). See The Sixth Circuits Position, *infra*.

n7 216 F.3d 549, 2000 U.S. App. LEXIS 14181 (6th Cir. 2000).

n8 452 U.S. 549, 1981 U.S. LEXIS 114 (1981).

n9 *Monroe*, 452 U.S. 549 at 559 (emphasis added).

N10 *Curby v. Archon*, 216 F.3d 549 at 556-557 (citation omitted).

n11 *Wrigglesworth v. Brumbaugh*, 121 F. Supp. 2d 1126, 2000 U.S. Dist. LEXIS 17418 (W.D. Mich. 2000). See also *Jordan v. Air Products & Chemicals, Inc.*, 225 F. Supp. 2d 1206, 2002 U.S. Dist. LEXIS 18306 (C.D. Cal. 2002).

n12 20 CFR § 1002.33.

n13 That section provides:

A persons entitlement to the benefits of this chapter by reason of the service of such person in one of the uniformed services terminates upon the occurrence of any of the following events:

- (1) A separation of such person from such uniformed service with a dishonorable or bad conduct discharge.
- (2) A separation of such person from such uniformed service under other than honorable conditions, as characterized pursuant to regulations prescribed by the Secretary concerned.
- (3) A dismissal of such person permitted under section 1161(a) of title 10.
- (4) A dropping of such person from the rolls pursuant to section 1161(b) of title 10.

n14 38 U.S.C. § 4304(1); 20 CFR § 1002.135(a); 70 Fed. Reg. 75261 (December 19, 2005).

n15 38 U.S.C. § 4304(2); 20 CFR § 1002.135(b); 70 Fed. Reg. 75261 (December 19, 2005).

n16 38 U.S.C. § 4304(1), 10 U.S.C. § 1161 (a); 20 CFR § 1002.135(a); 70 Fed. Reg. 75261 (December 19, 2005).

n17 38 U.S.C. § 4304(1), 10 U.S.C. § 1161 (b); 20 CFR § 1002.135(a); 70 Fed. Reg. 75261 (December 19, 2005).

n18 38 U.S.C. § 4312(a)(1); 20 CFR § 1002.32(a)(1); 20 CFR § 1002.85(b); 5 CFR § 353.204. The Department of Defense defines appropriate officers to include all commissioned officers, warrant officers, and non-commissioned officers authorized by the Secretary concerned to act in this capacity. 32 CFR § 104.3.

n19 20 CFR § 1002.32(a).

n20 See 70 Fed. Reg. 7525-56 (December 19, 2005).

n21 32 *CFR* § 104.6(a). See also 70 *Fed. Reg.* 75255 (December 19, 2005).

n22 32 *CFR* § Part 104, Appendix B.

n23 20 *CFR* § 1002.88.

n24 20 *CFR* § 1002.88. Section 1002.88 implements the long-standing legal principle that an employee departing for service is not required to decide at that time whether he or she intends to return to the pre-service employer upon completion of the tour of duty. Rather, the employee may defer the decision until after he or she concludes the period of service, and the employer may not press the employee for any assurances about his or her plans. See H.R. Rep. No. 103-65, Pt. I, at 26 (1993) (One of the basic purposes of the reemployment statute is to maintain the service members civilian job as an unburned bridge.) and S. Rep. No. 103- 158, at 47 (1993), both of which cite *Fishgold v. Sullivan Drydock and Repair Corp.*, 328 U.S. 275, 284 (1946). 70 *Fed. Reg.* 75256 (December 19, 2005).

n25 38 U.S.C. § 4312(a)(1).

n26 32 *CFR* § 104.6(a)(2)(i)(B).

n27 20 *CFR* § 1002.85(d).

n28 See 70 *Fed. Reg.* 75256-57 (December 19, 2005).

n29 38 U.S.C. § 4312(b); 20 *CFR* § 1002.86.

n30 38 U.S.C. § 4312(b); 20 *CFR* § 1002.86(a).

n31 32 *CFR* § 104.3.

n32 32 *CFR* § 104.3, 20 *CFR* § 1002.86(b).

n33 *See* 70 *Fed. Reg.* 75256 (December 19, 2005) (citing S. Rep. No. 103-158, at 47 (1993)).

n34 38 *U.S.C.* § 4312(c); 20 *CFR* § 1002.99.

n35 20 *CFR* § 1002.100. *See* 70 *Fed. Reg.* 75257 (December 19, 2005).

n36 20 *CFR* § 1002.100.

n37 70 *Fed. Reg.* 75257 (December 19, 2005).

n38 38 *U.S.C.* § 4312(c); 20 *CFR* § 1002.101; 70 *Fed. Reg.* 75257 (December 19, 2005).

n39 38 *U.S.C.* § 4312(c); 20 *CFR* § 1002.101.

n40 20 *CFR* § 1002.3.

n41 USERRA, Sec. 8(a)(3); 20 *CFR* § 1002.102. *See also* 70 *Fed. Reg.* 75257 (December 19, 2005).

n42 20 *CFR* § 1002.102. *See also* 70 *Fed. Reg.* 75257 (December 19, 2005).

n43 The specific excluded periods are detailed in 38 U.S.C. § 4312(c).

n44 *Woodman v. OPM*, 258 F.3d 1372, 1377, 2001 U.S. App. LEXIS 16869 (Fed. Cir. 2001).

n45 *King v. St. Vincents Hosp.*, 502 U.S. 215, 1991 U.S. LEXIS 7175 (1991).

n46 *Paisley v. City of Minneapolis*, 79 F.3d 722, 1996 U.S. App. LEXIS 5402 (1991); *Woodman v. OPM*, 258 F.3d 1372, 2001 U.S. App. LEXIS 16869 (Fed. Cir. 2001).

n47 38 U.S.C. § 4312(e)(1); 20 CFR § 1002.115. For a case in which an individual lost his right to reemployment by failing to give timely notice, see *McGuire v. UPS*, 152 F.3d 673, 1998 U.S. App. LEXIS 18375 (7th Cir. 1998).

n48 38 U.S.C. § 4312(e)(1)(A)(i); 20 CFR § 1002.115 (a); 5 CFR § 353.205(a).

n49 38 U.S.C. § 4312(e)(1)(A)(ii); 20 CFR § 1002.115 (a).

n50 20 CFR § 1002.115 (a), 117 (b).

n51 20 CFR § 1002.115 (a).

n52 38 U.S.C. § 4312(e)(1)(B); 20 CFR § 1002.115 (a); 5 CFR § 353.205(a).

n53 38 U.S.C. § 4312(e)(1)(C); 20 CFR § 1002.115 (b), 117 (b); 5 CFR § 353.205(b).

n54 38 U.S.C. § 4312(e)(1)(D); 20 CFR § 1002.115 (b); 5 CFR § 353.205(c).

n55 70 Fed. Reg. 75258 (December 19, 2005).

n56 38 U.S.C. § 4312(e)(2)(A); 20 CFR § 1002.11 6; 5 CFR § 353.205(d).

n57 38 U.S.C. § 4312(e)(2)(B) ; 20 CFR § 1002.116.

n58 70 Fed. Reg. 75258 (December 19, 2005).

n59 38 U.S.C. § 4312(e)(3); 20 CFR § 1002.117(a); 5 CFR § 353.205(e); 70 Fed. Reg. 75260 (December 19, 2005).

n60 20 CFR § 1002.120.

n61 20 CFR § 1002.120.

n62 20 CFR § 1002.11 8.

n63 20 CFR § 1002.119.

n64 38 U.S.C. § 4312(f)(1)(A); 20 CFR § 1002.121(a); 5 CFR § 353.206.

n65 38 U.S.C. § 4312(f)(1)(B); 20 CFR § 1002.121(b); 5 CFR § 353.206.

n66 38 U.S.C. § 4312(f)(1)(C).

n67 20 CFR § 1002.123(a).

n68 20 CFR § 1002.123(b).

n69 38 U.S.C. § 4312(f)(3)(A); 20 CFR § 1002.122.

n70 38 U.S.C. § 4312(f)(3)(A).

n71 38 U.S.C. § 4312(d)(1)(A-C).

n72 38 U.S.C. § 4312(d)(1)(A); 20 CFR § 1002.139(a).

n73 20 CFR § 1002.139(a).

n74 See 70 *Fed. Reg.* 75262 (December 19, 2005).

n75 70 *Fed. Reg.* 75262 (December 19, 2005) (quoting H.R. Rep. No. 103-65, Pt. I, at 25 (1993), which in

turn cites *Watkins Motor Lines v. De Galliford*, 167 F.2d 274, 275, [1948 U.S. App. LEXIS 3159] (5th Cir. 1948); *Davis v. Halifax County School System*, 508 F. Supp. 966, 969, 1981 U.S. Dist. LEXIS 11030 (E.D. N.C. 1981)).

n76 70 Fed. Reg. 75262 (December 19, 2005) (citing *Davis* at 968 and *Cole v. Swint*, 961 F.2d 58, 60, 1992 U.S. App. LEXIS 8789 (5th Cir. 1992); *Fitz v. Bd. of Education of Port Huron Area Schools*, 662 F. Supp. 1011, 1015, 1985 U.S. Dist. LEXIS 20124 (E.D. Mich. 1985), *affd*, 802 F.2d 457, 1986 U.S. App. LEXIS 28775 (6th Cir. 1986); *Anthony v. Basic American Foods, Inc.*, 600 F. Supp. 352, 357 (N.D. Cal. 1984); *Goggin v. Lincoln St. Louis*, 702 F.2d 698, 704, 1983 U.S. App. LEXIS 29626 (8th Cir. 1983)).

n77 38 U.S.C. § 4312(d)(1)(B); 20 CFR § 1002.139(b); 70 Fed. Reg. 75262 (December 19, 2005).

n78 38 U.S.C. § 4312(d)(1)(C); 20 CFR § 1002.21, 1002.139(c); 70 Fed. Reg. 75250 (December 19, 2005).

n79 70 Fed. Reg. 75262 (December 19, 2005) (citing *Stevens v. Tennessee Valley Authority*, 687 F.2d 158, 161-62, 1982 U.S. App. LEXIS 25979 (6th Cir. 1982), and cases cited therein; S. Rep. No. 103-158, at 46-47 (1993)).

n80 38 U.S.C. § 4312(d)(2); 20 CFR § 1002.139(d).

n81 38 U.S.C. § 4313(a); 20 CFR § 1002.180.

n82 20 CFR § 1002.181. Cases interpreting the prompt reemployment requirement include *Vander Wal v. Sykes Enterprises, Inc.*, 377 F. Supp. 2d 738, 2005 U.S. Dist. LEXIS 14730 (D.N.D. 2005) (even though one plaintiff was not reemployed until over one month after filing application, he was reemployed on first day that he stated he was available; second plaintiff was reemployed within seven business days of filing application); *Haight v. Katch*, 2005 U.S. Dist. LEXIS 43777 at *15-16 (D. Neb. Oct. 5, 2005) (under circumstances, employer not required to reemploy individual immediately upon the individual--unexpectedly and without prior notice--reporting to work; *Petty v. Metropolitan Government of Nashville-Davidson*, 2006 U.S. Dist. LEXIS 83787 (M.D. Nov. 16, 2006) (metropolitan police departments delay of three weeks in reemploying a veteran of the Iraq war no violation, when the individual resigned from the service in lieu of facing a court martial over charges that he had violated the Military Code of Justice)).

n83 *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285, 1946 U.S. LEXIS 3070 (1946) (citation omitted).

n84 70 *Fed. Reg.* 75246 (December 19, 2005).

n85 38 U.S.C. § 4302(a).

n86 38 U.S.C. § 4302(b).

n87 38 U.S.C. § 4304(1); 20 *CFR* § 1002.135(a); 70 *Fed. Reg.* 75261 (December 19, 2005).

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Peter Lareau has been engaged in the practice of labor law for the better part of four decades. Starting as a field attorney with the National Labor Relations Board in 1968, he subsequently moved to the Venable law firm where he remained for 25 years and was a partner in the firm's Baltimore, Maryland office. Since moving to England, in 1995, and then to California, Mr. Lareau's work has primarily involved researching and writing on labor law subjects. He is the author of *NLRA: Law and Practice*, a six volume looseleaf treatise, and *Drafting the Union Contract*, both of which are published by Lexis Nexis Matthew Bender. He also serves as Editor-in-Chief of Bender's monthly labor and employment law journal, the *Benders Labor and Employment Bulletin*.



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Chestek on Kho v. Pennington, 2007 Ind. LEXIS 807 (Sept. 19, 2007)

2008 Emerging Issues 846

Chestek on Kho v. Pennington, 2007 Ind. LEXIS 807 (Sept. 19, 2007)

By Kenneth D. Chestek

November 5, 2007

SUMMARY: The Indiana Medical Malpractice Act (IMMA) creates substantive rights, and is not merely a procedural statute, according to a plurality of the Indiana Supreme Court. Accordingly, a law firm which fails to follow the procedures set forth in the statute may be liable in damages to the health care provider that the firm originally named as a defendant in a medical malpractice lawsuit. *Kho v. Pennington, 2007 Ind. LEXIS 807* (Sept. 19, 2007). This commentary, written by Kenneth Chestek, discusses the import and potential extensions of this important change.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: The Indiana Medical Malpractice Act (IMMA) creates substantive rights, and is not merely a procedural statute, according to a plurality of the Indiana Supreme Court. Accordingly, a law firm which fails to follow the procedures set forth in the statute may be liable in damages to the health care provider that the firm originally named as a defendant in a medical malpractice lawsuit. *Kho v. Pennington, 2007 Ind. LEXIS 807* (Sept. 19, 2007).

Background. The IMMA was enacted in 1998 (substantially revising a prior legislative scheme) to address what the legislature declared as an emergency in medical malpractice insurance coverage. 1998 Ind. PL 111, § 19. In addition to creating a Patient Compensation Fund (Ind. Code § 34-18-6-1), it also requires that all proposed medical malpractice complaints be first reviewed by a medical review panel created in the Indiana Department of Insurance (IDOI). Ind. Code § 34-18-8-4. The filing of the complaint with the IDOI tolls the statute of limitations. Ind. Code § 34-18-7-3. The opinion of the panel is admissible in subsequent litigation, and an opinion adverse to the plaintiff may be deemed sufficient to support summary judgment in favor of the health care provider. *McGee v. Bonaventura, 605 N.E.2d 792, 1993 Ind. App. LEXIS 3* (Ind. App. 1993) (applying a similar provision of the former statutory scheme).

Situations may arise, however, where the statute of limitations may expire as to some defendants who are not covered by the IMMA while the proposed complaint is still under review. The IMMA therefore has a savings provision that allows a party to file a complaint in court notwithstanding the fact that the party's proposed complaint is still under review by a medical malpractice review panel. Ind. Code § 34-18-8-7. However, as one Indiana law firm recently learned, counsel should be careful not to include in the complaint any information which identifies the health care providers who have qualified for protection under that Act.

Kho v. Pennington. In *Kho v. Pennington, 2007 Ind. LEXIS 807* (Sept. 19, 2007), plaintiff claimed that the

negligence of a hospital and its emergency room physicians caused the death of Tracy Merle Lee. Dr. Kho had been the on-call doctor on the night that Lee was treated; accordingly, in January 2001 plaintiff filed with IDOI a proposed complaint against Dr. Lee, the hospital and another physician. One month later, plaintiff filed a separate action in the Scott Circuit Court. Dr. Lee then moved for summary judgment on the grounds that he had not actually provided any medical service to the decedent. In August 2001, plaintiffs counsel voluntarily dismissed Dr. Lee from the action.

Dr. Lee then sued plaintiff and plaintiffs counsel on a theory of malicious prosecution; he also claimed that plaintiff and her counsel violated the IMMA by filing a complaint in the Scott Circuit Court, naming him explicitly, before the medical review board proceeding had been completed. (The record of the case does not reveal why this lawsuit was filed before completion of the review process in the IDOI.) He alleged that this violated Ind. Code § 34-18-8-7, which allows a plaintiff to file an action in court against a health care provider while a medical review board proceeding is pending, but only if the complaint does not contain any information that would allow a third party to identify the defendant. Defendants moved for summary judgment on both issues, which the trial court granted.

The Court of Appeals affirmed the dismissal of the malicious prosecution claim on the basis that plaintiffs counsel had ample probable cause to include Dr. Lee as a defendant, based upon hospital records that included frequent references to him as the treating physician. *Kho v. Pennington*, 846 N.E.2d 1036, 1044 (Ind. Ct. App. 2006). That court also affirmed the trial court on the basis that the IMMA does not provide a private cause of action for its violation. *Id.* at 1048. The Court of Appeals found that the IMMA is a procedural law and provides no substantive rights; accordingly, the remedy for violation of the statute should have also been procedural: a dismissal of the complaint. *Kho*, 846 N.E.2d at 1048.

Procedural or substantive? The Supreme Court weighs in. The Supreme Court of Indiana granted transfer. The Court of Appeals holding on the malicious prosecution claim was affirmed. *Kho v. Pennington*, 2007 Ind. LEXIS 807 (Sept. 19, 2007) at *4. However, the Supreme Court found that an action for statutory negligence (also known as negligence per se) could be proven. In a fractured opinion, three justices voted to remand the matter for trial, although the basis for the remand appears to be unclear.

The malpractice plaintiff and her counsel once again argued in the Supreme Court that the IMMA was a procedural statute, and did not create any substantive rights. Their argument was based on the language of the statute, which provides in part that the complaint filed in court may not contain any information that would allow a third party to identify the defendant . . . Ind. Code § 34-18-8-7(a)(1). Accordingly, the plaintiffs argued, the remedy should be a dismissal of the complaint without prejudice to re-filing a complaint without the identification, citing *Hubbard v. Columbia Womens Hosp.*, 807 N.E.2d 45, 51-52 (Ind. Ct. App. 2004). While two justices found that argument persuasive, *Kho*, 2007 Ind. LEXIS 807 at *27 (Sullivan, J., concurring and dissenting), two justices (Dickson and Boehm) held that long-standing principles of negligence per se would allow Dr. Kho to seek damages from the medical malpractice plaintiff and her counsel. They therefore voted to remand the case for further proceedings consistent with this opinion. *Id.* at *23. Justice Shepard wrote an opinion concurring in the result which also concurred with remanding the case for trial.

There is, however, some confusion as to what the trial court will be expected to do on remand. Justices Dickson and Boehm clearly voted to remand for trial only on the negligence per se claim, agreeing that the malicious prosecution claim failed. Justice Shepard concurred in the result, but on the ground that the malicious prosecution claim should have been submitted to the jury; his opinion does not discuss whether he believes there is a cause of action for negligence per se. Since Justice Rucker joined in Justice Sullivan's concurring and dissenting opinion (which would have affirmed the Court of Appeals on both issues), a 4-1 majority agrees with the dismissal of the malicious prosecution claim, but the vote on the negligence per se claim seems to be deadlocked at 2-2, with Justice Shepard's view unstated.

Assuming that Justice Shepard's opinion is interpreted (or later clarified) to support a remand on the negligence per se claim, another puzzling aspect of this case involves the malpractice plaintiffs claim that the inclusion of Dr. Kho's name in her complaint would not have protected his identity in any event, because that identity could easily have been

obtained from other sources. For example, the proposed complaint filed with IDOI is a public record, fully identifying Dr. Kho. Likewise, in order to obtain personal jurisdiction over Dr. Kho, plaintiff had to provide instructions to the process server as to where to locate and serve Dr. Kho, which are also a public record. Justices Dickson and Boehm acknowledge that because of this, the statute may [provide] less than foolproof protection for the health care providers good name and reputation; however, they conclude that this imperfect provision serves a significant ameliorative function clearly intended by the legislature. *Id. at *21*. Justice Sullivan (with Justice Rucker concurring) agreed with the malpractice plaintiff that these facts lend support to the claim that the statute is procedural and not substantive. Once again, Justice Sullivan's silence on this issue seems to leave this an open question.

To some extent, this opinion appears to be inconsistent with *Schriber v. Anonymous*, 848 N.E.2d 1061 (Ind. 2006). In that case, the plaintiffs asked IDOI if the proposed defendant in a medical malpractice case was a qualified health care provider. IDOI reported that it was not, so plaintiffs filed suit, naming the health care provider in the complaint. It later turned out that the health care provider was indeed a qualified provider, but due to a recent name change the IDOI had incorrectly reported the status of the provider to the malpractice plaintiff. The trial court in that case dismissed the action for failure to comply with the IMMA, but the Court of Appeals reversed, saying that the confusion about the name of the provider gave the plaintiff no reasonable means of complying with the statute; therefore, it found that the health care provider was not a qualified provider. *Schriber v. Anonymous*, 810 N.E.2d 1119 (Ind. Ct. App. 2004). The Supreme Court, however, disagreed with the Court of Appeals, concluding that a more appropriate alternative would be to judicially toll the expiration of the limitation period under the Act, so as to provide the plaintiff with a reasonable time after discovery of the proper entity name within which to commence an action in accordance with the Act. 848 N.E.2d at 1064. Thus, in the *Schriber* case, the Supreme Court applied a procedural remedy to a violation of the same section of the statute.

Practical Application. The safest course of action for a medical malpractice claimant will be to strictly adhere to the statutory language. If the need arises (to preserve a claim against a defendant for whom the statute of limitations is not tolled, for example) to file a complaint before the medical review board completes its proceeding, counsel is well advised to eliminate the names of all qualified health care providers from the complaint itself (by suing Dr. Doe, for example). However, there does not appear to be any requirement that the identity of the health care provider must be omitted from instructions to the process server, since it appears to be the opinion of four justices of the court that the inclusion of those names would not violate the statute. Counsel is also well advised to consult the IDOI prior to filing any action in court to determine whether any or all of the proposed defendants have qualified for coverage under the IMMA.

ABOUT THE AUTHOR(S):

Kenneth D. Chestek joined the Legal Analysis, Research and Communication (LARC) team at Indiana University School of Law in the Summer of 2003 after working as a Clinical Assistant Professor at the University of Michigan. He graduated cum laude from University of Pittsburgh School of Law where he was Editor in Chief of the Law Review. He has extensive practice experience and has worked as the managing attorney for Marshall, Dennehey, Warner, Coleman & Goggin's Erie office and as a partner in both his own firm (Chestek and Bax) and at Agresti & Agresti, in Erie, Pennsylvania. While in practice, he also served for 18 years as Chief Civil Counsel to Erie County, Pennsylvania.

He has been active in numerous capacities with the Legal Writing Institute, an organization of nearly 2000 legal writing professionals in the United States and around the world. Currently, he serves as a member of the Board of Directors and Treasurer of LWI. He also co-chairs the ALWD/LWI Annual Survey Committee, and serves as list manager for the discussion listserv (hosted at IU-Indy law school)

He has published and given lectures on a wide variety of subjects, including teaching methods, tax exemption policy, hospitals and the uses of computers in law offices.



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Garcia on the Attorney-Client Privilege in the Realm of Public Records Requests

2008 Emerging Issues 850

Grace V.B. Garcia on the Attorney-Client Privilege in the Realm of Public Records Requests

By Grace V. B. Garcia

November 5, 2007

SUMMARY: In *Suffolk Construction Co., Inc. v. Division of Capital Asset Management*, 449 Mass. 333 (2007), the Massachusetts Supreme Judicial Court answered the question of whether by enacting the Massachusetts Public Records Law, the Legislature intended to extinguish the protection provided by the attorney-client privilege to public officers or employees and governmental entities subject to that law? By answering the question in the negative, the Court made it crystal clear that the attorney-client privilege is a fundamental privilege in both the private and public sector. Now government officials are assured that they can speak freely with their legal counsel, allowing them to obtain quality legal advice, which will not be subject to disclosure. This commentary, written by Grace Garcia, discusses the import and potential extensions of this important decision.

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ARTICLE: In *Suffolk Construction Co., Inc. v. Division of Capital Asset Management*, 449 Mass. 444 (2007), the Massachusetts Supreme Judicial Court answered the question of whether, by enacting the Massachusetts Public Records Law, the Legislature intended to extinguish the protection provided by the attorney-client privilege to public officers or employees and governmental entities subject to that law. By answering the question in the negative, the Court made it crystal clear that the attorney-client privilege is a fundamental privilege in both the private and public sector. Now government officials are assured that they can speak freely with their legal counsel, allowing them to obtain quality legal advice, which will not be subject to disclosure.

Resolving the issue required an analysis of the state Public Records Law, the importance of the attorney-client privilege in our society, and the difference between the attorney-client privilege and the work-product doctrine.

Massachusetts Public Records Law

Massachusetts Public Records Law, Mass. Gen. Laws. ch. 66, § 10, as supported by Mass. Gen. Laws. ch. 4, § 7, provides that upon request, anyone is entitled to obtain copies of a broad array of public records. The primary purpose of the Public Records Law is to allow the public to have extensive access to governmental records. Thus, an individual has the right to obtain public records whether they have a vested interest or are merely curious.

Although the Public Records Law is generally broad in nature, it contains many clear exemptions to the

governments obligation of disclosure. Some of the exemptions from disclosure include records related to personnel rules and practices of a government, personal notebooks, certain inter- and intra-agency policy position documents, trade secret information, and certain law enforcement investigations. See generally *Cape Cod Times v. Sheriff of Barnstable County*, 443 Mass. 587, 591-92, n.14 (2005) (listing various exemptions of the Public Records law). Thus, despite the fundamental mandates of open disclosure, the Law provides certain areas of protection that are often afforded to private persons and companies. Notable in the Public Records Law, however, is that there is no mention of the application of the attorney-client privilege.

Suffolk Construction Reiterates that the Attorney-Client Privilege Is Essential

The attorney-client privilege is the oldest privilege covering confidential communications known to common law. It shields from the view of third parties all confidential communications between a client and its attorney undertaken for the purpose of obtaining legal advice. *Suffolk Constr.*, at 448. The privilege is shown if one proves the following elements:

(1) that he was or sought to be a client of the attorney; (2) that the attorney in connection with the document acted as a lawyer; (3) that the document relates to facts communicated for the purpose of securing a legal opinion, legal services or assistance in a legal proceeding; and (4) that the privilege has not been waived.

Town of Norfolk v. U.S. Army Corp of Engrs., 968 F.2d 1438, 1457 (1st Cir. 1992). As the privilege can be waived simply by an intended disclosure, critical to the claimants burden of proof is that the communication was made confidentially in the course of obtaining legal advice.

For any person or entity that asserts the attorney-client privilege, public or private, he or she bears the burden of proof that the privilege exists. Specifically, one must not only prove the existence of the attorney-client relationship, but all four elements for the privilege listed above. See, e.g., *Matter of the Reorganization of Elec. Mut. Lia. Ins. Co. Ltd. (Bermuda)*, 425 Mass. 419, 421 (1997). At one time, once a document had become public, regardless of the circumstances, any privilege that attached to the document was deemed waived. *Id.* at 422. However, as the privilege rests with the client, the modern trend is to protect the privilege provided the client and attorney took reasonable measures to ensure confidentiality. *Id.* Thus, practitioners must be sure to advise their clients on the scope of the attorney-client privilege and the clients responsibilities in protecting the privilege.

Confusion with the Work-Product Privilege

The confusion that led to *Suffolk Construction Co., Inc.*, that is, whether the attorney-client privilege in Massachusetts had been abrogated in the realm of public records requests, was based on the Courts prior holding in *General Electric Co. v. Department of Environmental Protection*, 429 Mass. 798 (1999). In *General Electric*, the Supreme Judicial Court held that the Public Records Law did not automatically exempt work-product documents from disclosure, unless those documents fell within one of the explicit exemptions contained in the Public Records Law.

The work-product doctrine differs from the attorney-client privilege in that it restricts the discovery of documents that are prepared in anticipation of litigation or for trial by or for another party or by or for that other partys representative (including his attorney). *Suffolk Constr.* 449 Mass. at 455 n.16. Consequently, the work-product doctrine shields an entirely different and separate category of information than that of the attorney-client privilege. The work-product doctrine gives protections to an attorneys work product, which can be discoverable upon a showing of need. In comparison, the attorney-client privilege is a privilege that belongs to the client, not the attorney, and is enforceable even after the clients death.

In deciding *General Electric*, the Court reiterated the Public Records Laws presumption that a record is public unless the record is proven to be exempt. The Court, without opining why, deemed that the Legislatures intent was to

abolish the broad work-product privilege and replace it with the narrower deliberative process exemption. Based on the Public Record Laws failure to contain a clear exemption for the attorney-client privilege, Suffolk Construction unsuccessfully attempted to use *General Electric* to argue that public records should be disclosed.

The Courts Clear Answer

Based on the fundamental differences in the attorney-client privilege and the work-product doctrine, the Supreme Judicial Court distinguished *General Electric* in holding that public entities are entitled to assert the protection of the attorney-client privilege to the same extent as a private person or entity. In making its decision, the Court stated that there was no basis, in history or in the law, that would show any intent to abolish the privilege in the realm of public records requests. The attorney-client privilege is a basic, deep-seated, privilege that allows for the fair and effective administration of justice. *Suffolk Const.*, 449 Mass. at 446. The privilege allows clients to tell their attorneys everything--the good, the bad, and the ugly--allowing the attorney to properly perform his or her duties and render legal advice based on the full information received from the client. By permitting candid conversation between attorneys and clients, the privilege advances the public interests in the observance of law and administration of justice. *Suffolk Const.*, at 449. Now practitioners can counsel all clients, private and public alike, on the attorney-client privilege and the broad protection that it affords.

Cross References. Massachusetts Pleading and Practice § 26.11 -- Privileged Matter;

§ 26.14 The Work Product Doctrine and Rule 26(b)(3); Massachusetts Evidence From A to Z § A.42 Attorney Client Privilege.

ABOUT THE AUTHOR(S):

Grace V. B. Garcia is a Partner in the Boston office of Morrison Mahoney LLP. Ms. Garcias practice is concentrated in the areas of commercial litigation, construction law, product liability and premises liability. In 2005, 2006, and 2007, she was recognized by Boston Magazine and Law & Politics as a Super Lawyer Rising Star. Ms. Garcia is admitted to the bars of the Commonwealth of Massachusetts and the State of New York. She is actively involved in several bar associations and serves on the Massachusetts Bar Association's Litigation Section Council. Previously, Ms. Garcia served as a member of the MBA's Business Law Section Council (2003 -- 2006), New Lawyer Section Council (2000 -- 2003), co-chair of the Boston Bar Association's New Lawyer's Section (2002 -- 2004), and the BBA's Task Force on Pro Bono and New Lawyers (2002 -- 2003). Ms. Garcia is a part of the Massachusetts Associated General Contractors Safety Committee. Additionally, after being on the Executive Committee for several years, Ms. Garcia is the co-director for the Boston Chapter of the Downtown Women's Club for the 2007-2008 year. Ms. Garcia is the author of the Massachusetts Litigation Blog. In addition, Ms. Garcia has authored several articles including: Fundamentals of Electronic Discovery, Boston Bar Journal (March/April 2003) and Achieving Equitable Balance: Justice Wilkins and Chapter 93A, Boston Bar Journal (Nov./Dec. 2000) (co-author). She has lectured for various continuing legal education programs on electronic discovery, document retention, and deposition techniques.



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Bisceglie on Rosenberg v. Metlife, Inc.

2008 Emerging Issues 847

Bisceglie on Rosenberg v. Metlife, Inc., 8 N.Y.3d 359, 866 N.E.2d 439, 834 N.Y.S. 2d 494 (2007)

By Kyle C. Bisceglie

November 5, 2007

SUMMARY: In a decision that affects securities brokers worldwide, the NY Court of Appeals held that employers statements on NASDs Form U-5 governing employee terminations receive absolute, rather than qualified, immunity. Kyle C. Bisceglie, a Partner at Olshan Grundman Frome Rosenzweig & Wolofsky in New York City, analyzes the impact of this decision and provides guidance for practitioners arbitrating and litigating claims post-Rosenberg.

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ARTICLE: Absolute Immunity Applied to Brokers' Statements on NASD Form U-5

In *Rosenberg v. Metlife, Inc.*, 8 N.Y.3d 359, 866 N.E.2d 439, 834 N.Y.S. 2d 494 (2007), a divided 4-2 Court of Appeals (in which Chief Justice Kaye did not participate) determined that a brokerage firm's statements on a National Association of Securities Dealers ("NASD") Uniform Termination Notice for Securities Industry Registration ("Form U-5") are entitled to absolute immunity from a libel claim even if made maliciously. In so doing, the Court gave greater weight to the need of securities firms and NASD's regulatory scheme to provide full and complete disclosure on the Form U-5 as to all circumstances surrounding employees' terminations than to potential damage to the defamed employees' future career prospects. Because NASD requires that a Form U-5 be filed when a registered representative is terminated and be reviewed before a representative is hired, and investigates terminations based on misconduct, this decision has far-reaching implications.

Public Policy Basis for Privilege. Public policy mandates that certain otherwise defamatory communications be given immunity from libel suit based on either a qualified or an absolute privilege. A qualified privilege extends to a statement made in good faith discharge of a private or public duty. Examples include the following:

? "qualified media privilege" (known in New York as "fair report privilege," *NY Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Curtis v. Butts*, 388 U.S. 130 (1967); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Edwards v. National Audobon Society*, 556 F.2d 113 (2d Cir. 1977));

? the "common interest doctrine," protecting communications made by one person on a subject in which he or she "has an interest or a legal, moral or societal duty to speak" to another person having a "corresponding legal duty or interest", (*Brockman v. Frank*, 149 Misc. 2d 399, 565 N.Y.S. 2d 426 (S.D.N.Y. 1991); see also *Huggins v. Moore*, 94

N.Y.2d 296, 704 N.Y.S.2d 904, 726 N.E.2d 456 (1999); Ferguson v. Sherman Square Realty Corp., 30 A.D.3d 288, 817 N.Y.S.2d 272 (1st Dep't 2006));

? communications by employers relating to employees or prospective employees, (*Browne v. Prudden-Winslow Co., 195 A.D. 419, N.Y.S. 350 (1st Dep't 1921); Levine v. Board of Educ., 186 A.D.2d 743, 589 N.Y.S.2d 181 (2d Dep't 1992)*);

? the "labor dispute privilege," *McGovern v. Hays, 135 A.D.2d 125, 524 N.Y.S.2d 558, app. denied 72 N.Y.2d. 803, 532 N.Y.S.2d 368, 528 N.E.2d 520 (3d Dep't 1988)*);

? qualified immunity to professional and fiduciary communications, *McQuillan v. Kenyon & Kenyon, 705 N.Y.S.2d 671 (2d Dep't 2000)*; and

? immunity for physicians and health care providers, *Farooq v. Coffey, 206 A.D.2d 879, 616 N.Y.S.2d 112 (4th Dep't 1994)*.

For a statement subject to a qualified privilege to be actionable, the plaintiff must show that the declarant acted with malice.

An absolute privilege, on the other hand, immunizes a declarant from liability regardless of malice and is generally reserved for statements "material and pertinent" to "the public function" including executive, legislative, judicial or quasi-judicial proceedings. *Rosenberg, 8 N.Y.3d at 365, 866 N.E.2d at 442-43, 834 N.Y.S. 2d at 494.*

Importance of Form U-5 in NASD's Quasi-judicial Function. In providing absolute immunity to employers' statements on a Form U-5, the *Rosenberg* Court built on its decision in *Wiener v. Weintraub, 22 N.Y.2d 330, 331 (1968)* where the Court provided absolute immunity for the statements in a complaint letter to the grievance committee of the bar association accusing an attorney of misconduct. Noting in *Rosenberg* that NASD is the largest self-regulatory organization ("SRO") subject to SEC oversight, oversees the conduct of over 5,000 brokerage firms and more than 660,000 registered securities representatives, is subject to U.S. Securities and Exchange Commission regulation and is the only "national securities association" registered under 15A of the Securities Exchange Act of 1934, the Court found that the Form U-5 plays a "significant role" in discharging one of NASD's central responsibilities in the investigation and adjudication of securities violations.

The practitioner should note that, with the July, 2007, consolidation of NASD and the regulatory and enforcement functions of the New York Stock Exchange into Financial Institution Regulatory Authority ("FINRA"), NASD's role as a SRO and the role played by the Form U-5 has become even more important.

Subject to risks of penalty to the employer member firm, NASD requires that a Form U-5 be filed within 30 days of termination of a registered representative, that a member firm review a Form U-5 in the hiring process, and, of greatest significance, routinely investigates terminations for cause that involve misconduct and frequently initiates disciplinary action as a result. This was critical to the *Rosenberg* majority's decision to view "the compulsory Form U-5 as a preliminary or first step in the NASD's quasi-judicial process," which entitles the statements to absolute immunity. *Rosenberg, 8. N.Y.3d at 367.*

Unlike the statements in the attorney complaint in *Weiner*, the statements on the Form U-5 are, generally speaking, "public." Specifically, they are maintained on NASD's Central Registration Depository ("CRD") and must be reviewed by future member employers. Through the interplay between Form U-5 and the Uniform Application for Securities Industry Registration or Transfer ("Form U-4"), the public has access to certain information about the termination of a member employee via NASD's BrokerCheck program. The *Rosenberg* majority valued protection of the investing public and the integrity of the financial markets by encouraging "[a]ccurate and forthright responses" at the expense of potential abuse of the Form U-5.

Significance of *Rosenberg*. *Rosenberg* represents a marked extension by the Court of Appeals of absolute immunity to non-adjudicated public statements and puts New York out of step with how the majority of jurisdictions treat broker-dealers, see e.g., *Galarneau v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 2007 U.S. App. Lex. 23919 (1st Cir. October 12, 2007) (Maine law); *Dawson v. New York Life Insurance Co.*, 135 F.3d 1158 (7th Cir. 1998) (Illinois law); *Glenmore v. Dean Witter Reynolds, Inc.*, 83 F.3d 132 (6th Cir. 1996) (Tennessee law); *Andrews v. Prudential Securities*, 1997 U.S. Dist. LEXIS 23694 *1 (E.D. Mich. 1997); *Eaton Vance Distributors, Inc. v. Ulrich*, 692 So.2d 915 (Fla. Dist. Ct. App. 2d Dist. 1997); *Prudential Securities, Inc. v. Dalton*, 929 F.Supp. 1411 (D. Okl. 1996); *Harburjak v. Prudential Securities, Inc.*, 759 F. Supp. 293 (W.D.N.C. 1991), and NASD's original proposal for qualified immunity. See 2-UA Blue Sky Regulation § 507, n.2 (2006) (citing Securities Exchange Act Release 39,892,66 SEC Dock. 2473) (1998)).

Earlier Decisions Muddled. Prior to *Rosenberg*, there were two lines of cases in New York. A number of reported decisions flatly held that statements on a Form U-5 were absolutely privileged. *Cicconi v. McGinn, Smith & Co.*, 2005 Slip Op. 0050, 27 A.D.3d 59, 808 N.Y.S.2d 604 (1st Dep't 2005); *Herzfeld & Stern, Inc. v. Beck*, 175 A.D. 689, 572 N.Y.S.2d 683 (1st Dep't 1991); *Culver v. Merrill Lynch & Co.*, 1995 U.S. Dist. LEXIS 10017, *16 (S.D.N.Y. 1995); *Hessel v. Goldman Sachs & Co.*, 281 A.D.2d 247, 722 N.Y.S.2d 21 (1st Dep't 2001); *Dunn v. Ladenburg Thalmann & Co.*, 259 A.D.2d 544, 686 N.Y.S.2d 471 (2d Dep't 1999).

In contrast, the line permitting prosecution of a libel claim against broker-dealers provided only tepid support for qualified immunity. See *Fahnestock v. Waltman*, 935 F.2d 512 (2d Cir. 1991); *Jordan v. Metropolitan Life Ins. Co.*, 280 F. Supp. 2d 104, 109 (S.D.N.Y. 2003); *Acciardo v. Millenium Securities Corp.*, 83 F. Supp.2d 413, 419 (S.D.N.Y. 2000). Specifically, both *Fahnestock* and *Acciardo* involved confirmation of an arbitration award in which the arbitrators had already applied a qualified immunity. As a result, the *Fahnestock* and *Acciardo* courts upheld the arbitrators' ruling based on a "manifest disregard of the law" standard effectively finding that the arbitrators' application of qualified immunity had some legal basis. This is very different from holding that a standard of qualified immunity applies. However, it was sufficient authority to cause confusion. In *Jordan*, the district court denied an employee's request for an injunction to force the employer to favorably amend the Form U-5 and noted that plaintiffs' defamation claim is subject to qualified immunity. *Jordan*, 280 F. Supp. at 109-110. Also, it was sufficiently unclear that it led the Second Circuit in *Rosenberg* to certify the question to the Court of Appeals. *Rosenberg v. Metlife, Inc.*, 453 F.3d 122 (2d Cir. 2006); *Rosenberg v. Metlife, Inc.*, 7 N.Y.3d 804, 854 N.E.2d 1268 (2006).

Post-*Rosenberg* Strategies. In light of the Court's holding, there will be more venue shopping in multi-state libel cases and more arguments over applicable choice of law. New York applies the law of the state with the greatest interest/most significant relationship with the alleged conduct and the parties, which is usually determined by the plaintiff's domicile and/or the situs of the alleged tortious conduct. *Celle v. Filipino Reporter Enterprises, Inc.*, 209 F.3d 163, 175 (2d Cir. 2000); *Lee v. Bankers Trust Company*, 166 F.3d 540, 545 (2d Cir. 1999); *Machleder v. Diaz*, 801 F.2d 46, 51 (2d Cir. 1986). Securities industry employers should follow the law of the state where the employee works and/or resides when assessing appropriate language for the Form U-5. Plaintiffs should consider emphasizing the impact of the statement outside of New York.

The Second Circuit, in applying the certified response from the Court of Appeals in *Rosenberg*, did not "decide if there are circumstances in which statements on Form U-5 are not absolutely privileged" (*Rosenberg v. MetLife, Inc.*, 493 F.3d 290, 291, n.1 (2d Cir. 2007)), but suggested that those circumstances would exist where the statements were not "material and pertinent to the issue to be resolved in the proceeding." Counsel should consider whether any statements were made beyond the Form U-5, such as remarks made to the media, socially, in emails outside the firm or in meetings. In-house counsel for brokers should vet the statement in the Form U-5 to tie it into the reasons for termination and purge any collateral statement not necessary to give an account of the reasons for the termination. Notwithstanding the immunity, depending on the circumstances, other employee claims, including retaliation, breach of contract and discrimination claims, are still viable.

At least one decision has held that *Rosenberg* is insufficient to obtain a stay of the arbitration and any question over

the extent of the applicable immunity should be raised before the arbitral tribunal, not in a CPLR article 75 proceeding. *McKim Capital, Inc. v. Stewart*, 2006 NY Slip Op 52462U LEXIS 3888, *1-2 (N.Y. Misc. 2006).

Finally, practitioners should keep in mind that potential clients are often most concerned about their reputation and ability to find new gainful work in the same industry. While *Rosenberg* limits the availability of money damages, it does not preclude an employee from protecting his or her reputation by initiating a NASD arbitration or court action to expunge defamatory language on the Form U-5. Employment lawyers should explain this distinction to discharged employees concerned about the deleterious effect of a negative Form U-5.

For additional discussion of arbitrating and litigating statements on the Form U-5 see, New York Civil Practice: CPLR Article 75 Arbitration; Personal Injury: Actions, Defenses, Damages § 4, Defamation: Defenses and Defense Considerations; Anne H. Wright, Form U-5 Defamation, 52 *Wash & Lee L. Rev.* 1299 (1995) (for discussion on Form U-5 defamation and privileges); Vivek G. Bhatt, The Amended Form U-5: Two Proposals for Solving the Privilege Dilemma, 21 *Whittier L. Rev.* 963 (2000) (discussion of qualified and absolute privileges attributed to U-5 statements and possible solutions to the issue); Loretta A. Wise, Enforcing the Personal Trading Rules Under the Investment Company Act: Employment Law Considerations, 33 *Rutgers L. J.* 487 (2002) (employment law considerations in relation to defamation suits in the securities industry).

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Susan M. Brazas on Werner v. Nebal

2008 Emerging Issues 1284

Susan M. Brazas on Werner v. Nebal, 2007 Ill. App. LEXIS 1175 (Ill. App. Ct. 2007).

By Susan M. Brazas

November 4, 2007

SUMMARY: The affirmative defense of provocation remains intact for Illinois Dram Shop actions, but statements about child support arrearage as the fueling provocation will be kept from the jury. In *Werner v. Nebal*, the First District upheld numerous evidentiary rulings of the trial court as to the provocation defense, party admissions, and ambulance records. This Emerging Issues Analysis discusses the implications of this decision.

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ARTICLE: First District Affirms That Provocation Remains An Affirmative Defense To Dram Shop Actions But Keeps Intact The Act's Significant Remedy.

We don't care who started it. That seems to be the message between the lines of the First District's recent opinion affirming all of the trial court's rulings against admissibility of various evidence. The *Werner v. Nebal* court found that the prejudice would outweigh the probative value of the details of an argument which, allegedly, led to a fight and resulting injuries which occurred at a tavern in Crestwood, Illinois. Heated words had been exchanged among family members about the paternity and arrearage of child support, and a fight broke out during which the plaintiff was injured. Named defendants in this action, brought under the Illinois Dram Shop Act, 235 ILCS 5/6-21, were the tavern owner, the alleged attacker, and the alleged co-attacker, John Doe.

The First District affirmed all of the trial court's rulings to keep from the eyes of the jury: 1) that the argument between the two persons involved was about the attacker's having fathered a child and having child support arrearage; 2) a jury instruction on the affirmative defense of provocation; 3) a verdict form apportioning damages among all the defendants; 4) testimony by paramedics that the defendant had admitted to his prior alcohol consumption; 5) testimony by witnesses of what they overheard and what they believed the fight was about; and 6) the ambulance report.

The Appellate Court thus kept intact the formidable force of the Illinois Dram Shop Act as a tool for absolute liability of a seller of alcohol for injuries caused by an intoxicated person whose intoxication was caused by the defendant seller having provided alcohol to the intoxicated person. Cases through the years have taken varied approaches to the fine line between provocation and causation within the context of the Dram Shop Act. In order to cause intoxication under the Act, the alcohol must be a material and substantial factor in the intoxication. *Mohr v. Jilg*, 223 Ill. App. 3d 217, 586 N.E.2d 807 (4th Dist. 1992).

Contributory negligence is not a defense in a Dram Shop Action. *Merritt v. Chonowski*, 58 Ill. App. 3d 192, 373 N.E.2d 1060 (3d Dist. 1978). This is so because the Dram Shop Act creates no-fault liability and provides a substantial remedy for injured persons, although with a short (one year) statute of limitations and with a limitation on the amount of recoverable damages.

The most surprising aspect of the *Werner* opinion is its implicit upholding--but limiting--of the affirmative defense of provocation. The *Werner* trial court had explicitly confirmed that provocation is a valid defense to an Illinois Dram Shop action. The appellate decision did not express disagreement with this position, but instead agreed with the trial court's finding that insufficient evidence existed to establish provocation.

The *Werner* appellate court's silent accord with the viability of provocation as an affirmative defense is significant. The Illinois Supreme Court had stated that the affirmative defense of provocation as complicity is incompatible with the doctrine, as complicity is not as to the plaintiff's contribution to his injury, but only as to his contribution to the inebriate's intoxication. *Nelson v. Araiza*, 69 Ill. 2d 534, 543, 372 N.E.2d 637 (1978). However, the appellate courts interpreting the *Nelson* holding varied in their views as to whether this language was dicta or precedent and, thus, whether it condemned or upheld the viability of provocation as an affirmative defense. The *Nelson* court's focus was on the complicity doctrine, and limited the complicity defense so that a plaintiff is precluded from recovery only if he actively contributed to or procured the intoxication of the inebriate. This standard was confirmed by the Illinois Supreme Court several years later in *Walter v. Carriage House Hotels, Ltd.*, 164 Ill. 2d 80, 88, 646 N.E.2d 599 (1995). In *Walter* the court stressed that for the defense of complicity, the active participation in the inebriate's intoxication is required, although the court declined to enumerate factors for complicity.

Medical Records Admissibility. Recently, the Third District Appellate Court, in *Troyan v. Reyes*, 367 Ill. App. 3d 729, 733 (2006) ruled that medical records are admissible under the business records exception to hearsay, even where medical providers are not present to testify. The *Troyan* court relied heavily on the trend in federal courts and in other states to readily admit medical records under the business records exception to hearsay, and reasoned that the diagnoses and opinions in medical records are inherently reliable and trustworthy because the opinions are worthless unless accurate.

However, the *Werner* court clarified that invoking the business records exception does not relax the foundational requirements for medical records to be admissible. In *Werner*, the defendant's attorney had not elicited testimony that the ambulance report was a true and accurate copy of the records. Thus, even though the ambulance personnel had testified that these records were made in the normal course of their work, the foundation was improperly laid and therefore the ambulance records were inadmissible. This is consistent with the cautions set forth in the *Troyan* opinion. Those same foundation essentials have been spelled out by the court in *Kimble v. Jorgenson*, 358 Ill. App. 3d 400, 415 (2005) to include that evidence must be presented to demonstrate that the document is what its proponent claims it to be.

Establishing Foundation for Records. The *Werner* case illustrates that counsel should be meticulous in laying a foundation for records or other documents, and not be lulled into a false sense of security that they will automatically be admitted under a hearsay exception. The trial court's caution could be explained by the prejudicial impact of the content of the ambulance record, namely, the inebriate's statement regarding his prior alcohol consumption. Attorneys are well advised to have a checklist attached to key documents as a reminder to obtain testimony on each foundational element. This checklist should include the point that a witness with sufficient personal knowledge must testify that the records are what their proponent claims them to be.

Strategic Implications. Defense counsel in a Dram Shop action are well advised to plead clearly all possible affirmative defenses in their answer, as per 735 ILCS 5/2-613(d). Given the *Werner* opinion, this should include the affirmative defense of provocation, and, if applicable, the affirmative defense of complicity. These areas should be explored in the early stages of discovery with an eye toward bringing dispositive motions on these issues.

Practical Ramifications. Counsel for both parties should make liberal use of motions in limine to clarify what evidence may be offered, especially where highly prejudicial disputes exist between the parties. The *Werner* opinion emphasizes the prejudicial impact of the subject of child support arrearage and allowed only limited reference to the general nature of the dispute as to paternity and child support. Thus, counsel should, in advance, craft a less-prejudicial general description of factual scenarios in anticipation of the argument against admissibility due to prejudice.

Jury Instruction Strategy. Specific jury instructions for Dram Shop Act cases are set forth in the Illinois Forms of Jury Instruction series. Illinois Forms of Jury Instruction § 93.50 was amended to account for the holding in *Nelson* as to the affirmative defense of complicity. Given the *Werner* holding, a modified version of § 93.50 could be offered if the affirmative defense of provocation has been pleaded. The general rule is that a party is entitled to a jury instruction on a theory of recovery if there is some evidence in the record to support it. *Stift v. Lizzadro*, 362 Ill. App. 3d 1019, 1026, 841 N.E.2d 126, 132 (1st Dist. 2005).

In contrast, the *Werner* court concluded that the trial court had not abused its discretion in refusing to give a jury instruction on the affirmative defense of provocation on the basis that there was insufficient evidence to instruct as to provocation. The *Werner* court concluded that the inebriate's words and gestures did not constitute provocation, and cited to *Gilman v. Kessler*, 192 Ill. App. 3d 630, 667, 548 N.E.2d 1371, 1381 (2d Dist. 1989) which identified the fine line between causation and provocation. (Note that *Gilman* concluded that evidence to be considered as to causation includes the injured person's actions before he was injured.) The lesson on this issue is that discovery and witness testimony should flesh out all of the conduct on the part of the plaintiff, not just words and gestures. Further, jury instructions should be tailored to clarify what is being claimed in the affirmative defense, and the definition of causation as including consideration of the plaintiff's own conduct.

Cross References: Illinois Litigation Forms and Checklists Checklist 70.01 (Drafting Motions); C70.02 (Using Motions in Pleading Stage of Litigation); C70.03 (Using Motions to Limit or Define Discovery Issues).

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Pleading Scierter: Vairo on Tellabs v. Makor Issues & Rights

2008 Emerging Issues 836

Pleading Scierter: Vairo on Tellabs v. Makor Issues & Rights

By Georgene Vairo

November 1, 2007

SUMMARY: Georgene Vairo on the Supreme Courts Analysis of Pleading the Strong Inference of Scierter as Required by the PSLRA. The Supreme Court has decided several important pleading cases during the 2006-2007 term. Tellabs addresses the issue of how to plead the strong inference of scierter, as required by the Private Securities Litigation Reform Act (PSLRA). This commentary, written by Georgene Vairo, Professor and author and editor of several books, including several chapters in Moores Federal Practice, focuses on Tellabs and also analyzes other current Supreme Court opinions on pleading practices in federal court.

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ARTICLE: *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 168 L. Ed. 2d 179, 2007 U.S. LEXIS 8270, 75 U.S.L.W. 4462 (2007) is one of several important pleadings cases decided by the United States Supreme Court during the 2006-2007 Term. A securities fraud class action case, *Tellabs* specifically addressed the issue of how to plead the strong inference of scierter, as required by the Private Securities Litigation Reform Act (PSLRA).

This Commentary focuses on *Tellabs*, and then provides an analysis of the Supreme Courts current thinking about pleading practices in federal court, explaining why the Court is taking a strict approach to pleading in some cases.

Background. Before reading *Tellabs*, one would not have known how important falcons are to pleading. Lets look at the hypothetical used by the Court that may or may not help us understand the debate between Justice Ginsburg, writing for the majority, and Justice Scalia, concurring in the judgment: A jade falcon is stolen from a room to which only A and B had access. May one infer from that hypothetical that there is a strong inference that B stole the Falcon?

Tellabs was a securities fraud class action against a fiber optics manufacturer, its president, and several other executives. The plaintiff class alleged that the defendants knowingly deceived the public about the true value of the company's stock. The defendants moved to dismiss on the grounds that the plaintiffs had failed to plead with the particularity required by the PSLRA. The district court dismissed. Although the district court found that the complaint satisfied the PSLRAs particularity requirement, it held that the plaintiffs failed to meet the statutes strong inference pleading requirement for scierter. The Seventh Circuit disagreed and reversed.

In evaluating whether a complaint sufficiently alleges scienter, the Seventh Circuit held that the district court must: 1) examine all the allegations in the complaint, and then 2) decide whether the allegations establish a strong inference of scienter. Although the Seventh Circuit agreed that the PSLRA unquestionably raised the bar for pleading scienter, it then ruled that the standard for deciding whether the complaint survives is: if it alleges facts from which, if true, a reasonable person could infer that the defendant acted with the required intent. In adopting this standard, the Seventh Circuit rejected the more stringent standard adopted by the Sixth Circuit. The Sixth Circuit test allows a complaint to survive only if the allegations support the most plausible of competing inferences. *Fidel v. Farley*, 392 F.3d 220, 227 (6th Cir. 2004). The Supreme Court entered the fray to resolve the split. While the Supreme Court itself split on the issue, it unquestionably abandoned the relatively lenient standard adopted by the Seventh Circuit.

Pleading Scienter -- Parsing the Options. Justice Ginsburg, writing for six justices, agreed with the Seventh Circuit that it is proper for the district court to assess the complaint in its entirety, as well as to consider any other sources courts typically examine when determining a motion under *Fed. R. Civ. P. 12(b)(6)*, such as documents that are attached to the pleadings, and matters of which courts can may take judicial notice. She rejected the Seventh Circuits lenient test, but adopted a test that is less rigid than the Sixth Circuits test. Justice Scalia, writing for himself, concurred in the judgment, but rejected the majoritys view regarding how to evaluate the allegations in the complaint, and favored a test closer to the more stringent Sixth Circuit test. Justice Alito, agreed with Justice Scalia as to the methodology and standard, but went even further, explaining that the standard for surviving a motion to dismiss in the PSLRA context is more akin to surviving a motion for summary judgment or judgment as a matter of law. Dissenting, Justice Stevens argued for yet a different, but lenient, test.

Signaling that *Tellabs* is a special pleading case because it involves the Congressionally mandated PSLRA pleading standard, Justice Ginsburg began by distinguishing an ordinary civil action from the securities class action case at bar. The short and plain statement standard set forth in *Fed. R. Civ. P. 8(a)(2)* applies in ordinary civil actions, but in enacting the PSLRA, in addition to enacting other provisions designed to curb perceived abuses of securities fraud cases, Congress provided in 15 U.S.C. §§ 78u-4(b)(1) and (2) heightened pleading standards to apply in such cases.

All *Tellabs* courts agreed that the shareholder plaintiffs met the first PSLRA requirement: that they specify each misleading statement and the reason why such statement is misleading. 15 U.S.C. § 78u-4(b)(1). However, the courts differed as to whether the second provision, requiring that plaintiffs state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind was satisfied. 15 U.S.C. § 78u-4(b)(2). Justice Ginsburg wrote that although Congress intended to promote greater uniformity in the circuit courts, and to heighten the pleading standard, quoting the Seventh Circuit, it failed to [T]hrow much light on what facts . . . suffice to create [a strong] inference, or on what degree of imagination courts can use in divining whether the requisite inferences exist. Thus, rather than create uniformity, Congress standard once again divided the courts of appeals.

Accordingly, Justice Ginsburg sought to provide a workable construction of the strong inference standard by balancing her notion of PSLRAs twin goals of curbing frivolous, lawyer-driven class actions against the need to preserve an investors ability to pursue compensation for meritorious claims. To accomplish her goal, Justice Ginsburg articulated three prescriptions:

1) She began by reminding us that on a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss a securities fraud claim, the district court must accept all the plaintiffs' allegations as true.

2) More controversially, according to Justices Scalia and Alito, she stated that the district court must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on *Fed. R. Civ. P. 12(b)(6)* motions.

3) Most controversially, her standard for determining whether the facts so alleged give rise to a strong inference of

scienter requires the district court to take into account plausible opposing inferences.

Justice Ginsburg noted that the Seventh Circuits standard did not involve a comparative inquiry. Rather, it simply required a basis for finding scienter, rather than a strong inference of scienter. She looked to the dictionary to justify her comparative approach. Congress requires plaintiffs to plead with particularity facts that give rise to a strong -- *i.e.*, a powerful or cogent -- inference. Such strength cannot be determined in a vacuum, necessitating a comparative approach: a complaint survives only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged.

Enter the jade falcon: In his concurring opinion, Justice Scalia questions how an inference that is merely at least as compelling as any opposing inference may be characterized as a strong inference. How could it possibly be said, he asks, that there is a strong inference that B is the thief if a jade falcon were stolen from a room to which only A and B had access? In what may largely be a semantic argument, there may be a *possibility* that B stole the falcon, perhaps even a *strong possibility*, but such possibilities are not a *strong inference*. He finds that an inference connotes belief, and in the falcon hypothetical, it would be impossible to form a strong belief, or inference, that B was the thief, and not A, or that A was the thief, and not B.

Justice Scalia agrees with Justice Ginsburg that Congress did not intend to set the bar so high that the plaintiff must produce a smoking gun to survive a motion to dismiss, or other irrefutable proof that the defendant acted with scienter. But, by codifying a strong inference test, Congress could not have been trying to provide plaintiffs with the edge in close cases. Thus, his test is whether the inference of scienter (if any) is *more plausible* than the inference of innocence. His test is not quite as strict as the Sixth Circuits *most plausible* test. Although he concedes that Congress could have done a better job of drafting, he believes that his test is truer to the text of the statute.

In his separate concurrence, Justice Alito adopts a test similar to Justice Scalias: to satisfy the strong inference test, the plaintiff must show that the inference is more likely than not correct. He then curiously states that Justice Scalias test is preferable because it aligns the test with that used in a motion for summary judgment or judgment as a matter of law. Without any support whatsoever, he writes that Congress must have intended a test that was a known quantity, rather than a previously unknown test such as the one articulated by the majority. While Congress surely has the power to set forth pleading standards, unless and until it takes over and redrafts the Federal Rules of Civil Procedure, the tests for deciding motions to dismiss -- made without the benefit of any discovery; and for summary judgment -- made after discovery but before trial; and judgment as a matter of law -- made after the close of at least the plaintiffs evidence at trial, are all different and give respect to the maturation of the case.

Justice Stevens, in his dissent, offered another test that is a known quantity -- the probable cause test. He wrote that by leaving the term strong inference undefined, Congress intended to delegate to the courts the task of giving the test content. Naturally, he was excoriated by Justice Scalia for suggesting that federal courts have such power unless expressly granted by Congress.

Tellabs is likely to generate analytic confusion in the lower courts, as they struggle with Justice Ginsburgs formulation. As both Justices Scalia and Alito point out in their respective concurring opinions, their differing formulations may not, as a practical matter, make much of a difference. However, as in any context, the more strict sounding the test, the more latitude the district court will have in ruling for a defendant, and the greater the likelihood that an opinion dismissing an action will be affirmed in a close case.

Ironically, by using the tie should go to the defendant rubric, Justice Scalia may well be setting up the majoritys test as a tie goes to the plaintiff test. As a practical matter, litigants ought to couch their arguments regarding the strength of their scienter inferences in comparative terms. Clearly, if they can show that the inference more likely than not shows scienter, the complaint will survive.

Considering Complaint in its Entirety. Justice Ginsburg and Justice Alito also battled over how the lower courts ought to scrutinize the allegations made in the complaint. Justice Ginsburg agreed with the Seventh Circuit that district courts should read the complaint in its entirety, and consider any other sources that a court normally would look to in deciding a motion to dismiss. Justice Alito disagreed. Because facts must be pleaded with particularity, vague and ambiguous allegations as well as omissions, may not be considered at all, according to him. Justice Ginsburg had noted that such allegations could count against finding scienter, but that the court should take a holistic approach to the complaint.

Although not as an important dispute on a theoretical level, on a practical level, how a district court goes about reading the complaint can make an important difference. In close cases, how the court reads the complaint and takes into account the other materials considered on a motion to dismiss, may well tip the scales and break the tie one way or the other.

Explaining Supreme Court's Recent Pleading Cases. One month before it decided *Tellabs*, the Supreme Court decided *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 167 L. Ed. 2d 929, 2007 U.S. LEXIS 5901, 75 U.S.L.W. 4337 (May 21, 2007). In *Bell Atlantic*, the Court tightened up the pleading requirements for antitrust claims. Justice Stevens was in dissent in both cases. Justice Ginsburg, the author of the majority opinion in *Tellabs*, had joined him in the *Bell Atlantic* dissent. What explains her switch? Why is the Court so interested in pleading? Why do pleading issues produce a higher degree of concurrence, at least in the result, than the other notable 5-4 cases the Court decided in the 2006-2007 term?

First, just as the Court in *Bell Atlantic* made a point of stating that it was discussing the question of pleading antitrust claims, the Court in *Tellabs* stressed that the decision was dictated by the nature of the case. That may provide the basis for understanding why Justice Ginsburg appeared to change her tune. While *Bell Atlantic* did involve pleading in antitrust cases, the governing pleading rule was *Fed. R. Civ. P. 8*. The majority and dissent fought over the meaning of Rule 8, and how to survive a motion to dismiss for failure to state an antitrust claim alleging parallel conduct. In *Tellabs*, in contrast, the governing pleading rule was an Act of Congress -- the PSLRA. Thus, she wrote: Congress, as creator of federal statutory claims, has power to prescribe what must be pleaded to state the claim, just as it has power to determine what must be proved to prevail on the merits. It is the federal lawmaker's prerogative, therefore, to allow, disallow, or shape the contours of -- including the pleading and proof requirements for -- § 10(b) private actions.

In *Bell Atlantic*, the Court adopted a plausibility standard for pleading antitrust conspiracy claims. There is a notable resemblance between *Bell Atlantic* and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986): in both cases the Court took pains to note that the issues to be decided -- summary judgment in *Matsushita*, and pleading in *Bell Atlantic* -- were in the context of an antitrust conspiracy case. Both cases adopted a plausibility test for determining whether a district court could resolve antitrust claims without the need for a trial. There is no question that antitrust cases generally present unique challenges and complexity. Justice Alito's concurrence in *Tellabs* suggesting a test modeled on summary judgment standards, presents a variation on this theme and shows how important nuts and bolts procedure can be, and, perhaps, shows how Justice Ginsburg was attempting to limit the scope of her decision.

Justice Alito would essentially require a plaintiff to make a summary judgment type response to a motion to dismiss. In his view, Congress could require such a showing. The importance of this is that, just as the *Matsushita* summary judgment standard did, the *Tellabs* and *Bell Atlantic* standards may provide an opportunity for the lower courts to graft what ought to be reserved to antitrust and securities cases to any case.

Perhaps one pleading case does not a revolution make, but the *Bell Atlantic* analysis and its 7-2 majority suggests a continued erosion of the notice pleading era. *Tellabs* was decided by an 8-1 margin, with two justices seeking an even more stringent pleading test. Like *Bell Atlantic*, *Tellabs* shows that the ideal of notice pleading of *Fed. R. Civ. P. 8* --

Conley v. Gibson and all -- lacks the force that it once did. The hope that notice pleading will lead to discovery that will turn up the evidence necessary to reach a jury, or to obtain a favorable settlement from a defendant who fears being subjected to lengthy discovery, no longer seems to be the paradigm of federal litigation. That Justice Ginsburg feels the need to overturn the relatively conservative Seventh Circuit in order to limit the erosion of the notice pleading concept speaks volumes.

Bell Atlantic and *Tellabs* sandwiched another pleading case -- *Erickson v. Pardus*, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007). There, the Supreme Court, in a per curiam opinion, held that a prisoners pro se complaint should not have been dismissed on the ground that it was too conclusory. How can the apparent inconsistency be explained? First, the Court probably did not want to disturb its long-standing rules on pro se pleading. Second, there are other devices available to courts for dealing with frivolous prisoners cases. Third, such cases, frivolous or not, generally do not involve the complexity or cost that antitrust or securities cases almost always present, and do not involve a plaintiffs lawyer. In other words, the Court would be less concerned about protracted litigation and huge costs in such cases.

Conclusion. What might all this mean for plaintiffs defending a motion to dismiss after *Tellabs* and *Bell Atlantic*? It would be prudent practice for a plaintiff to allege more facts in order to provide a basis for jumping the plausibility pleading standard if a district court seeks to apply it explicitly or implicitly. Indeed, amendments to the discovery rules of the Federal Rules of Civil Procedure also put those who plead more facts at an advantage during the discovery process. For example, a party who pleads in greater factual detail may be able to obtain more material under *Fed. R. Civ. P. 26 (b)(1)(a)*'s standard that discovery may be obtained that is relevant to the claim or defense of any party.

For further analysis of pleading requirements in the PSLRA, see 2-9 *Moore's Federal Practice -- Civil* § 9.03 [6][a].

For additional discussion of requirements for pleading scienter, see 7-91 *Securities Law Techniques* § 91.02 [1][a][ii].

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Vairo on Emerald Investors Trust v. Gaunt Parsippany Ptnrs.

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Vairo on Emerald Investors Trust v. Gaunt Parsippany Ptnrs.

By Georgene Vairo

November 1, 2007

SUMMARY: Georgene Vairo on the Third Circuits Determination of the Citizenship of a Trust for Purposes of Diversity Jurisdiction. Determination of the citizenship of a trust for purposes of diversity jurisdiction has produced a variety of approaches at the court of appeals level. The Third Circuit in *Emerald Investors Trust* has analyzed the approaches and adopts a different test. This commentary, written by Georgene Vairo, Professor of Law at Loyola Law School, Los Angeles and author and editor of several books, including the chapters on removal jurisdiction, venue, change of venue and multidistrict litigation in *Moore's Federal Practice*, discusses how the Third Circuits test will likely become the prevailing approach.

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ARTICLE: *Emerald Investors Trust v. Gaunt Parsippany Partners*, 492 F.3d 192; 2007 U.S. App. LEXIS 13820 (3d Cir. June 13, 2007) involves the question of how to determine the citizenship of a trust for diversity jurisdiction purposes. Determining the citizenship of an individual generally is doctrinally straightforward -- an intensely fact-based determination will lead to a determination of the individual's domicile, or whether the individual has changed his or her domicile. The test for citizenship is domicile. Congress has provided the test for determining the citizenship of a corporation. Under 28 U.S.C. § 1332 (c), a corporation is a citizen of any state in which it is incorporated -- which is generally easily ascertained; and of its principal place of business. Because the circuit courts have adopted different tests for determining the principal place of business, there are variations from circuit to circuit. But, application of the tests, like the test for determining domicile, is fact based. Determining the citizenship of unincorporated entities, on the other hand, has produced a variety of approaches at the court of appeals level depending on the type of entity, and has resulted in several Supreme Court opinions that provide some guidance, but not always easy answers, to questions such as: How is the citizenship of a partnership determined? A limited partnership? A syndication? A trust? *Emerald Investors* is a careful articulation of the Third Circuits approach to resolving the issue of the citizenship of a trust.

The black letter rule is that a trust is a citizen of the state of which the trustee is a citizen. See 15-102 *Moore's Federal Practice -- Civil* § 102.57 [5]. A minority of courts of appeals have instead based citizenship on functional considerations, looking to either the trustee's or the beneficiaries' citizenship, depending on who effectively controls the trust. Other courts have looked exclusively to the citizenship of the beneficiaries. The Third Circuit analyzes each of these approaches and persuasively adopts a different test, holding that a trust is a citizen of the state or states of which the both the trustee and the beneficiary are citizens.

Facts and Procedural Background. In *Emerald Investors Trust*, a trust sued several partnerships seeking recovery on unpaid promissory notes and foreclosure of mortgages securing the notes. Applying a beneficiary test, the district court held that it had diversity jurisdiction because the sole beneficiary of the trust was incorporated in the British Virgin Islands and had its principal place of business there, while the defendants were citizens of states within the United States and were not citizens of the British Virgin Islands. The district court did not consider the citizenship of the trustee, who was a citizen of Florida. The Third Circuit, affirming the rule it had adopted almost 30 years before, held that the citizenship of both trustees and beneficiaries count when determining diversity jurisdiction, it remanded the case to the district court for further discovery with respect to the citizenship of the parties. First, however, the Third Circuit carefully considered the four possible approaches to determining the citizenship of a trust in light of the two relevant Supreme Court rulings on the citizenship of unincorporated entities.

Third Circuit Precedent. In *Riverside Mem'l Mausoleum, Inc. v. UMET Trust*, 581 F.2d 62, 65 (3d Cir. 1978), the Third Circuit held that the citizenship of both the trustees and the beneficiaries of the trust both counted in determining the citizenship of a trust for diversity purposes.

Two years after the Third Circuit decided *Riverside*, the United States Supreme Court considered a diversity issue in a case involving a trust. In *Navarro Savings Association v. Lee*, 446 U.S. 458, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (1980), the Supreme Court considered whether trustees of a business trust, suing in their own names, may invoke the diversity jurisdiction of the federal courts based on their own citizenship rather than that of the trust's beneficial shareholders. The trustees had exclusive authority over the property, and the declaration of trust authorized them to take legal title to trust assets, to invest those assets for the shareholders' benefit, and to sue and be sued in their capacity as trustees. The shareholders possessed no such authority. The Court held that a trustee is a real party to the controversy for purposes of diversity jurisdiction when he possesses certain customary powers to hold, manage, and dispose of assets for the benefit of others," and that trustees who meet this standard [may] sue in their own right, without regard to the citizenship of the trust beneficiaries."

Ten years later, in *Carden v. Arkoma Associates*, 494 U.S. 185, 110 S. Ct. 1015, 108 L. Ed. 2d 157 (1990), a limited partnership sued over a contract dispute, relying on diversity jurisdiction. The Court refused to treat a limited partnership as a corporation, under 28 U.S.C. § 1332(c), or to determine the partnership's citizenship solely by reference to its general partners. The Court held that in a suit by or against an artificial entity other than a corporation, diversity of citizenship depends on the citizenship of all the members. The Court distinguished *Navarro* on the ground that it had nothing to do with the citizenship of the trust because it was a suit by the trustees in their own names.

The Third Circuit summarized the rules established by *Navarro* and *Carden* as follows: *Navarro* makes clear that in a suit by or against the individual trustees of a trust, if the trustees possess certain customary powers to hold, manage, and dispose of assets, their citizenship, and not that of the trust beneficiaries, controls for purposes of diversity jurisdiction. In a suit by or against an artificial entity in its own name, on the other hand, *Carden* suggests that diversity jurisdiction depends on the citizenship of all the members. With *Navarro* and *Carden* as the relevant Supreme Court guidance, the Third Circuit concluded that there are four alternatives for determining the citizenship of a trust: (1) consider the citizenship of the trustee only; (2) consider the citizenship of the beneficiary only; (3) consider the citizenship of either the trustee or the beneficiary depending on who is in control of the trust in the particular case; or (4) consider the citizenship of both the trustee and the beneficiary.

Trustee-Only Rule Rejected. The Third Circuit acknowledged that *Navarro* could be understood as suggesting that a court should look to the citizenship of the trustee to determine the trust's citizenship, without regard to the

citizenship of the beneficiary, as long as the trustee has certain customary powers to hold, manage, and dispose of assets for the benefit of others. Indeed, this is currently the leading view, adopted by both the Seventh and Ninth Circuits. See *Hicklin Eng'g, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006); *Johnson v. Columbia Props. Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006); *May Dep't Stores Co. v. Federal Ins. Co.*, *May Dep't Stores Co. v. Fed. Ins. Co.*, 305 F.3d 597 (7th Cir. 2002), 599 (7th Cir. 2002).

However, the Third Circuit rejected this reading of *Navarro*. *Navarro* was essentially a *Fed. R. Civ. P. 17* real party in interest problem. As the Supreme Court emphasized in *Carden*, the trustees in *Navarro* were entitled to sue in their own names. The question was whether they could invoke diversity jurisdiction on the basis of their own citizenship rather than that of the trust's beneficial shareholders. *Navarro* did not address the question of the citizenship of an entity that is itself a party to the action. Additionally, the trustees-only rule seems to contradict the *Carden* holding that an artificial entity "should assume the citizenship of all of its members". The trust's beneficiary, whose citizenship would be disregarded under a trustee-only rule, is in a position similar to that of the limited partners in *Carden*.

Beneficiary-Only Rule Rejected. The Third Circuit acknowledged that a rule looking only to the citizenship of the beneficiary would be consistent with *Carden*, at least as long as the trustee is not a member" of the trust. It noted that this is the position of the Eleventh Circuit in *Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 292 F.3d 1334, 1338 (11th Cir. 2002). The Eastern District of Virginia also adopted a beneficiary-only rule as consistent with *Carden*. *In re A. H. Robins Company, Inc.*, 197 B.R. 575; 1995 Bankr. LEXIS 2068 (E.D. Va. 1995). However, the Third Circuit warned that this rule could lead to an untoward result" in many cases. For example, reliance on the citizenship of a beneficiary who has delegated all control of the trust to a trustee who brings the suit would be inconsistent with the reason for diversity jurisdiction, because if the trust had a local advantage or faced a local prejudice it would be on the basis of the identification of the trustee, not the beneficiary. The Third Circuit likely is quite right that Congress is not likely to favor a rule that would invite jurisdictional manipulation of that sort. However, Congress has not spoken to this issue in the trust context, as it has in setting out the citizenship for infants, decedents, and incompetents. See 28 U.S.C. § 1332(c)(2) providing that the citizenship of such parties shall be their citizenship, and not the citizenship of their representatives.

Control Party Rule Rejected. A case-by-case rule depending on whether the trustee is active or passive would place a great and unnecessary burden" on the litigants and the courts, according to the Third Circuit. In every case in which a trust is a party and the plaintiff relies on diversity jurisdiction, the court would have to monitor jurisdictional discovery and make findings with respect to the roles of the trustee and beneficiary in the affairs of the trust, all in a case that might be dismissed or remanded to state court. In fact, some courts have resisted efforts to base citizenship determinations on functional considerations. See *May Dep't Stores Co. v. Fed. Ins. Co.*, 305 F.3d 597, 599 (7th Cir. 2002); see also *Kuntz v. Lamar Corp.*, 385 F.3d 1177, 1183 (9th Cir. 2004); *SHR Ltd. P'Ship v. Braun*, 888 F.2d 455, 458-459 (6th Cir. 1989); *Saadeh v. Farouki*, 107 F.3d 52, 57 (D.C. Cir. 1997).

Citizenship of Both Trustee and Beneficiary Rule Reaffirmed. According to the Third Circuit, looking to the citizenship of both the trustee and the beneficiary in all cases in which a trust is the party in interest is the best approach for several reasons. First, it is consistent with both *Navarro* or *Carden*. Second, it avoids the possibility of an illogical outcome under a trustee- or beneficiary-only approach in a case in which the trustee controls the trust and the beneficiary is merely passive or vice versa. Third, a bright-line rule is preferable to a case-by-case functional rule because it is the most efficient. Finally, the dual-role approach best accommodates the court's concerns of judicial economy and due respect for the principles of federalism when matters of diversity jurisdiction are implicated. Thus, the Third Circuit reaffirmed the rule of *Riverside* that the citizenship of both the trustee and the beneficiary control in

determining the citizenship of a trust.

Trustee-Beneficiary Rule Applied. Applying the trustee-beneficiary rule, the Third Circuit could not determine whether diversity jurisdiction existed in the present case. The plaintiff was a trust whose only beneficiary was a citizen of the British Virgin Islands and whose only trustee was a citizen of Florida. The court could not definitively determine the citizenship of the defendant partnerships based on the record before it. However, it appeared that at least one limited partner resided in Florida, and more often than not an individual is a citizen of the state in which the individual resides. Expressing grave doubts" as to whether the district court had subject matter jurisdiction, the Third Circuit vacated the district court's judgment and orders from which the parties appealed and remanded the matter to the district court with instructions to allow full discovery on the issue of the parties' citizenship.

Conclusion. As the Third Circuit recognized, there is a difference between a trust and a limited partnership, and therefore *Carden* is not directly controlling. Obviously, a limited partner is a member of a partnership. It is not as clear that a trustee is a member of a trust. A trust is a somewhat strange legal animal in that there is a division of ownership and control, whereas in a limited partnership, all partners are owners although the limited partners have no control.

However, the Third Circuit is likely reading *Carden* correctly. Of paramount concern to the Supreme Court in *Carden* was its desire not to overstep its jurisdictional boundaries. There is no statutory authority that provides any special citizenship determination rule for partnerships, trusts or any other unincorporated entity or association with regard to diversity, as 28 U.S.C. § 1332(c)(1) provides for corporations, or for that matter, as 28 U.S.C. § 1332(c)(2) provides for individuals lacking capacity, such infants, decedents and incompetents. Therefore, a partnership is not a "citizen" of any state within the meaning of the statutes regulating jurisdiction, and its citizenship must be determined with reference to each of its partners. Similarly, the citizenship of a joint venture is the citizenship of each member regardless of whether the member has a specific interest in the suit. In *Carden*, the Supreme Court held that the citizenship of all partners in a limited partnership, rather than only the citizenship of the general partners or the state where the partnership is created, governs the determination of citizenship for jurisdictional purposes. And, it stated, any alteration of these rules must come from Congress.

The Third Circuits careful and persuasive analysis of the different alternatives is reminiscent of the recent line of cases involving the citizenship of Lloyds of London. See 15-102 *Moore's Federal Practice -- Civil* § 102.57 [4]. The courts of appeals have split over how to determine the citizenship of such an entity. Just as the courts began to pay attention and develop a more nuanced approach to that issue, the Third Circuits opinion in *Emerald Investors* is likely to do the same for the analysis of the citizenship of a trust, and is likely to become the prevailing view.

This may well be a timely development. Until now, there have been relatively few court of appeals cases that have addressed the issue of the citizenship of a trust for diversity purposes. Given the proliferation of different types of trusts, used for investments or estate planning, to name a couple, it is important for the courts to develop a coherent rule. Additionally, although few cases address the citizenship of ERISA plans for diversity purposes, the majority view is that an employee benefit plan under ERISA is an express trust. ERISA requires that the named fiduciaries have authority to manage and control the plan and, with limited exceptions, all plan assets be held in trust. The Eleventh Circuit has held that an ERISA plan is an unincorporated association for diversity purposes, and further held that only the citizenship of the trustees count for determining diversity jurisdiction. *Xaros v. U.S. Fidelity & Guaranty Co.*, 820 F.2d 1176, 1181-1182 (11th Cir. 1987). So, the *Emerald Investors* decision will become an important precedent as other courts of appeals deal with ERISA cases as well.

Finally, it is important to note that the Third Circuit rule is the most restrictive in terms of the availability of diversity jurisdiction. Requiring the district court to look to the trustees or trustees citizenship, plus that of the beneficiary or beneficiaries, will result in more cases in which there is a lack of complete diversity. Such a result is consistent with the typical bias against diversity jurisdiction (notwithstanding the special case of the Class Action Fairness Act). And, as the *Carden* court pointed out, it is up to Congress to legislate a different result.

For further analysis of citizenship of trusts, see 15-102 Moore's Federal Practice -- Civil § 102.57 [5].

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Spoliation of Evidence: Order on Doe v. Norwalk Cmty College

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Spoliation of Evidence: Order on Doe v. Norwalk Cmty College

By Richard S. Order

November 1, 2007

SUMMARY: Spoliation of evidence has taken on new meaning in the electronic age. In Norwalk, a federal district court in the District of Connecticut methodically analyzed the requirements for imposing spoliation sanctions. This commentary, written by Richard S. Order, Partner at Axinn, Veltrop & Harkrider LLP and commercial litigation expert, discusses the Norwalk case and the importance of preserving evidence in this electronic age.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: District Court Finds Spoliation of Evidence and Sanctions the Spoliator with an Adverse Inference Jury Instruction. Particularly since the *Zubulake v. UBS Warburg LLC* series of five decisions concerning electronic discovery by U.S. District Judge Shira A. Scheindlin in 2003 and 2004, 216 *F.R.D.* 280, 2003 *U.S. Dist. LEXIS* 7940, 217 *F.R.D.* 309, and 220 *F.R.D.* 212 (*S.D.N.Y.* 2003), and 229 *F.R.D.* 422 (*S.D.N.Y.* 2004), and even more so in light of the sanctions for withholding documents threatened by U.S. District Judge Rudi Brewster of the Southern District of California against Qualcomm Inc. and its attorneys in 2007 in Qualcomm's suit against Broadcom Corp., every litigator and in-house litigation manager should by now have experienced the panic that hit corporate attorneys in the aftermath of the Enron debacle and the ensuing under-the-microscope feeling engendered by Sarbanes-Oxley regulations.

Spoliation of evidence has taken on new meaning in the electronic age. Decades ago, trial lawyers were taught that spoliation was the intentional destruction of documents that were harmful to their clients' case. Deep-sixing a bad document, we knew, could get us and our clients in trouble. We would warn our junior attorneys, paralegals, and clients against destruction of documents, but if they nevertheless discarded or withheld them, there often was no way for opposing counsel to discover the spoliation of paper documents.

Businesses, however, use very little paper nowadays. As a result, most discoveries are focused on electronically communicated and stored information. The volume of relevant information has expanded exponentially as a single email to a handful of co-workers morphs into dozens of replies to everyone else's replies compared to a few hard copy responses to a hard copy memo of years gone by. Moreover, instead of relying on the filing skills of secretaries to preserve paper documents that they barely glance at or understand and maintain them in a system that might permit a searcher to retrieve them years later in response to discovery requests, businesses now automatically save documents in searchable electronic format conducive to producing multiple gigabytes of information, including metadata, on a dozen DVDs.

The temptation to get rid of bad documents, however, survives. Only the methods of destruction and of detection have changed. By now, most people realize that simply hitting the delete button does not eradicate a document forever. Deep in the computer's hard drives, the information lurks and can be retrieved. Consequently, the electronic-age spoliator has been forced to devise more sophisticated ways to accomplish the task.

Doe v. Norwalk. In *Norwalk*, U.S. District Judge Janet C. Hall of the District of Connecticut granted plaintiff's motion for sanctions for discovery misconduct and spoliation of evidence, awarding her the ultimate sanction of an adverse inference jury instruction to be given after trial--if defendants do not take the obvious hint and settle before trial. The plaintiff was a student at Norwalk Community College who alleged that her teacher sexually assaulted her. She sued the teacher and the college for violations of prohibitions against teacher-student sexual harassment under Title IX of the Educational Amendments of 1972, for negligent retention and supervision of the teacher, and for negligent infliction of emotional distress. Plaintiff claimed that the college had received four previous complaints of that teacher's sexual misconduct.

To prove her claims, plaintiff had to establish the essential elements that the college was on notice of the teacher's previous sexual assaults before he assaulted the plaintiff and that the college's response was nothing more than deliberate indifference. When the college failed to produce any documents reflecting the college's prior knowledge of other sexual assaults, plaintiff moved to compel inspection of the college's electronic records, including the personal computers of certain college officials. Magistrate Judge Holly B. Fitzsimmons granted the motion, and plaintiff's forensic computer expert went to work on the college's system. Although he could not find the documents plaintiff believed existed, he detected suspicious activity and plaintiff moved for sanctions.

The court found a number of shocking circumstances warranting a harsh sanction:

- . Certain hard drives, including the defendant teacher's, had been scrubbed or wiped, rendering them devoid of data, especially in the timeframe of the alleged assault

- . The college did not adhere to the Connecticut State Librarian's document retention policy, believing the policy did not apply to normal computer usage and transitory emails

- . The college did not follow the policy of preserving the hard drives of departed faculty members

- . No litigation hold had been disseminated advising college personnel to preserve relevant information

- . The college continued the routine deletion of the backup server even after the lawsuit started because the plaintiff was a Jane Doe and it believed that it could not identify her even to ensure documents relating to her were not destroyed

- . The college misidentified the user of certain hard drives and, as a result, did not provide plaintiff's expert with the hard drive of a professor whose hard drive the expert had specifically requested

- . The expert discovered a number of improper activities shortly before and after his first inspection of the hard drives, including access and deletion of files, the sending or receiving of 122 previous emails en masse at the same time, and the copying of files into a computer

- . The computer of a key player was replaced one month after the lawsuit began, and the old computer was discarded

Relying on *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002), the court methodically marshaled these findings in its analysis of the requirements for imposing sanctions for spoliation in the Second Circuit. First, the producing party must have had a duty to preserve the documents at the time they were destroyed. Second, the destruction must have occurred with a culpable mind. Third, if the destruction was merely negligent, the destroyed documents must have been relevant to and supportive of the requesting party's claim or defense.

The court held that the plaintiff had demonstrated that the college intentionally, recklessly, or through gross negligence destroyed evidence after it was under a duty to preserve it and that the destroyed documents would have tended to show the college was on notice of the teacher's history of sexual assaults prior to the incident at issue.

Duty to Preserve. The court rejected the college's argument that any duty to preserve did not arise until well after commencement of the lawsuit such as when plaintiff indicated in the *Fed. R. Civ. P. 26 (f)* report her intent to conduct electronic discovery.

Rather, the duty to preserve arose no later than a meeting among a dean and two teachers to discuss an incident involving the defendant teacher and the plaintiff, nine months before she filed suit. The holding of that meeting indicated to the court that the college was aware of plaintiff's allegations and should have known that any documents, including e-mails and hard drives, related to [the teacher] could potentially be relevant to future litigation. *2007 U.S. Dist. LEXIS 51084*, at *11. Consequently, the court reasoned, the college should have initiated a litigation hold at the time of the meeting and should have suspended its routine document destruction policy.

While the serious nature of an accusation of a sexual assault should normally alert an employer that a civil suit may eventually follow and, therefore, trigger a duty to preserve evidence, it may be difficult for lawyers to know how to advise clients about document preservation in other circumstances. For example, employers receive complaints about employees every day. Most of these complaints are resolved or dismissed without consulting counsel. Of the complaints that employers deem worthy of incurring the cost of outside counsel or the attention of in-house counsel, many are also resolved or dismissed fairly quickly.

The increased frequency and magnitude of sanctions for spoliation, however, suggest that even when a complaint has apparently been resolved satisfactorily or viewed as groundless, lawyers must still make additional recommendations as to whether to issue litigation holds in the small chance that the complainant might someday file suit. While the chances that the complainant will file may be small, the prospect of sanctions should counsel a conservative recommendation to issue a litigation hold. Of course, the client has to be willing to issue and comply with the hold and tolerate the disruption that the hold may cause its routine system.

Culpable State of Mind. Relying on *Residential Funding*, the court started with the premise that ordinary negligence would establish the requisite culpable state of mind. The court went on, however, to hold that the college's failure to put a litigation hold in place and to preserve emails and hard drives constituted gross negligence and, perhaps, recklessness.

In particular, the court questioned why there was not one mention of the teacher or the plaintiff in the file of a certain college official although he had 500 communications on other topics surrounding the date of the incident. The court found this situation indicates selective destruction, evidencing intentional behavior. *2007 U.S. Dist. LEXIS 51084*, at *21. Other examples of tampering that the court pointed to included access and deletion of files close to the time when plaintiff's expert was examining the files, the sending or receiving of 122 previous emails en masse at the same time, the copying of files into a computer, and the disposal of another teacher's computer a month after the lawsuit was filed.

Again, the challenge facing counsel advising a client under similar circumstances is to determine the breadth of the litigation hold and anticipate and prevent seemingly routine business practices such as replacing and discarding the computers of key players that a client may engage in without a thought as to the evidence it may be destroying.

Relevance. The court held that since the college had committed at least gross negligence in failing to preserve documents, no other proof of relevance is necessary, and [plaintiff] is entitled to an adverse inference instruction. *2007*

U.S. Dist. LEXIS 51084, at *24.

The court went on, nevertheless, to analyze whether such a sanction was appropriate even if the college's conduct were deemed simply negligent, thereby virtually ensuring that the college will not be able to overturn this decision on appeal. The court stated that if the college's conduct had only been negligent, the plaintiff had to demonstrate that the destroyed evidence would have been relevant and favorable to her. *2007 U.S. Dist. LEXIS 51084*, at *24*25.

This is the hardest prong of the spoliation elements to prove. Recognizing how difficult this could be, the court relied on *Kronisch v. United States*, 150 F.3d 112, 128 (2d Cir. 1998), which lowered the level of proof to support an inference in favor of the requesting party to less than that required to survive summary judgment on that issue.

Fortunately for the plaintiff, she was able to present an affidavit from another woman who claimed she sent one of the teachers an email complaining that the college could have prevented the assault on the plaintiff if it had acted after receiving the affiant's earlier complaint about the defendant teacher. That email had been destroyed by the college.

Thus, proving the final prong if the producing party's conduct was simply negligent may require the court to decide the credibility of witnesses or to weigh other evidence that may demonstrate the previous existence of the destroyed documents.

Adverse Inference Jury Instruction. The court repeatedly referred to and ultimately imposed the sanction of an adverse inference jury instruction with respect to the destroyed evidence, *2007 U.S. Dist. LEXIS 51084* at *26, to be given at the end of trial. The court cited to authority that it could issue a sanction in its sound discretion but did not precisely describe the import or nature of the adverse inference instruction it would give the jury.

Presumably, the upshot of the instruction would state that the jury may or must find that the college had prior notice of the teacher's previous sexual assaults simply by inference. It is not clear whether the court will also inform the jury that the reason it may or must so find is because the college destroyed evidence that most likely confirmed its prior notice. The college could argue that such an explanation would be unduly prejudicial. In *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 439-440 (S.D.N.Y. 2004) (*Zubulake V*), the court set out the adverse inference instruction it planned to give, which explained that UBS failed to produce emails that Zubulake argued were favorable to her claims and permitted the jury to find that the documents would have been unfavorable to UBS.

In any event, knowing that such an instruction is just waiting for the conclusion of trial, the college might want to begin exploring settlement possibilities. In practice, an adverse inference instruction often ends litigation--it is too difficult a hurdle for the spoliator to overcome. . . . Accordingly, the adverse inference instruction is an extreme sanction and should not be given lightly. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 219-220 (S.D.N.Y. 2003) (*Zubulake IV*).

Costs. The court awarded the plaintiff the costs she incurred in moving for sanctions, including the costs of her forensic computer expert. The court gave plaintiff the option of seeking reimbursement of the costs now or at the end of the case. Since the expert costs, along with the attorney's fees, are most likely very substantial and since this case may have been proceeding on a contingency fee basis, there appears to be little reason to wait until the end of trial to recoup the costs of the motion. The only apparent reason to wait until after trial might be to avoid disclosing the plaintiff's counsel's timesheets at this time, although any strategic information could be redacted.

Conclusion. Needless to say, lawyers and their clients need to remain vigilant in preventing spoliation of evidence. In this era of information explosion, it will become more and more challenging to ensure that clients implement effective litigation holds and avoid routine deletion of electronic documents and disposal of hard drives, which may someday appear suspicious to a judge who will be reviewing the circumstances without much regard to other business and activities preoccupying the clients at that time. In other words, while the prospect of possible litigation may be

remote in the client's mind and, therefore, in its treatment of potential evidence, a judge will retrospectively focus on the issues in the eventual lawsuit and tend to ascribe a culpable state of mind to a client whose documents have disappeared.

From a requesting party's point of view, it is very common to believe that the opposing party has not fully produced all responsive documents. The hard call is whether to invest the time and expense of hiring a forensic computer expert in the hope of finding damning evidence of spoliation. Of course, winning an adverse inference instruction should force a prompt and favorable settlement.

For further analysis of spoliation sanctions in regard to electronically stored information, see 7-37 Moore's Federal Practice -- Civil § 37.121A, 7-37A Moore's Federal Practice -- Civil § 37A.5537A.57.

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Joseph B. McDonnell on Somers v. Quinn

2008 Emerging Issues 824

Joseph B. McDonnell on Somers v. Quinn, 373 Ill.App.3d 87, 867 N.E.2d 539, 310 Ill. Dec. 848 (Ill. A

By Joseph B. McDonnell

October 31, 2007

SUMMARY: Where an expert witness in a medical malpractice case lacks a valid license at the time he testifies, is he disqualified? In *Somers v. Quinn*, 373 Ill. App. 3d 87, 867 N.E.2d 539, 310 Ill. Dec. 848 (Ill. App. 2d Dist. 2007), the Second District Appellate Court considered whether a doctor whose license had been suspended prior to his testimony was properly disqualified as an expert witness by the trial judge. Although the Court affirmed the order (and, as well, the courts denial of plaintiffs motion for continuance to obtain another expert), the views of the majority and concurring opinions are conflicting and may present an opportunity for the Illinois Supreme Court to clarify the issue. This commentary, written by Joseph McDonnell, discusses the import and potential extensions of this important change.

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ARTICLE: In *Somers v. Quinn*, 373 Ill. App. 3d 87, 867 N.E.2d 539, 310 Ill. Dec. 848 (Ill. App. 2d Dist. 2007), the Second District Appellate Court considered whether a doctor whose license had been suspended prior to his testimony was properly disqualified as an expert witness by the trial judge. Although the Court affirmed the order (and, as well, the courts denial of plaintiffs motion for continuance to obtain another expert), the views of the majority and concurring opinions are conflicting and may present an opportunity for the Illinois Supreme Court to clarify the issue.

Background. In a medical malpractice case, plaintiffs attorney, three days before trial, took the evidence deposition of his medical expert. The witness had earlier testified in his discovery deposition that his medical license in Wisconsin had been suspended by the states licensing board after finding that the doctor had taken Hydrocortisone samples from his office. He had further testified that he was twice convicted of attempting to obtain prescriptions by fraud and that he had surrendered his medical license in 2002 due to vision problems caused by eye ulcerations. At his evidence deposition he testified that he had been granted a limited medical license, but that, in October 2004, the board had found that he had obtained medication by forging prescriptions. He had later surrendered his medical license effective December 15, 2004, five months before the evidence deposition was taken. While taking issue with the validity of the boards findings, the doctor admitted that he had stipulated to those findings in the boards written order accepting the surrender of his license, and that he held no medical license at the time of the evidence deposition.

The Trial Courts Ruling. On defendants motion *in limine* to exclude those portions of the doctors evidence deposition in which he testified to the applicable standard of care, the trial court ruled that *Section 8-2501 of the Code of Civil Procedure* (735 ILCS 5/8-2501) requires that an expert be licensed to practice medicine at the time he testifies to

the applicable standard of care. Alternatively, the trial court held that, even if it had discretion to permit the doctors testimony, it would still exclude the testimony. Plaintiff then moved for a continuance for the purpose of retaining another expert, and the motion was denied on the basis that plaintiff had not exercised due diligence. After the parties stipulated that, in the absence of the doctors testimony, plaintiff would present no evidence on the standard of care, the defendant moved for a directed verdict which was granted.

Right Result, but Why? On appeal by plaintiff, the result was affirmed, but the majority and concurring opinions clashed over whether a valid licensure at the time of the medical experts testimony is mandatory under the statute. The statute provides:

Expert Witness Standards. In any case in which the standard of care applicable to a medical professional is at issue, the court shall apply the following standards to determine if a witness qualifies as an expert witness and can testify on the issue of the appropriate standard of care.

(a) Whether the witness is board certified or board eligible in the same specialties as the defendant and is familiar with the same medical problem or problems or the type of treatment administered in the case;

(b) Whether the witness has devoted 75% of his or her time to the practice of medicine, teaching or University based research in relation to the medical care and type of treatment at issue which gave rise to the medical problem of which the plaintiff complains;

(c) whether the witness is licensed by any state or the District of Columbia in the same profession as the defendant; and

(d) whether, in the case against a nonspecialist, the witness can demonstrate a sufficient familiarity with the standard of care practiced in this State.

735 ILCS 5/8-2501 (2004).

Writing for the majority, Justice Hutchinson held that the plain language of the statute does not impose a mandatory licensure requirement. Instead, the statute leaves the admission of the experts testimony to the determination and discretion of the trial court. *Somers v. Quinn*, 373 Ill. App. 3d at 91. He agreed with the plaintiffs argument that the statute simply lists factors to be applied by the trial court in determining whether a witness is qualified to testify. In doing so, the majority makes the puzzling statement that it is inappropriate to disregard statutory authority governing admission of expert testimony in medical malpractice cases and to instead decide the case based upon other common-law requirements for the competency of a medical expert. 373 Ill. App. 3d at 92. The majority then criticizes the concurring opinion of Judge OMalley for supposedly misconstruing the Illinois Supreme Courts holding in *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 806 N.E.2d 645, 282 Ill. Dec. 348 (2004). According to the majority, the Supreme Courts statement in *Sullivan* that in order to testify as an expert on the standard of care in a given school of medicine, the witness must be licensed therein, does not justify the conclusion that the existence of a license is required before a medical expert may testify. *Sullivan*, according to the majority, held only that a practitioner of one school of medicine may not testify regarding the standard of care in another school of medicine without holding a license in the latter. Therefore, according to the majority, the lack of a current license, although properly considered by the trial court as a factor in its determination, was not a basis for automatically disqualifying the witness as an expert.

Winning the Battle but Losing the War. Nonetheless (and somewhat strangely), the majority held that the trial judge had not abused his discretion in disqualifying the witness. The Courts rationale is rather brief. After citing authority for the proposition that a trial judges disposition of an issue within his discretion will not be disturbed unless it is arbitrary and unreasonable, the court concluded that the trial judge could have reasonably concluded that the witness was not qualified due to the surrender of his medical license and due to the other findings made by the Wisconsin Board of Medical Examiners. Under the totality of the circumstances, said the majority, it could not hold that the trial court had abused its discretion in disqualifying the witness.

The Concurrence: You're Right but for the Wrong Reason. The concurring opinion by Justice O'Malley took serious issue with the Courts construction of Section 8-2501, stating that the Illinois Supreme Court has held repeatedly and unequivocally that an expert witness in a medical malpractice case must be a licensed member of the school of medicine about which he proposes to express an opinion. *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 806 N.E.2d 645, 282 Ill. Dec. 348 (2004); *Dolan v. Galluzzo*, 77 Ill. 2d 279, 32 Ill. Dec. 900, 396 N.E.2d 13 (1979); *Purtill v. Hess*, 111 Ill. 2d 229, 95 Ill. Dec. 305, 489 N.E.2d 867 (1986). The concurrence stated that, under *Purtill*, there are two foundational requirements for the admission of expert testimony in a medical malpractice case: (1) that the witness be a licensed member of the school of medicine about which he proposes to testify; and (2) that the expert be familiar with the methods, procedures and treatments ordinarily observed by other health care providers in either the defendants community or a similar community. The Supreme Court, in *Sullivan*, foreclosed any notion, according to the concurrence, that the admission of opinion testimony from a witness unlicensed in the relevant school of medicine could be considered harmless error.

Moreover, added Justice O'Malley, even though the Supreme Court has not had occasion to construe Section 8-2501, both *Purtill* and *Sullivan* (decided *after* the enactment of the statute) held that licensure in the relevant school of medicine is an absolute requirement of a medical expert giving opinion testimony.

Tips for Practitioners. The first and most obvious lesson to be learned from this case is: **Do not under any circumstances proceed to trial with an expert who has lost his license.** Even if the majority's view is correct (that licensure is but a factor to be considered in determining the witness's qualifications), the downside in terms of jury appeal (should the witness be cleared) is obvious. Apart from that, there is much to be said in favor of the concurring opinion's construction of Section 8-2501. The preamble to the statute states that the court *shall apply* the enumerated standards in determining whether a witness qualifies as an expert and can testify as to the appropriate standard of care. The factors are listed in the conjunctive, not the disjunctive, suggesting that the trial court must find that *all* of them are satisfied before the witness may be permitted to testify to the standard of care. Until clarification by the Supreme Court, counsel treads on thin ice in proceeding with a witness who does not satisfy each of the statutory factors. Even a court which broadly construes the standards as only guidelines for the trial court's consideration may nonetheless (as in the case in question) find that the totality of the circumstances justifies exclusion of the witness. Where such a determination in effect ends the case, it is too great a risk to take.

Cross References. Parness, Illinois Civil Procedure, Second Edition (LexisNexis) Chapter 8, Discovery.

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David L. Ferstendig on Brill v. City of New York

2008 Emerging Issues 823

David L. Ferstendig on Brill v. City of New York, 2 N.Y.3d 648, 781 N.Y.S.2d 261, 814 N.E.2d 431 (20

By David L. Ferstendig

October 31, 2007

SUMMARY: In *Brill v City of New York*, 2 N.Y.3d 648, 781 N.Y.S.2d 261, 814 N.E.2d 431 (2004), the New York State Court of Appeals made it clear that the courts should not countenance late summary judgment motions, without a showing of good cause, even if it means permitting less than meritorious claims or defenses to proceed to trial. In the past three years, numerous cases following the Brill rule have denied summary judgment motions based on late motions, some even only days late. And three years later, there is still a clear divergence of opinion in the Bar as to whether the Brill decision was a good one. Unless and until there is a curative legislative amendment or rule change, the practitioner should be careful to comply with the various summary judgment motion deadlines that exist throughout the state. This commentary, written by David Ferstendig, discusses the import and potential extensions of this important change.

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ARTICLE: The Continuing Shrill Over *Brill*

In *Brill v City of New York*, 2 N.Y.3d 648, 781 N.Y.S.2d 261, 814 N.E.2d 431 (2004), the New York State Court of Appeals made it clear that the courts should not countenance late summary judgment motions, without a showing of good cause, even if it means permitting less than meritorious claims or defenses to proceed to trial. In the past three years, numerous cases following the *Brill* rule have denied summary judgment motions based on late motions, some even only days late. And three years later, there is still a clear divergence of opinion in the Bar as to whether the *Brill* decision was a good one. Unless and until there is a curative legislative amendment or rule change, the practitioner should be careful to comply with the various summary judgment motion deadlines that exist throughout the state.

The 120 Day Rule. CPLR 3212(a) provides that after issue has been joined (that is, an answer is served), the court may set a deadline for service of summary judgment motions, which will be no earlier than 30 days after the filing of the note of issue. If the court does not set a date, the deadline for making summary judgment motions is no later than 120 days after filing of the note of issue, except upon leave and good cause shown.

Back in 1996, the 120 Day rule as it became known to practitioners, was passed. The primary basis for the amendment was to prevent and avoid eve of trial summary judgment motions which could have a detrimental impact on trial calendars:

The legislative history underlying this enactment highlights the practices the amendment sought to combat. Specifically, prior to the amendment of CPLR 3212(a), there was no statutory time limit for a summary judgment motion. So long as issue had been joined, a party could make a motion for summary judgment, even on the eve of trial, thereby disrupting the court's calendar and leaving an adversary little or no time to reply (Mem. of Senate in Support, 1996 McKinney's Session Laws of NY, at 2432, 2433; *Kule Resources v Reliance Group*, 49 NY2d 587, 591). Moreover, the belated motion, sometimes used as a dilatory tactic, was most burdensome for the court and for parties who had already prepared for trial (Mem. of Senate in Support, *op. cit.*). Thus, the amendment to CPLR 3212(a) was a step toward alleviating the practice of "eleventh hour" summary judgment motions.

Gonzalez v 98 Mag Leasing Corp., 95 N.Y.2d 124, 128, 711 N.Y.S.2d 131, 133-34, 733 N.E.2d 203, 205-06 (2000).

The Good Cause Standard. In interpreting the phrase good cause, some pre*Brill* courts focused on whether there was a satisfactory explanation for the delay in filing the motion. Other courts permitted a late filing where the motion had merit and there was no showing of prejudice to the adversary. Compare e.g. *Carvajal v M. Madison, LLC*, 297 A.D.2d 550, 747 N.Y.S.2d 93 (1st Dept 2002); *Falcone v Khurana*, 294 A.D.2d 535, 742 N.Y.S.2d 871 (2d Dept 2002); *DiFusco v Wal-Mart Discount Cities*, 255 A.D.2d 937, 680 N.Y.S.2d 377 (4th Dept 1998) and *Burns v Gonzalez*, 307 A.D.2d 863, 763 N.Y.S.2d 603 (1st Dept 2003) *Garrison v. City of New York*, 300 A.D.2d 14, 751 N.Y.S.2d 436 (1st Dept 2002); *Medina v Barbaro*, 279 A.D.2d 615, 720 N.Y.S.2d 165 (2d Dept 2001).

And Along Came Brill. In *Brill v City of New York*, 2 N.Y.3d 648, 781 N.Y.S.2d 261, 814 N.E.2d 431 (2004), the defendant City of New York waited more than one year after the filing of the note of issue before moving for summary judgment. Nevertheless, the trial court found good cause for permitting the late filing, because the motion had merit. The Appellate Division affirmed. The Court of Appeals reversed, however, in essence eliminating the second ground used by courts to permit late filing, that is, a meritorious motion. The Court found that the City of New York did not establish a reason for its delay and, thus, denied its motion:

We conclude that good cause in CPLR 3212(a) requires a showing of good cause for the delay in making the motion a satisfactory explanation for the untimeliness rather than simply permitting meritorious, non-prejudicial filings, however tardy.

2 N.Y.3d at 652, 781 N.Y.S.2d at 264, 81 N.E.2d at 434.

The Court acknowledged the consequences of its decision:

What is to happen in this case is that summary judgment will be reversed and the case returned to the trial calendar, where a motion to dismiss after plaintiff rests or a request for a directed verdict may dispose of the case during trial. Hopefully, as a result of the courts refusal to countenance the statutory violation, there will be fewer, if any, such situations in the future, both because it is now clear that good cause means good cause for the delay, and because movants will develop a habit of compliance with the statutory deadlines for summary judgment motions rather than delay until trial looms.

2 N.Y.3d at 653, 781 N.Y.S.2d at 265, 81 N.E.2d at 435.

The Pro-Brill Chorus. Shortly after the *Brill* decision and continuing until today, a clear divergence of opinion developed in the Bar about whether *Brill* was a good decision. The pro-*Brill* group has emphasized, among other things, that:

1. Deadlines are deadlines and must be adhered to;
2. *Brill* was one of a series of decisions from New York States highest court stressing the need for attorneys to

follow statutory and court ordered deadlines. See, e.g., *Andrea v. Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C. (Habiterra Assoc.)*, 5 N.Y.3d 514, 806 N.Y.S.2d 453, 840 N.E.2d 565 (2005); *Kihl v. Pfeiffer*, 94 N.Y.2d 118, 122-23, 700 N.Y.S.2d 87, 90, 722 N.E.2d 55, 58 (1999); and

3. If a meritorious motion is denied, a plaintiff would certainly not pursue such a claim to trial and perhaps even risk being sanctioned for asserting a meritless claim.

The Facts on the Ground. What some of the *Brill* proponents do not (adequately) address are the possible practical effects of the decision. First, it is imperative to understand the stated purpose of the 120 Day rule, that is, to avoid eve of trial motions that would disrupt the trial calendar. In *Brill*, the Court of Appeals overturned the discretion of the trial judge, the person presumably in the best position to know the vagaries of the trial schedule and the impact of a delay. Thus, *Brill* eviscerated that discretion. In fact, the dissent in *Brill* made this precise point:

What is clear from the legislative history is that the Legislature sought to give the trial court wide discretion in entertaining a motion for summary judgment. The Legislature could not have intended to grant a futile hope to a litigant or to waste the time of a number of people when the state courts are as burdened as they are.

2 N.Y.3d 648, 655 (J. Smith dissent).

Second, many courts have adopted a shorter time period, e.g. 60 days. Moreover, practice throughout the state varies dramatically. Thus, while as a general proposition, upstate courts have a more hands-on approach by the judges, many large downstate courts have clearing house type parts where motions are returnable. The result is that in many instances, deadlines, particularly in the area of disclosure, are routinely ignored with absolutely no punishment or consequences. In fact, it is not uncommon to have to get three or four orders compelling disclosure or for preclusion before one can obtain straightforward discovery responses.

In these courts, many times these disputes are handled by court personnel and contact with judges is discouraged. In short, while it is certainly laudable to enforce deadlines, selective enforcement is unfair. What makes this particular example of disclosure issues so problematic, however, is their relationship to the *Brill* holding.

The deadline to serve summary judgment motions is tied to the filing of the note of issue. However, it is not uncommon for that document signaling the end of discovery to be served prematurely and before critical discovery has been conducted. While the Uniform Rules provide a mechanism to strike a note of issue where discovery is not complete (see 22 N.Y.C.R.R. 202.21(e)), in practice in some downstate New York courts, for example, Kings County, the granting of such a motion, no matter how egregious the discovery violation, is a cause for a national holiday!

The more accepted practice in these courts is for the judge to leave the case on the trial calendar, not strike the note of issue, but to permit discovery to proceed. While there is case law to suggest that the summary judgment deadline might be put off in those circumstances, there are other troubling cases that suggest that there must be a connection between the discovery obtained and the basis for the summary judgment for an extension to apply. Compare e.g., *Pena v. Womens Outreach Network, Inc.*, 35 A.D.3d 104, 824 N.Y.S.2d 3 (1st Dept 2006) and *First Union Auto Finance v. Donat*, 16 A.D.3d 372, 791 N.Y.S.2d 596 (2d Dept 2005), *Espejo v Hiro Real Estate Co.*, 19 A.D.3d 360, 796 N.Y.S.2d 162 (2d Dept 2005) and *Kunz v Gleeson*, 9 A.D.3d 480, 781 N.Y.S.2d 50 (2d Dept 2004).

Sometimes it is not clear at all whether a particular deposition, for example, will be related or not. The practical consequence for the practitioner is to:

1. request that, if the judge does not strike the note of issue, he or she nevertheless extend the summary judgment filing deadline a request not always granted; or

2. serve the summary judgment motion in a timely fashion perhaps prematurely before discovery is complete.

Third, *Brill* dealt with a situation where the movant waited a year after filing of the note of issue to make the summary judgment motion. Based on the language in *Brill*, however, subsequent cases have interpreted it to mean that a motion even days late MUST be denied if there is no satisfactory explanation for the delay. See e.g., *Milano v. George*, 17 A.D.3d 644, 792 N.Y.S.2d 906 (2d Dept 2005) (one day late).

Fourth, the impact of the *Brill* decision is to further clog the courts by permitting some cases that should have been disposed of, to proceed to trial. See J. Smith dissent in *Brill*. It may be naive to believe that a plaintiff faced with one judges statement that a summary judgment motion is meritorious--even though it had to be denied as untimely--will either walk away from the case or settle for a nominal amount. Taking that argument to its logical (or illogical) conclusion, why would any plaintiff in a non-*Brill* situation, faced with an actual grant of summary judgment by one judge against him or her, ever appeal that decision? And yet, the reporters are packed with precisely such appellate decisions. Moreover, some courts have now, in essence, bifurcated the process, that is, they first deal with the timeliness issue. Only after the court finds the motion to be timely, does it proceeds to the merits of the motion. Furthermore, in certain areas of practice, for example, personal injury and products liability, many plaintiffs counsel could rightfully believe that their chances at trial before a jury are relatively unaffected by a judges earlier determination that their clients claim lacked merit based on the submission of papers alone without live testimony. As to the threat of sanctions, there is nothing in the *Brill* decision suggesting that there is any such increased risk. In fact, had this been a real possibility, the *Brill* court could have easily stated that denying a meritorious summary judgment motion would have no real practical ramifications because a plaintiff pursuing such a meritless claim would face sanctions. To the contrary, the *Brill* court acknowledged that the more realistic scenario was that the case would go to trial where a motion to dismiss after plaintiff rests or a request for a directed verdict *may* dispose of the case during trial (emphasis added).

Conclusion. Faced with an unforgiving court system based on the *Brill* decision, the practitioner first and foremost must make all efforts to meet the specified summary judgment deadline. If this requires the motion to be made prematurely in an excess of caution, so be it! In the first instance, however, when faced with a filed note of issue, outstanding discovery, and the courts refusal to strike the note of issue, the practitioner should ask the judge to extend the summary judgment deadline to 60 to 90 days after the completion of all discovery.

Perhaps the best solution is a curative legislative amendment returning discretion to the lower court judge to determine whether he or she can or should hear a late summary judgment motion. Alternatively, the courts should be required by statute or rule to strike the note of issue if discovery is outstanding, rather than to permit discovery to continue while keeping the case on the calendar. The other possibility is to establish a new starting point for the 120-day rule, other than the note of issue.

Cross-references. LexisNexis AnswerGuide New York Civil Litigation § 7.08, § 7.09. Weinstein, Korn & Miller *CPLR Manual* § 21.07. *New York Civil Practice: CPLR* § 3212.05.

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James J. Walsh on Trentadue v. Gorton

2008 Emerging Issues 812

James J. Walsh on Trentadue v. Gorton, 479 Mich. 378, 2007 Mich. LEXIS 1622 (2007)

By James J. Walsh

October 30, 2007

SUMMARY: The Michigan Supreme Court brought an end to the ability of Michigan courts to use the common law discovery rule to toll the accrual dates of statutory periods of limitation. This is a dramatic departure from past practice and its effects may be broad-reaching. This commentary, written by James J. Walsh, discusses the impact and implications of this significant decision.

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ARTICLE: In *Trentadue v. Gorton*, 479 Mich. 378, 2007 Mich. LEXIS 1622 (2007), the Michigan Supreme Court brought an end to the ability of Michigan courts to use the common law discovery rule to toll the accrual dates of statutory periods of limitation. A 4-3 majority found that Michigans statutory scheme for periods of limitations superseded the common law pursuant to MCLS § 600.5827, and held that because the Michigan legislature did not expressly provide for a discovery rule in the applicable statute of limitations, MCLS § 600.5805(10), Michigan courts could not apply the common law discovery rule to toll the running of this period of limitation. *See* MCLS § 600.5805(10) (The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property). This holding is in line with other recent cases that found common law doctrine inapplicable to the exclusive statutory scheme that governs periods of limitation in Michigan. *See Garg v. Macomb County Community Mental Health*, 696 N.W.2d 646, 472 Mich. 263 (2005) (holding that the common law continuing violations doctrine does not apply to MCLS § 600.5805(10)); *Boyle v. General Motors Corp.*, 661 N.W.2d 557, 468 Mich. 226 (2003) (holding that the common law discovery rule does not apply to claims alleging common law fraud, pursuant to MCLS § 600.5827). With its decision, the majority in *Trentadue* brought an end to the ability of many plaintiffs to bring claims against defendants in cases where the plaintiffs were not aware of the identity of the defendants or of the existence of the claims until after the statutes of limitations had run.

The plaintiff in *Trentadue* was the personal representative of the estate of her deceased mother, who had been murdered at her rented home in 1986. The murderers identity was not discovered until 2002, when DNA evidence revealed that the murderer was a man who had serviced the propertys sprinkler system two days prior to the murder. In *Trentadue*, the Michigan Supreme Court noted the absence of a discovery provision in MCLS § 600.5805(10) and held that the statutes three-year period of limitations barred the plaintiff from bringing wrongful death claims against a variety of defendants, including the murderers parents, who owned the sprinkler business for which the murderer worked. The fact that the plaintiff had no way of knowing who was responsible for her mothers murder until nearly 16

years after her death was insufficient to toll the limitations period.

With its ruling in *Trentadue*, the Michigan Supreme Court overturned almost 44 years of precedent. Michigan courts have been applying the common law discovery rule since 1963, when Michigan followed a nationwide trend and adopted the rule in *Johnson v. Caldwell*, 123 N.W. 785, 371 Mich. 368 (1963). *Trentadue* is significant because in it the majority expressly overruled *Johnson* and later cases which applied its holding and rationale, and substantially altered the rules for when a plaintiff may bring his claims. Because *Trentadue's* holding represents a dramatic departure from past practice and its effects may be broad-reaching, it is essential for practitioners to understand the implications of its holding.

The Scope of the Courts Holding in *Trentadue*. Of course, the holding in *Trentadue* affects more than wrongful death claims. Generally, the three-year statute of limitations currently found in MCLS § 600.5805(10) applies in all cases where the claim involves damages for injury to persons or property, unless the injury was the consequence of the defendants breach of a specific provision in a contract. See *Hanson v. Art Post American*, 269 N.W.2d 222, 83 Mich. App. 553 (1978). This includes not only wrongful death claims, but also claims as diverse as conversion, *Tillman v. Great Lakes Truck Center, Inc.*, 2007 Mich. App. LEXIS 2349 (October 18, 2007), nonphysical infringements of civil rights, *Stringer v. Board of Trustees of Edward W. Sparrow Hospital*, 233 N.W.2d 698, 62 Mich. App. 696 (1975), as well as ordinary negligence, *Bryant v. Oakpointe Villa Nursing Center, Inc.*, 684 N.W.2d 864, 471 Mich. 411 (2004). Furthermore, although *Trentadue* involved MCLS § 600.5805(10), its rationale applies to all statutory claims for which the applicable statute of limitations does not expressly provide a discovery rule. Finally, in *Makridakis v. Makridakis*, 2007 Mich. App. LEXIS 1994 (August 23, 2007), the Michigan Court of Appeals held that *Trentadue* applies not only to a plaintiffs statutory claims, but also to his common law claims, pursuant to MCLS § 600.5827.

Practitioners representing potential plaintiffs in tort cases must be cautioned that the holding in *Trentadue* bars claims both retroactively and prospectively. The majority in *Trentadue* found that any reliance of a potential plaintiff on the continuing existence of a discovery rule was not an issue, noting that [a] plaintiff does not decide to postpone asserting a claim because he relies on the availability of extra-statutory discovery-based tolling. To the contrary, discovery-based tolling is a retroactive mechanism for relief to be used only when a plaintiff could not anticipate his claims.

Almost one month after the Michigan Supreme Court decided *Trentadue*, the Court of Appeals applied *Trentadue* in the context of a familial property dispute to prevent the plaintiff-father from bringing his common-law claims against the defendant-son. In *Makridakis v. Makridakis*, *supra*, the Court of Appeals recognized that retroactive application of the *Trentadue* holding bars the plaintiffs claims, including his claims of misrepresentation and breach of fiduciary duty. The Court of Appeals noted in a per curiam opinion that although the plaintiffs claims were timely under the law as it was when he filed his action, since the date of filing *Trentadue* had changed the law, the law under *Trentadue* applied.

Strategic Considerations and Alternatives for Plaintiffs Counsel. Unless and until either the Michigan Supreme Court overturns its decision or the Michigan legislature chooses to effectively overturn the Courts decision through statutory amendment, see, e.g., 2007 Mi. House Bill 5275 (proposing the addition of a general discovery rule to MCLS § 600.5827), the strict rule in *Trentadue* controls the ability of Michigan plaintiffs to bring claims against defendants after the statutory period of limitations has run.

When faced with the possibility of barred claims under *Trentadue*, a practitioner representing a plaintiff should carefully investigate every possible claim the plaintiff may have against a defendant. Although *Trentadue* may bar many claims, a plaintiff still may have viable claims remaining. Firstly, while the statute of limitations for some claims may have already run by the time the plaintiff discovers the existence of his claims or the defendants identity, the

plaintiff may be able to bring other claims with longer statutory periods of limitation. For example, the general statute of limitations for a breach of contract claim is six years. MCLS § 600.5807(8). Thus, although the three-year period of limitation may bar a plaintiff's tort claim for injuries to persons or property, he may have up to an additional three years to bring his claim if those injuries arise out of the breach of an express provision in a contract. *Fries v. Holland Hitch Co.*, 162 N.W.2d 672, 12 Mich. App. 178 (1968). Moreover, under MCLS § 600.5813, a general statute of limitations, claims for all other personal actions may be brought within six years after the claims accrue. Accordingly, a practitioner should investigate whether a plaintiff's claims could fall under the broad definition of all other personal actions. See *Attorney General v. Harkins*, 669 N.W.2d 296, 300, 257 Mich. App. 564 (2003) (noting definitions of personal action). Practitioners are also cautioned, however, that the more specific statute of limitations applies over the more general one, if both are applicable to a certain action. *Local 1064, RWDSU, AFL-CIO v. Ernst & Young*, 535 N.W.2d 187, 190, 449 Mich. 322 (1995). The six-year period of limitations pursuant to MCLS § 600.5813 has been applied successfully to claims of misrepresentation, see, e.g., *Blue Cross & Blue Shield v. Folkema*, 436 N.W.2d 670, 174 Mich. App. 476 (1982); certain claims involving interests in real property, see, e.g., *Hart v. City of Detroit*, 331 N.W.2d 438, 416 Mich. 488 (1982) (applying MCLS § 600.5813 to an inverse condemnation claim); and a claim to enforce an injunctive order issued under an environmental protection statute, see *Attorney General v. Harkins*, *supra*.

Secondly, if the Michigan legislature expressly enacted a statutory provision that allows for tolling based on a discovery rule, the holding in *Trentadue* will not affect a plaintiff's ability to bring claims for which these provisions apply. For example, the Legislature enacted limited statutory discovery provisions for professional and medical malpractice actions. MCLS § 600.5838(2), MCLS § 600.5838a(2); see also, e.g., *Local 1064, RWDSU AFL-CIO v. Ernst & Young*, *supra* (action alleging malpractice against accounting firm); *Seebacher v. Fitzgerald, Hodgman, Cawthorne & King, P.C.*, 449 N.W.2d 673, 181 Mich. App. 642 (1989) (action alleging legal malpractice); *Becker v. Meyer Rexall Drug Co.*, 367 N.W.2d 424, 141 Mich. App. 481 (1985) (action alleging malpractice against state-licensed pharmacist); *Peltier v. Eldredge*, 345 N.W.2d 605, 131 Mich. App. 533 (1983) (action alleging medical malpractice). The Legislature also has enacted special statutory provisions that apply to claims brought against a contractor, state-licensed architect or professional engineer for any injury to property, real or personal connected to an improvement made to real property by such as professional, MCLS § 600.5839(1), including such claims based on contract, *Travelers Insurance Co. v. Guardian Alarm Co. of Michigan*, 586 N.W.2d 760, 763, 231 Mich. App. 473 (1998), citing *Michigan Millers Insurance Co. v. West Detroit Building Co, Inc.*, 494 N.W.2d 1, 196 Mich. App. 367 (1992). MCLS § 600.5839(1) provides that a plaintiff has six years after the time of occupancy of the completed improvement, use of the completed improvement, or acceptance of the completed improvement to bring such a claim. Afterwards, a discovery rule allows certain claims to be brought, provided that 1) the claims are brought within one year after the potential plaintiff discovered or should have discovered the defect; 2) the claims are for defects which were the proximate cause of the injury or damage; and 3) the defects were caused by the professionals gross negligence. This discovery rule is limited -- in no case may such a claim be brought more than 10 years after the use, acceptance or occupation of the improvement, regardless of when the alleged defect is discovered.

Thirdly, an applicable statute of limitations still may be indefinitely tolled for actions against defendants who have fraudulently concealed the existence of the claim. MCLS § 600.5855 allows actions to be brought against such a defendant at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations. Practitioners must be cautioned that for MCLS § 600.5855 to apply, a plaintiff must successfully establish fraudulent concealment by showing an affirmative act or misrepresentation on the part of the defendant. *Doe v. Roman Catholic Archbishop of Archdiocese of Detroit*, 692 N.W.2d 398, 264 Mich. App. 632 (2004); *Lumber Village, Inc. v. Siegler*, 355 N.W.2d 654, 135 Mich. App. 685 (1984); see also *Bradley v. Gleason Works*, 438 N.W.2d 330, 175 Mich. App. 459 (1989) (noting that defendants mere silence is insufficient to constitute fraudulent concealment); *Draws v. Levin*, 52 N.W.2d 180, 332 Mich. 447 (1952) (defining fraudulent concealment as employment of artifice, planned to prevent inquiry or escape investigation and to mislead or hinder acquirement of information disclosing right of action).

For general information on Michigan statutes of limitation see, Michigan Law & Practice STATUTE OF LIMITATIONS § 1 et seq.

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Ferstendig on CPLR 2214 & 2215 & the New Rules Governing Service of Motions

2008 Emerging Issues 814

David L. Ferstendig on CPLR 2214 & 2215 and the New Rules Governing Service of Motions and Cross Mot

By David L. Ferstendig

October 30, 2007

SUMMARY: CPLR 2215 provided that cross-motions could be served at least three days before the original motion was noticed to be heard. This presented certain logistical and timing problems, which affected whether the original moving party had sufficient time to respond. An amendment signed into law attempts to cure those problems by permitting the original moving party to demand that cross-motions be served at least 7 days before the return date. While the new law does serve a laudatory purpose, it creates a separate set of rules for the service of cross-motions (as opposed to the original motions), by mail or overnight delivery, which could create unnecessary confusion among practitioners. Moreover, it fails to address the problems associated with the service of opposing and reply papers by mail. This commentary, written by David Ferstendig, discusses the import and potential extensions of this important change.

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ARTICLE: David L. Ferstendig on New Rules Governing Service of Motions and Cross Motions (CPLR 2214, 2215)

The timing in motion practice has always presented certain logistical problems. Under CPLR 2214(b) on a 12-7-1 motion, the party opposing the motion had only five days under the statute to respond. In addition, the opposition papers can be dropped in the mail leaving the movant a particularly short time to reply. Reply papers served one day before the motion date could arrive after submission of the motion. Similarly, a cross-motion served under CPLR 2215 three days before the return frequently provided the original moving party with insufficient time to respond. An amendment signed into law attempts to cure those problems by requiring original motion papers to be served at least 16 days before the return date, and permitting the original moving party to demand that cross-motions be served at least seven days before the return date (L. 2007, Ch. 185, effective 7/3/07). While the new law does serve a laudatory purpose, it creates a separate set of rules for the service of cross-motions (as opposed to the original motions), by mail or overnight delivery, which could create unnecessary confusion among practitioners. Moreover, it fails to address the problems associated with the service of opposition and reply papers by mail.

Significant Changes to Timing in Motion Practice

The amendment makes several significant changes in the timing of motion practice:

1. 12-7-1 motions are now 16-7-1; that is, the original movant has the option of serving the motion *by hand* at least 16 days in advance of the return date instead of the prior 12 day requirement under CPLR 2214(b). If served by overnight delivery, one business day is added; if served by regular mail, five days are added. *See* CPLR 2103(b)(2), (6).

2. A movant who serves a 16 day motion can demand not only that answering papers be served at least seven days before the return date (in accordance with prior practice), but may also make the demand applicable to any cross-motion. *See* CPLR 2214(b) as amended.

3. Clearing up a conflict in the law, the amendment requires that if the cross-motion is served by regular or overnight mail, additional time must be provided. *Compare* *Perez v. Perez*, 131 A.D.2d 451, 451, 516 N.Y.S.2d 236, 237 (2d Dept 1987) and concurring opinion in *Guzetti v. City of New York*, 32 A.D.3d 234, 820 N.Y.S.2d 29 (1st Dept 2006). However, the amendment creates its own set of timing rules: three extra days if served by regular mail and one day (not one business day) if served by overnight mail. CPLR 2215(b).

The Three-Day Cross-Motion Remains Alive and Well

Thus, the additional time required to serve a cross-motion (that is, seven days) is occasioned only if (1) the original motion is served at least 16 days before the return date *and* (2) the notice of motion expressly demands service of cross-motions at least seven days before the return date. Thus, if a demand is not made, or the motion is served less than 16 days, but more than eight days before the return date, the cross-motion can be served by hand up to three days before the return date.

Statute requires that additional time be added if cross-motion is served by mail

Prior to the amendment, the generally accepted (better) practice was to serve cross motions by mail at least eight days before the return date. *See* *Perez v. Perez*, 131 A.D.2d 451, 516 N.Y.S.2d 236 (2d Dept 1987) (five days added). However, a recent concurring opinion in First Department cast doubt on that position. *See* *Guzetti v. City of New York*, 323 A.D.2d 234, 237, 820 N.Y.S.2d 29 (1st Dept 2006) (no additional time). The amendment appears to require that the additional time must be added (3-1).

The Timing of Papers Served by Mail or Overnight Mail Should Have Remained Consistent

The better avenue, however, I believe, would have been to make the five day, one business day, requirements in CPLR 2103(b)(2) and (6) applicable to the service of cross-motions. This would have eliminated some of the confusion that will inevitably arise by having two sets of timing rules applicable to service of motions and cross-motions by mail.

The Legislation Leaves the Other Timing Problems for Another Day

The amendment does not deal with the timing problems associated with the service of opposition and reply papers by mail. In such a circumstance, the additional time is not added under CPLR 2103. Thus, for example, if a briefing schedule is not agreed to by counsel, reply papers served one day before the return date may not be received until after the motion is submitted. Moreover, the amendment does not address the practice of serving cross-motions for summary

judgment, which require more time to prepare adequate opposition papers. Finally, certain courts and judges have rules that require the filing of all papers at least two days before the return date, which would severely hamper the movant wishing to respond to a three day motion.

When Should the Opposition to the Cross-Motion Be Served?

Although not entirely free of ambiguity, it appears that the amendment provides that on a 16-7-1 motion the original movant should serve his opposition to the cross-motion together with his reply on the original motion (that is, up to one day before the return date). The issue as to a response to a three day cross motion is not addressed.

Summary Chart

A. 16-7-1 motion

1. If original motion served by hand: at least 16 days before return date.

If original motion served by regular mail: add five days, that is, at least 21 days before return date.

If original motion served by overnight mail: add one business day, that is, at least 16 days plus one business day.

2. If original motion demands that cross-motion be served at least seven days before return date of original motion, cross-motion papers must be served:

. If by hand, at least seven days before return date.

. If by regular mail, at least 10 days before return date.

. If by overnight mail, at least eight days before return date.

B. 8-2 motion

1. If original motion served by hand: at least eight days before return date.

If original motion served by regular mail: at least 13 days before return date.

If original motion served by overnight mail: at least eight days plus one business day before return date.

2. If cross-motion served by hand: at least three days before return date.

If by regular mail: at least six days before return date.

If by overnight mail: at least four days before return date.

Conclusion

There is no question that the timing issues associated with motion and cross-motion practice needed to be addressed. This amendment, however, deals with some but not all of the issues and creates confusion by setting two different time periods for service by mail and overnight delivery with respect to a motion versus a cross-motion. It ignores the problems associated with serving opposition and reply papers by mail or the rather common practice of serving cross-motions for summary judgment three days before the return date. It places the burden on the movant to demand a seven day cross-motion (admittedly not a great burden after the Bar fully understands the law) when the amendment should *not have permitted* three-day cross-motions, where the original motion was served on 16 days

notice. For the time being until a further curative amendment is passed movants should modify their form Notices of Motion on 16 day motions to include a requirement that cross-motions be served at least seven days before the return date. Eight day motions should be used sparingly, as they already are, avoiding the three-day cross-motion quagmire.

Cross References

New York Civil Practice: CPLR: CPLR Table II, CPLR 2214, CPLR 2215. Weinstein, Korn & Miller *CPLR Manual* § 15.03, § 15.04. LexisNexis AnswerGuide New York Civil Litigation Chapter 7.

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Ferstendig on 2007 CPLR Amendments Clarifying Rules Regarding Filing of Papers

2008 Emerging Issues 818

David L. Ferstendig on the 2007 CPLR Amendments Clarifying Rules Regarding Filing of Papers to Comme

By David L. Ferstendig

October 30, 2007

SUMMARY: Concerned with the effects of the decision in *Mendon Ponds Neighborhood Assn v. Dehm*, 98 NY 2d 745, 751 NYS 2d 819, 781 NE 2d 833 (2002), legislation was enacted in 2007 to try and clear up the ambiguities of the present filing statutes and to avoid traps for the unwary practitioner. The result is a more understandable set of rules which should reduce the possibility that initiating pleadings are not properly filed and of the consequent commencement problems. This commentary, written by David Ferstendig, discusses the import and potential extensions of this important change.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Concerned with the effects of the decision in *Mendon Ponds Neighborhood Assn v. Dehm*, 98 NY 2d 745, 751 NYS 2d 819, 781 NE 2d 833 (2002), legislation was enacted in 2007 to clear up ambiguities in the current filing statutes. The result is a more understandable set of rules that should increase the likelihood that initiating pleadings are properly filed and that commencement problems are avoided.

The Mendon Ponds decision. In *Mendon Ponds*, the New York State Court of Appeals dismissed an Article 78 proceeding because it was filed with the Chief Clerk of the Monroe Supreme and County Courts, instead of with the Monroe county clerk. See CPLR § 203, § 304, § 306-a, § 306-b. Such a dismissal can be more than an inconvenience if the statute of limitations has run because it can result in the loss of potential claims.

The amendment clarifies the filing requirements. The 2007 legislation attempts to clarify the applicable statutes so as to leave no ambiguity. Thus, for example:

1. It amends CPLR § 105(e) to define clearly who the clerk is in the supreme and county court, that is, the clerk of the county.
2. It amends CPLR § 306-a regarding the assignment of an index number, making it clear that the initiating pleadings are to be filed with the clerk of the county.
3. It amends CPLR § 2102 to reinforce the need to file with the county clerk. Significantly, CPLR § 2102 now

provides that:

(b) A paper filed in accordance with the rules of the chief administrator or any local rule or practice established by the court shall be deemed filed. Where such rules or practice allow for the filing of a paper other than at the office of the clerk of the court, such paper shall be transmitted to the clerk of the court.

(c) A clerk shall not refuse to accept for filing any paper presented for that purpose except where specifically directed to do so by statute or rules promulgated by the chief administrator of the courts, or order of the court.

Effective date of statute. The amendment takes effect and applies to actions or proceedings commenced on or after January 1, 2008.

Further amendment provides the court with discretion to correct or ignore mistakes. In separate legislation, CPLR 2001 was amended (L. 2007, ch. 529, eff. 8/15/07) to provide a court with discretion to correct or ignore mistakes in the commencement process that do not prejudice the opposing party. This would bring these mistakes in line with other non-prejudicial procedural events already covered by CPLR 2001. The amended statute specifically refers to defects in filing and the failure to purchase an index number. It was offered in response to a series of Court of Appeals decisions that held that these type of defects required dismissal of the action if a timely objection was made. *See Harris v. Niagara Falls Board of Education*, 6 N.Y.3d 155, 811 N.Y.S.2d 299, 844 N.E.2d 753 (2006) (after successfully applying for leave to serve late notice of claim, plaintiffs failure to purchase a new index number for subsequent personal injury action was waivable defect if not timely raised, not a lack of subject matter jurisdiction); *Fry v. Village of Tarrytown*, 89 N.Y.2d 714, 658 N.Y.S.2d 205, 680 N.E.2d 578 (1997); *Gershel v. Porr*, 89 N.Y.2d 327, 653 N.Y.S.2d 85, 675 N.E.2d 836 (1996).

In the case of a failure to pay an index number fee, the court will condition the denial of a motion seeking dismissal on plaintiffs payment of the proper fee. Significantly, the sponsors memo for the legislation specifically noted that the amendment did not:

1. Excuse a complete failure to file within the statute of limitation.
2. Excuse a plaintiff or petitioner from having to actually file a summons and complaint or petition in order to properly commence an action.
3. Excuse a bare summons, because that would not constitute a filing.
4. Overrule the Court of Appeals decision in *Parker v. Mack*, 61 NY 2d 114, 472 NYS 2d 882, 460 NE 2d 1316 (1984). (No action is commenced by the service of a summons alone which neither contains nor has attached to it a notice of the nature of the action and of the relief sought).

Thus, the amendment is intended to clarify that a mistake in the *method* of filing (and not a mistake in *what* is filed) is a mistake that a court can now correct.

Conclusion. The 1992 commencement by filing system in New York was intended to eliminate the problems associated with commencement by service by providing a definite and easy way to interpose a claim for statute of limitations purposes. Ironically, years later and despite a series of Court of Appeals decisions, it appeared that the commencement by filing system was setting new traps for lawyers.

Both 2007 amendments serve the laudatory purpose of removing the harshness of automatic dismissal for mistakes in the method of filing.

Cross References. New York Civil Practice: CPLR: § 105, § 304, § 304.02, § 306-a, § 306-b, § 2102. LexisNexis AnswerGuide New York Civil Litigation Ch. 1. Weinstein, Korn & Miller CPLR Manual Ch. 3.

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Sinclair and Harrison on Umstattd v. Centex Homes

2008 Emerging Issues 790

Sinclair and Harrison on Umstattd v. Centex Homes, 274 Va. 541, 650 S.E.2d 527, 2007 Va. LEXIS 98 (2

By Prof. Kent Sinclair and Gessner H. Harrison

October 25, 2007

SUMMARY: Does Mandamus Lie to Compel Acceptance of a Subdivision Application and Preliminary Subdivision Plat Under Virginia Law, Or Do Declaratory Judgment Proceedings Afford an Adequate Remedy? Frequently, local planning, zoning, and development officials must face the issue of whether to accept subdivision plat applications and preliminary plats submitted to them by developers desirous of initiating new residential housing, mixed residential-commercial, and other types of development projects. In the recent case of *Umstattd v. Centex Homes*, 274 Va. 541, ___ S.E.2d ___, 2007 Va. LEXIS 98 (2007), the Supreme Court of Virginia addressed the issue of whether a developer could employ the remedy of mandamus to compel local planning officials to accept and process a subdivision plat application and preliminary plat it had submitted for a major residential development project under zoning restrictions permitting such subdivision as a matter of right. The Court also ruled on the related issue of whether this developer, which had also sought a judgment declaring that it had the right to have its application accepted and processed and that any local ordinance or regulation authorizing the locality to refuse to do so was unlawful, could employ declaratory judgment for such purposes.

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ARTICLE: Frequently, local planning, zoning, and development officials must face the issue of whether to accept subdivision plat applications and preliminary plats submitted to them by developers desirous of initiating new residential housing, mixed residential-commercial, and other types of development projects. In the recent case of *Umstattd v. Centex Homes*, 274 Va. 541, ___ S.E.2d ___, 2007 Va. LEXIS 98 (2007), the Supreme Court of Virginia addressed the issue of whether a developer could employ the remedy of mandamus to compel local planning officials to accept and process a subdivision plat application and preliminary plat it had submitted for a major residential development project under zoning restrictions permitting such subdivision as a matter of right. The Court also ruled on the related issue of whether this developer, which had also sought a judgment declaring that it had the right to have its application accepted and processed and that any local ordinance or regulation authorizing the locality to refuse to do so was unlawful, could employ declaratory judgment for such purposes.

Background. Following the procedure required by a towns ordinances, plaintiff a nationwide homebuilder that also was the contract purchaser of a 324-acre tract of land zoned R-1, a category permitting subdivision into one-acre lots as a matter of right submitted a subdivision application with an attached preliminary subdivision plat for 191 single-family detached homes to the appropriate planning officials for the Town of Leesburg, Virginia. The towns planning chief sent

a letter rejecting the preliminary subdivision plat based on several listed "significant deficiencies" regarding both the plat and the application, despite the fact that the developer had already submitted two revised versions addressing multiple "deficiencies" previously noted by town planning officials and their employees. The developer then brought suit against the mayor, the town council, and the planning chief (collectively, the town) in two counts. The first count was a petition for a writ of mandamus to compel the town planning commission to accept and process the application to a final decision. The second count was a motion for a declaratory judgment that would declare the developer's right to have its application accepted and processed by the towns officials and to declare unlawful any local ordinance or regulation that would authorize the town to refuse to do so. After an *ore tenus* hearing, the circuit court agreed with the developer and awarded a writ of mandamus, directing the town to accept and process the application in accordance with law. However, the circuit court did not decide the developer's claim for declaratory judgment, evidently concluding that it was rendered moot by the award of mandamus. The town appealed.

General Principles. The Court in *Umstatt* analyzed the issues of whether the circuit court had erred in awarding the writ of mandamus as requested by the developer and whether declaratory judgment was available by stating the following well-settled principles of Virginia law regarding the remedy of mandamus and the scope of the declaratory judgment statutes, *Va. Code Ann. §§ 8.01-184 et seq.*:

Limited availability of mandamus remedy: Relying on *In re Horan*, 271 Va. 258, 258, 634 S.E.2d 675, 676 (2006) and *Hertz v. Times-World Corporation*, 259 Va. 599, 607-608, 528 S.E.2d 458, 462-63 (2000), the Court observed that "[m]andamus is an extraordinary remedy that may be used to compel a public official to perform a purely ministerial duty imposed by law." The Court further explained that, as it had previously observed in those cases, "use of the remedy is limited," that it is "not awarded as a matter of right but only in the exercise of a sound judicial discretion," and that it is "not awarded in a doubtful case." The Court also specified that mandamus "is not available where the applicant has an adequate remedy at law."

Relying on *Richlands Medical Ass'n v. Commonwealth*, 230 Va. 384, 386-87, 337 S.E.2d 737, 739 (1985), the Court noted that "[a] significant limitation upon the use of mandamus is the requirement that the duty to be enforced must be one in which the public official must act as a matter of course, without the exercise of his own judgment or discretion." Elaborating, the Court explained the rationale underlying this limitation as follows: "Where the official duty involves the necessity on the part of the officer to make some investigation, to examine evidence and form his judgment thereon, mandamus will not be awarded to compel performance of the duty [because] [t]o do so would improperly transfer to the court the discretion the law has committed to the officer."

Purpose and availability of declaratory judgment statutes: Referring to *Va. Code Ann. § 8.01-191* and its prior holdings in *Hoffman Family, L.L.C. v. Mill Two Associates*, 259 Va. 685, 693, 529 S.E.2d 318, 323 (2000); *Cupp v. Board of Supervisors*, 227 Va. 580, 592, 318 S.E.2d 407, 413 (1984); and *Liberty Mutual Ins. Co. v. Bishop*, 211 Va. 414, 418, 177 S.E.2d 519, 522 (1970), the Court explained that the purpose of Virginia's declaratory judgment statutes "is to provide a mechanism for resolving uncertainty in controversies over legal rights, without requiring one party to invade the asserted rights of another in order to permit an ordinary civil action for damages." The Court further noted that it had recently reaffirmed this principle in its decision in *Miller v. Highland County*, 274 Va. 355, ___ S.E.2d ___, 2007 Va. LEXIS 119 (2007), a case it had decided the same day as *Umstatt*.

Key Issue #1: Were town officials required to exercise discretion or judgment regarding acceptance and processing of the application and plat? The Court in *Umstatt* observed that, with respect to the developer's subdivision application and preliminary plat, the town's subdivision ordinance required the town's land development official "to decide a mixed question of law and fact," specifically, "[w]hat, if any, waivers were required in consideration of the facts of the proposed subdivision, the conditions existing on the subject land and the neighboring lands, and the mandates of the applicable statutes, ordinances and regulations?" The Court further explained that this inquiry was part of the land development official's responsibility under that ordinance to "determine whether the application was 'incomplete' and contained 'deficiencies.'" As such, the Court concluded that "[t]he official's task was not purely ministerial" because "[i]t involved the application of law to a complex set of facts and required the exercise

of judgment."

Regarding the ultimate issue of whether the developer could employ mandamus to compel town officials to accept and process the subdivision application and preliminary plat, the Court concluded that it was "apparent that the decision to be made by the towns officials in deciding whether to accept the application involved considerable investigation of the submitted plans, the conditions existing on the subject land and in the surrounding area, and the exercise of discretion and judgment in applying the applicable statutes, ordinances and regulations to the conditions found to exist." As a result, the Court concluded that this decision "was . . . not subject to compulsion by mandamus."

In reaching these conclusions, the Court distinguished the facts in *Umstattd* from those in a prior case, *Board of Supervisors v. Hylton Enterprises*, 216 Va. 582, 221 S.E.2d 534 (1976). The Court explained that in *Hylton*, mandamus was held to be the proper remedy to compel county officials to act on site plans that had been pending before them for over two years, because the duty of the officials to take action within a reasonable time was purely ministerial. Further, the Court noted that in *Hylton*, what action should be taken was not determined, and the substance of the officials' decision lay in their discretion. In contrast, the Court noted that in *Umstattd*, the towns officials acted upon the application promptly, by rejecting it within ten working days as required by the ordinance. Further, the Court noted that, unlike the complaining party in *Hylton*, the developer in *Umstattd* "complains not of [the town officials'] failure to act, but of the substance of their action and the reasons they gave to support it."

Key Issue #2: Would declaratory judgment be an adequate remedy for the developer's claims? In addressing the issue of whether the developer's claim for declaratory judgment would afford the developer an adequate remedy with respect to its claims that the town wrongfully refused to accept and process its subdivision application and preliminary plat, the Court further distinguished *Hylton* from *Umstattd*. The Court pointed out that, in *Hylton*, declaratory judgment was held to not be an adequate remedy at law "because it is unavailable where the claims and rights asserted have fully matured and the alleged wrongs have already been suffered." In contrast, the Court observed that the posture of *Umstattd* was quite different, because "the claims and rights asserted by [the developer] have not matured, but remain to be resolved by judicial determination" because "neither [the developer] nor the town has yet taken final action in reliance on their respective contentions." Under these circumstances, the Court held that "declaratory judgment affords an adequate remedy" because "[t]he mixed questions of law and fact in controversy, as well as the resolution of the legal disputes between the parties, remain pending before the circuit court as the subject of [the developer's] still unresolved claim for declaratory judgment." Accordingly, the Court opined that "declaratory judgment will decide those disputes and guide the parties in their future courses of action."

Importance of Ruling. Given that the submission of subdivision applications and preliminary plats is such a frequent occurrence, particularly in areas of the Commonwealth proximate to major metropolitan centers, *Umstattd* provides much needed guidance to both developers and localities on the issue of what remedies are available to developers who become dissatisfied with a locality's handling of these materials. As the Court teaches in *Umstattd*, mandamus will not lie to address dissatisfaction with the validity of the *substantive reasons* given for a locality's refusal to accept and process a subdivision application and preliminary plat whenever that decision involves the exercise of discretion by local officials. This is so because the decision typically "involve[s] considerable investigation of the submitted plans, the conditions existing on the subject land and in the surrounding area, and the exercise of discretion and judgment in applying the applicable statutes, ordinances and regulations to the conditions found to exist." Instead, mandamus would appear to be an available remedy only under the limited circumstances previously examined by the Court in *Hylton*, and developers wishing to challenge the validity of the reasons given by a locality for its refusal to accept and process the aforementioned materials should do so, as the developer did in *Umstattd*, via Virginia's declaratory judgment statutes.

CVirginia Cross-References. For further analysis of the topics of Virginia law addressed herein, please consult the following sources:

With respect to general issues concerning claims against local governmental bodies in Virginia, see Kent

Sinclair & Leigh Middleditch, *Virginia Civil Procedure* (4th ed.), § 2.30 (Claims Against Counties, Cities, and Similar Entities).

On the operation of declaratory relief in Virginia under the restrictive case law from our Supreme Court interpreting Article 17 of Va. Code Ann., §§8.01-184 et seq., see Kent Sinclair & Leigh Middleditch, *Virginia Civil Procedure* (4th ed.), § 3.10 (Declaratory Relief) and Charles E. Friend & Kent Sinclair, *Friend's Virginia Pleading & Practice* (2nd ed. 2006), § 30.10 (Controversies in Which Declaratory Judgments May Be Rendered). *See also* John L. Costello, *Virginia Remedies*, § 16.09 (Declaratory Judgment).

With respect to the limited situations where mandamus relief is available in Virginia, and the alternatives to this writ, see Kent Sinclair & Leigh Middleditch, *Virginia Civil Procedure* (4th ed.), § 3.6 (Extraordinary Writs). *See also* Charles E. Friend & Kent Sinclair, *Friend's Virginia Pleading & Practice* (2nd ed. 2006), § 33.01 (Writs).

See generally Michies *Jurisprudence of Virginia and West Virginia*, MANDAMUS (2007).

ABOUT THE AUTHOR(S):

Professor Sinclair, an active member of the Virginia Bar, teaches the program in Virginia Law & Practice at the University of Virginia School of Law. He is Professor of Law and served for many years as Associate Dean of the Law School. He has written more than a dozen books, and is the author of *Sinclair & Middleditch, Virginia Civil Procedure* (4th ed. 2003 and annual supplements), and co-author of *Friend & Sinclair, Virginia Pleading and Practice* (2nd ed. 2007 with annual supplements). Both of these treatises are published by Lexis Law Publishing. Professor Sinclair is Chair of the Advisory Committee on Rules of Court for Virginia, and has served as Reporter for the

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Sinclair and Harrison on Morency v. Commonwealth

2008 Emerging Issues 788

Sinclair and Harrison on Morency v. Commonwealth, 274 Va. 569, 649 S.E.2d 682, 2007 Va. LEXIS 114 (2

By Prof. Kent Sinclair and Gessner H. Harrison

October 25, 2007

SUMMARY: Accrued Rights and Retroactive Application of Statutory Amendments under Virginia law: Ascertaining the Impact of Va. Code Ann. § 1-239 and Due Process Guarantees. The Court's resolution of the issue of whether the 2004 court order in *Morency* created a vested right that could not be affected by subsequent amendment of the statute authorizing the relief provided for in that order, based upon the Court's interpretation and application of Va. Code Ann. § 1-239, and its resolution of the question of whether due process guarantees preserve statutory rights accrued under a prior version of a subsequently amended statute in *McCabe* provide valuable guidance to courts and practitioners regarding the extent to which rights derived from court orders and statutes can remain insulated against retroactive legislation.

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ARTICLE: In *Morency v. Commonwealth*, the Supreme Court of Virginia, in a majority opinion, affirmed a circuit court judgment denying a petition filed by a convicted violent sex offender who sought, pursuant to the terms of a 2004 court order, to have his identifying information removed from the sex offender Internet registry maintained by the Virginia State Police. In doing so, the Court addressed, applied, and clarified principles of Virginia law regarding the retroactive amendment of statutes and rights accruing to parties as the result of court orders. Additionally, in *McCabe v. Commonwealth*, the Court addressed substantive and procedural due process arguments regarding the impact of a retroactive amendment to Virginia's sex offender registry statutes that the Court was unable to consider in *Morency* due to procedural deficiencies. The Court's resolution of the issue of whether the 2004 court order in *Morency* created a vested right that could not be affected by subsequent amendment of the statute authorizing the relief provided for in that order, based upon the Court's interpretation and application of Va. Code Ann. § 1-239, and its resolution of the question of whether due process guarantees preserve statutory rights accrued under a prior version of a subsequently amended statute in *McCabe* provide valuable guidance to courts and practitioners regarding the extent to which rights derived from court orders and statutes can remain insulated against retroactive legislation.

Background. The petitioner in *Morency* was previously convicted of aggravated sexual battery in violation of Va. Code Ann. § 18.2-67.3 and was required to register as a sex offender and to re-register with the State Police every 90 days throughout his lifetime, under Va. Code Ann. § 9.1-901, Va. Code Ann. § 9.1-902, and Va. Code Ann. § 9.1-904. Relying on then-applicable provisions, the offender filed a petition in the circuit court for relief from the quarterly re-registration requirements and, following the required hearing, the circuit court granted the petition and entered an

order in 2004 terminating his 90-day re-registration requirement. The 2004 order also commanded the clerk to notify the Virginia State Police promptly that the petitioner's registry information including name and pictures shall be removed from the Sex Offender and Crimes Against Minors Registry and the internet system associated therewith and maintained by the Virginia State Police. In 2006, the General Assembly amended Va. Code Ann. § 9.1-909 by eliminating removal of an offender's information from the Internet registry upon receipt by the State Police of an order granting relief under that section. Following this amendment, the offender received a letter from the State Police stating that the amendment applied retroactively and, as a result, his registration information would be reposted on the Internet registry. The petitioner then filed suit, seeking to enjoin the State Police from reposting the identifying information on the Internet registry. The circuit court denied his petition and he appealed.

In *McCabe*, the plaintiff was convicted upon a guilty plea of the crime of taking indecent liberties with a minor over whom she had a custodial or supervisory relationship in violation of Va. Code Ann. § 18.2-370.1. At that time, former Va. Code Ann. § 19.2-298.1 required her to register with the State Police as a sex offender and to re-register annually for a period of 10 years. Va. Code Ann. § 19.2-298.1 was subsequently amended, in 2001, reclassifying a violation of Va. Code Ann. § 18.2-370.1 as a sexually violent offense and changing the registration requirements such that plaintiff was required to re-register as a sex offender every 90 days for the rest of her life. Plaintiff brought suit, asserting that application of the changed registration requirements to her violated her rights under the Fourteenth Amendment to the United States Constitution. The circuit court granted the Commonwealth's demurrer and entered an order dismissing the complaint, and plaintiff appealed.

General Principles. In *Morency*, the Court analyzed the issue of whether the 2004 court order created a vested right that could not be affected by the 2006 amendment of the statute authorizing the relief provided for in that order by stating the following long-standing principles of Virginia law:

. **Applicability of Va. Code Ann. § 1-239:** Opining that whether the provisions of Va. Code Ann. § 1-239 preclude the retroactive application of the 2006 amendment was the dispositive issue to be considered, the Court in *Morency* summarized the pertinent language of the statute as follows: No new act of the General Assembly shall be construed to repeal a former law . . . or any right accrued under . . . the former law, or in any way whatever to affect such . . . right accrued, or claim arising before the new act of the General Assembly takes effect. Relying on *City of Norfolk v. Kohler*, 234 Va. 341, 345, 362 S.E.2d 894, 896 (1987), the Court then explained that the statute applies to accrued rights categorized as 'substantive' or 'vested.'

The Court noted in *Morency* that it had not previously considered whether a final judgment creates a vested or substantive right in the holder of that judgment qualifying it as an accrued right for purposes of Va. Code Ann. § 1-239. In deciding this question, the Court relied upon its holdings in *Bain v. Boykin*, 180 Va. 259, 23 S.E.2d 127 (1942), *Kennedy Coal Corp. v. Buckhorn Coal Corp.*, 140 Va. 37, 45, 124 S.E. 482, 485 (1924), the opinion of the United States Supreme Court in *McCullough v. Virginia*, 172 U.S. 102, 123-124 (U.S. 1898), and the opinion of the Fourth Circuit in *Plyler v. Moore*, 100 F.3d 365, 371, 374 (4th Cir. 1996), to conclude that a final judgment order may vest a litigant with an accrued right for purposes of Va. Code Ann. § 1-239 which cannot be abrogated by subsequent legislation under the statute. The Court was quick to note, however, that this conclusion does not end the inquiry because, as had been explained long ago in *Danville v. Pace*, 66 Va. 1, 11 (Va. 1874), [t]he nature of the specific 'right' embodied in the judgment order must be determined before it can be ascertained whether that right was, as a matter of law, secured against legislative invasion by operation of the statute.

. **Statutory remedies and vested rights:** Relying on its prior decisions in *Pace*, 66 Va. at 11, and *Commonwealth v. Shaffer*, 263 Va. 428, 432, 559 S.E.2d 623, 626 (2002), the Court showed that it was well-settled under Virginia jurisprudence that litigants do[] not have a vested or constitutional right in . . . statutory defense[s] and likewise do not have any vested interest in statutorily-derived procedural remedies, which, the Court noted, may be altered, curtailed, or repealed at the will of the legislature.

In *McCabe*, the Court analyzed the issue of whether the 2001 amendment to Va. Code Ann. § 19.2-298.1 reclassifying the offense of which the plaintiff had been convicted as one requiring her to re-register as a sex offender every 90 days for the rest of her life, as opposed to annually for 10 years following her conviction, violated her rights to substantive and procedural due process under the Fourteenth Amendment to the United States Constitution by stating the following long-standing principles of constitutional law:

. Validity of legislation turns on nature of affected right: Citing to *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) and *Walton v. Commonwealth*, 255 Va. 422, 427-428, 497 S.E.2d 869, 872-873 (Va. 1998), the Court stated that it was well established that one asserting a denial of substantive due process rights must first clearly describe and establish that the interest asserted is a fundamental right or liberty interest specially protected under the Due Process Clause, and that [t]o qualify for that designation, the right asserted must be a right deeply rooted in th[e] [n]ation's history and tradition or implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it was sacrificed. The Court then explained that Legislation interfering with a fundamental right or liberty interest survives constitutional scrutiny only if it is narrowly tailored to serve a compelling state interest, and that [i]f the asserted right is not a fundamental right or liberty interest specially protected by the Due Process Clause, the legislation will survive constitutional scrutiny if it is rationally related to a legitimate governmental interest.

. No right to rely on continued existence of statutorily-prescribed remedies: Relying on its prior decisions in *Board of Zoning Appeals v. CaseLin Sys., Inc.*, 256 Va. 206, 210, 501 S.E.2d 397, 400 (1998), *Allen v. Mottley Constr. Co.*, 160 Va. 875, 888, 170 S.E. 412, 417 (1933), and *Crawford v. Halsted & Putnam*, 61 Va. 211, 220 (Va. 1871), the Court concluded that, as a general proposition, there is no right to rely on the continued existence of civil statutes.

. Curtailing convicted rights of felons more than general populace is lawful: Relying on *Johnson v. Commonwealth*, 259 Va. 654, 672-673, 529 S.E.2d 769, 779-780 (Va. 2000) and *Doe v. Tandeske*, 361 F.3d 594 (9th Cir.), cert. denied, 543 U.S. 817 (2004), the Court concluded that the liberty rights of convicted felons may be curtailed more than those of the general populace. It further cited to Va. Const. Art. II, § 1, regarding a limitation on a convicted felon's right to vote, and Va. Code Ann. § 18.2-308.2, addressing the right of a convicted felon to possess a dangerous weapon, as examples of valid limitations.

Key Issue #1 (Morency): Was the relief provided for in the 2004 order a function of statutory authorization? In addressing the issue of whether the 2004 court order in *Morency* created a vested right that could not be affected by the 2006 amendment of the statute authorizing the relief provided for in that order, the Court began by focusing on the language of the statute at issue, Va. Code Ann. § 9.1-909, as it existed at the time that the order was issued. The Court found that [b]y the plain terms of the statute, a petition filed pursuant to [section 9.1-909] was a petition only for relief from the quarterly re-registration requirement. It likewise concluded that [t]he statute did not authorize a petition to require the removal of [sex offender r]egistry information from the Internet, and that the circuit court was thus without authority to order such action based on a petition. Continuing, the Court explained that the statute only authorized the circuit court to promptly notify the State Police of the entry of its September 30, 2004 order, and that [t]he removal duty of the State Police, upon notification of th[at] [o]rder, was self-executing. Thus, the Court concluded, removal was a function of statutory authorization, not court order, and that this was so regardless of the language of the 2004 order directing removal of the petitioner's identifying information from the Internet registry.

Key Issue #2 (Morency): Did the relief provided for in the 2004 order create a vested right protected by Va. Code Ann. § 1-239? After concluding that the relief provided for in the 2004 order was a function of statutory authorization as opposed to court order, the Court, relying on its prior opinions in *Pace*, 66 Va. at 11, and *Shaffer*, 263 Va. 428, 432, 559 S.E.2d 623, 626, held that the 2004 order did not clothe [petitioner] with a vested or substantive right to prevent his identifying information from being placed on the sex offender Internet registry. The Court explained that this was so because [r]emoval of such information from the Internet registry was solely an action directed by statute by virtue of the receipt of the . . . 2004 order by the State Police, and that [r]emoval under these circumstances, like the procedural remedy in *Shaffer*, could be altered 'at will' by the legislature. As a result, the Court ultimately concluded that the petitioner did not have an accrued right that was affected by the retroactive application of the 2006 amendment

to Va. Code Ann. § 9.1-909 for purposes of Va. Code Ann. § 1-239.

Key Issue #3 (McCabe): Did the retroactive legislation at issue in McCabe affect a fundamental due process right? In addressing the issue of whether the right to be free from lifetime re-registration requirements was a fundamental due process right, the Court, citing *Tandeske*, 361 F.3d at 597, *Smith*, 538 U.S. at 102103, and *Washington v. Glucksberg*, 521 U.S. 702 (1997), explained that Virginia's sex offender registry requirement, like those of other states, served a legitimate nonpunitive purpose, and that the categories of crimes and corresponding length of the reporting requirement were reasonably related to the danger of recidivism and were consistent with the regulatory objective. The Court also concluded that it found no history or tradition in [American] jurisprudence elevating a convicted felon's right to be free from post-incarceration registration to a fundamental or specially protected due process right. On the contrary, it found that Virginia's jurisprudence, like that of many sister states, recognized that history and tradition viewed the curtailment of similar fundamental freedoms of convicted felons, such as the right to vote and the right to bear arms, as being constitutionally valid. As a result, the Court ultimately held that McCabe's right to be free from lifetime quarterly re-registration as a sex offender does not qualify as a liberty interest specially protected by the Due Process Clause for purposes of a substantive due process claim.

Key Issue #4 (McCabe): May a fundamental right arise from a statutorily-based expectation? After concluding that a person convicted of a violent sex offense had no fundamental right to be free from lifetime re-registration requirements imposed by Virginia's sex offender statutes, the Court focused its attention on the issue of whether such a right could arise as the result of a person's expectation that an earlier version of the registration statute, which did not impose lifetime re-registration requirements, would continue to apply regardless of any future amendment occurring subsequent to that person's conviction via a plea of guilty. In doing so, it found that the plaintiff's reliance on language appearing in the United States Supreme Court's opinion in *Wilkinson v. Austin*, 545 U.S. 209 (2005), was misplaced. This was so, the Court opined, because contrary to plaintiff's assertions, the *Wilkinson* Court did not hold that state laws or policies could form the basis of a fundamental right or liberty interest invoking substantive due process protections. It then observed that as a general proposition, there is no right to rely on the continued existence of civil statutes recognized in Virginia jurisprudence, and stated that its review of same failed to reveal any recognized fundamental right to rely on the civil legislative scheme in existence at the time of [plaintiff's] guilty plea. As a result, the Court ultimately held that the plaintiff's substantive due process claim based on the alleged fundamental right to be free from lifetime re-registration as a sex offender fails because it is not a right 'deeply rooted in this [n]ation's history and tradition' or 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [it was] sacrificed.' Accordingly, the Court affirmed the circuit court's holding that plaintiff had failed to demonstrate that the reclassification affected some fundamental constitutional right and its concomitant ruling dismissing her complaint.

Importance of rulings. The questions answered by the Supreme Court of Virginia in *Morency* and *McCabe* regarding the extent to which rights and relief granted in both court orders and statutes are insulated from the retroactive effect of subsequent legislative changes provide litigants and practitioners alike with important guidance regarding the extent to which they can expect to successfully preserve those rights and relief. As the Court teaches in *Morency*, while Va. Code Ann. § 1-239 protects accrued, i.e., vested, rights against such changes, relief that is given as a function of statutory authorization is not protected under the statute from the retroactive effect of subsequently adopted amendments to the authorizing statute. As the Court explained, the circuit court in *Morency* was without authority to order the particular relief it had granted: ordering the removal of identifying information from the Internet sex offender registry. This signals that only relief derived from an exercise of conferred judicial discretion can qualify as an accrued right for purposes of the protection afforded by Va. Code Ann. § 1-239. Further, the Court teaches in *McCabe* that constitutional due process protections are not offended by the retroactive effect of subsequent statutory amendments unless the right or relief sought to be protected is a fundamental right--in other words, a right 'deeply rooted in this [n]ation's history and tradition' or 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [it was] sacrificed.' In so doing, the Court has indicated that only substantive rights, which are also viewed as fundamental rights, are likely to qualify for protection against the retroactive effect of legislative changes that are adopted subsequent to the accrual of such rights.

CVirginia Cross-References. For further analysis of the topics of Virginia law addressed herein, please consult the following sources:

A general treatment of aspects of these problems may be found in Kent Sinclair & Leigh Middleditch, *Virginia Civil Procedure* Chapter 2: Claims, Defenses, and Immunities. See also John L. Costello, *Virginia Remedies* Chapter 1: Remedies as Part of The System of Justice, § 1.07 Substantive Rights, Remedies, and Due Process.

Two classic cases in Virginia jurisprudence on these topics remain, *Starnes v. Cayouette*, 244 Va. 202, 419 S.E.2d 669 (1992) (on the retroactive enlargement of the period of limitations), and *Harris v. DiMattina*, 250 Va. 306, 462 S.E.2d 338 (1995) (discussing the direct predecessor to the statute construed in the two principal cases in this Commentary).

A range of important topics are collected in Michies *Jurisprudence of Virginia and West Virginia* (2007), in these sections among others: *Constitutional Law*, Fundamental Rights and Privileges § 76 et seq., *Constitutional Law*, Equal Protection of Laws § 126 et seq., *Constitutional Law*, Due Process of Law § 130 et seq., *Statutes*, Constitutionality and Validity § 27 et seq., *Statutes*, Amendment, Revival and Repeal § 82 et seq., and *Statutes*, Revision and Codification § 109 et seq.

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Susan M. Brazas on Frigo v. Silver Cross Hosp. & Med. Ctr.

2008 Emerging Issues 785

Susan M. Brazas on Frigo v. Silver Cross Hosp. & Med. Ctr., 2007 Ill. App. LEXIS 1014 (Ill. App. Ct.

By Susan M. Brazas

October 24, 2007

SUMMARY: Negligent Credentialing: The New Cause of Action in Medical Negligence Cases. Actionable medical negligence does not start with the physician's act of medical treatment, but instead with the hospital's act of negligently granting privileges to that physician. This is the holding in the First District Appellate Court's affirming of a **\$7.7 million jury verdict in Frigo v. Cross, which recognizes, for the first time in Illinois, negligent credentialing as a cause of action. The Court pulls away the protective cloak of the Medical Studies Act, and even the Hospital Licensing Act, instead relying heavily on case law from other jurisdictions. This commentary, written by Susan M. Brazas, frequent author and lecturer on civil practice matters, discusses the impact and implications of this novel and ground-breaking opinion.**

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: First District Recognizes Negligent Credentialing As A New Cause Of Action

In a case of first impression, the First District Appellate Court of Illinois in *Frigo v. Silver Cross Hosp. & Med. Ctr.*, 2007 Ill. App. LEXIS 1014 (Ill. App. Ct. 2007) has identified negligent credentialing as a new cause of action. Among the surprising twists to the decision is the Court's ruling on how the relation back doctrine protects allegations of this new theory from death by statute of limitations. Another is the applicability of the subsequent medical treatment IPI instruction to the negligent credentialing theory. The *Frigo* decision opens the door to the creation of negligence actions for staffing decisions in its reliance on the Supreme Court's landmark *Darling* case (*Darling v. Charleston Community Memorial Hospital*, 33 Ill. 2d 326, 331 (Ill. 1965)). The sanctity of a physician's staff credentials file is no longer assured, as the *Frigo* court denies credentialing the cloak of statutory protection of the Hospital Licensing Act (210 ILCS 85/1 et seq.) and the Medical Studies Act (735 ILCS 5/8-2101 et seq.).

In *Frigo v. Silver Cross*, the First District Appellate Court, in a majority opinion, held that negligent credentialing is a cause of action in Illinois. No prior Illinois court decisions have specifically ruled on this point, although the Court afforded much credence to the many jurisdictions (federal and other states) which recognize this cause of action. The Second District has touched upon this cause of action but without specifically ruling whether it is a viable cause of action. *Hendricks v. Victory Mem. Hosp.*, 755 N.E.2d 1013, 1015 (2d Dist. 2001). Even though they are persuasive and

not binding authority, the *Frigo* Court quoted from several other courts in adopting its reasoning. The linchpin of the *Frigo* decision is the landmark *Darling* case which first recognized hospital or institutional negligence in Illinois in 1965. *Darling v. Charleston Community Memorial Hospital*, 33 Ill. 2d 326, 331 (Ill. 1965).

Two holdings within the *Frigo* opinion address the practical ramifications of this new cause of action. First, the Court held that the initial Complaint's allegations of negligent management by the Defendant Hospital were sufficient to put the Hospital on notice of the later allegations of negligent credentialing. Thus, the Court found that these later, more detailed allegations related back to the original pleading and were thus not barred by the statute of limitations.

Second, the *Frigo* court found that the existing IPI Jury Instruction, No. 30.23, as to liability of a tortfeasor for injuries occurring in the course of subsequent medical care, is appropriate to use in a negligent credentialing case. IPI 30.23 states: If a defendant negligently causes an injury to the plaintiff, then the defendant is liable not only for the plaintiff's damages resulting from that injury, but is also liable for any damages sustained by the plaintiff arising from the efforts of health care providers to treat the injury caused by the defendant, even if that health care provider was negligent.

In its analysis, the *Frigo* court quoted from the Notes on Use to IPI 30.23 that it is intended to be used when there is evidence that a subsequent health care provider caused or aggravated the injury. Interestingly, there is no discussion (either in *Frigo* or in the Notes on Use) of whether this instruction is intended when the initial harm is done by a health care provider. The *Frigo* court noted that the physician aggravated the plaintiff's medical condition. Although this medical condition would not have been caused by the defendant, as IPI 30.23 states, nonetheless the *Frigo* court found it applicable. It could be concluded that instead the injury caused by the defendant was the hospital's placing the plaintiff in the hands of an unqualified physician.

Strategic Considerations. Attorneys handling medical malpractice actions are well advised to examine whether negligent credentialing allegations could be brought, either in a new case filing or via amended pleadings. If the statute of limitations has run, however, careful consideration should be made of whether sufficient allegations of negligent management have been made in existing pleadings. The *Frigo* court has continued the trend of a liberal standard for relation back of amendments. This trend was acknowledged by the Illinois Supreme Court in *Zeh v. Wheeler*, 111 Ill. 2d 266, 278, 489 N.E.2d 1342 (1986), and has been especially liberal to medical malpractice complaints, *Castro v. Bellucci*, 338 Ill. App. 3d 386, 391 (1st Dist. 2003), so that their actions can be heard on the merits.

Nonetheless, more than agency allegations is required to put the hospital on notice. As such, practitioners should draft allegations against hospitals or clinics that are broad enough to encompass negligent staffing decisions, to guard against statute of limitations problems. A review of current case law on this point will be important as appellate courts frequently consider relation back as, in essence, a ruling on whether the statute of limitations has expired. *Porter v. Decatur Mem. Hosp.*, 372 Ill. App. 3d 310, 867 N.E.2d 1049 (4th Dist. 2007).

Respondent in Discovery Approach. Counsel will likely encounter significant resistance to discovery requests related to physicians' lack of qualifications. The Medical Studies Act has long protected peer review and other such documents from viewing, and the fight over them is inevitably bitterly fought. *Chicago Trust Co. v. Cook Co. Hosp.*, 298 Ill. App. 3d 396, 698 N.E.2d 641 (1st Dist. 1998); *Ekstrom v. Temple*, 197 Ill. App. 3d 120, 553 N.E.2d 424 (2d Dist. 1990). Thus, counsel may find it necessary to name Respondents in Discovery as a way to force expedited discovery. Under this statute, 735 ILCS 5/2-402, a limited six-month window is allowed to convert a Respondent to a Defendant, except where the Respondent has refused to comply with discovery. The trial court has no discretion to extend this six-month deadline. *Robinson v. Johnson*, 346 Ill. App. 3d 895, 907 (1st Dist. 2003). Therefore, an attorney may well consider naming at least one hospital, hospital administrator, or physician as a Respondent in Discovery, quickly to obtain facts needed to determine whether a physician has been improperly credentialed.

Jury Instruction Implications. When negligent credentialing is alleged, jury instructions will need to be tailored to this theory, as at present there are no IPI instructions specifically addressing it. In keeping with the *Frigo* court's

analysis as to aggravation, the relatively new IPI 30.23 should be offered as should the IPI damages instructions as to aggravation (IPI 30.03), and a modified version of IPI 105.03.01 as to health care institutional negligence, tailored to describe this new tort. Caution should be used to allege adequately institutional *professional* negligence, however, and not only ordinary negligence, to which this instruction would not apply. *Owens v. Manor Health Care Corp.*, 159 Ill. App. 3d 684, 512 N.E.2d 820 (4th Dist. 1987).

Extension to Other Disciplines. The *Frigo* decision opens the way for creative reference to non-traditional citing authority to argue a point of law for which there is no clear precedent from Illinois. The *Frigo* reliance on, and quotation from, A.L.R. and out-of-state cases illustrates that logical extension of existing case law to a new theory can occur when ample support from various sources is offered.

As such, practitioners are advised to consider the impact of the *Frigo* holding on other disciplines beyond physician malpractice and hospital negligence. For example, the reviewing physician's report statute, 735 ILCS 5/2-622, applies to various providers of health care, yet has been construed to *not* apply to nursing home malpractice cases. *Eads v. Heritage Enters.*, 325 Ill. App. 3d 129, 757 N.E.2d 107 (4th Dist. 2001). Attorneys should consider whether an extension of the negligent credentialing theory should be argued as to other staffing decisions, such as the hiring of nurses, technicians, and other hospital or clinic employees who lack appropriate qualifications.

Cross References. See 735 ILCS 5/2-616(b); 735 ILCS 5/2-622; Illinois Forms of Jury Instruction § 30.21, Illinois Forms of Jury Instruction § 30.23, Illinois Forms of Jury Instruction § 62.12; Illinois Litigation Forms and Checklists C6.01; Parness, Illinois Civil Procedure Chapter 3, Pleading a Cause of Action: the Content and Form of Affirmative Pleadings and § 6.04, Amendments and Time Bars: Relation Back.

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McDonnell on Gallagher v. Lenart, 226 Ill. 2d 208, 2007 Lexis 1150 (Ill. 2007)

2008 Emerging Issues 786

McDonnell on Gallagher v. Lenart, 226 Ill. 2d 208, 2007 Lexis 1150 (Ill. 2007)

By Joseph B. McDonnell

October 24, 2007

SUMMARY: Where a settlement contract in a workers compensation case recites that the consideration paid is in full and final settlement of all claims under the Workers Compensation Act and fails to preserve the employers lien rights against a third party recovery, has the employer waived its lien? The Illinois Supreme Court resorted to elementary principles of contract law and confirmed that a waiver must be clear and unmistakable from the language used and may not be inferred or implied.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: The Illinois Supreme Court resorted to elementary principles of contract law in determining whether an employer, who had obtained from its employee a release in full and final settlement of all claims under the Workers Compensation Act, had waived its statutory lien by failing to specifically reserve its lien rights in the settlement contract. In doing so, the Court confirmed that a waiver must be clear and unmistakable from the language used and may not be inferred or implied.

In *Gallagher v. Lenart, 226 Ill. 2d 208 (Ill. 2007)*, the Court considered the language of the settlement contract and a resignation agreement signed by the employee at the same time in determining whether waiver of the employers right of reimbursement under Section 5(b) of the Workers Compensation Act, 820 ILCS 305/5(b), had occurred.

Background. Plaintiff Gallagher had sustained work-related injuries when the truck he was driving collided with another vehicle operated by Jaroslaw Lenart for his employer, Pacella Trucking. Gallaghers medical bills and TTD (temporary total disability) benefits were paid by Rail Terminal. He then settled with his employer for an additional \$150,000 and the parties executed a settlement contract which recited that the consideration paid was accepted in full and final settlement of all claims under the Workers Compensation Act for injuries sustained in the accident. At the same time, Gallagher signed a letter of resignation from his employment, the letter stating in part that it was intended to resolve in good faith any existing or potential disputes or claims arising out of Employees relationship and separation with Employer.

Third-Party Suit by Employee. At the time these documents were signed, Gallaghers suit against Lenart and his

employer, Pacella, for injuries and damages sustained in the accident, was pending. Rail Terminal had been sued by the defendants for contribution in that action, but its motion for summary judgment was allowed and it was no longer a party when Gallaghers settlement with the defendants was made. Rail Terminal sought leave to intervene in order to protect its statutory lien for benefits paid to Gallagher, under Section 5(b) of the Workers Compensation Act. 820 ILCS 305/5(b). That section provides in substance for the imposition of a lien on behalf of the employer against any settlement or judgment obtained by its employee against a third party. Both Gallagher and the defendants opposed the motion on the grounds that Rail Terminal had waived its lien in connection with the settlement of the workers compensation claim. The circuit court, relying on the First District case of *Borrowman v. Prastein*, 356 Ill. App. 3d 546 (2005), agreed and entered an order reciting that Rail Terminal had waived its lien by failing to reserve the lien in the settlement documents. The Fourth District reversed, finding *Borrowman* to have been wrongly decided and at odds with general principles of contract law. Plaintiffs petition for leave to appeal to the Supreme Court was allowed.

Contract principles applied. The Supreme Courts analysis focused on the contract language, and it considered both the settlement contract and the resignation letter in determining the issue before it. That issue, said the court, was *not* whether the employer had *forfeited* its lien, as inartfully phrased by the Fourth District in *Borrowman* and reiterated by the First District in its disposition below, but whether, based on the language of the contract and the resignation letter, the employer had waived its lien rights under 820 ILCS 305/5(b). Nor was the issue one of whether an employer could waive its lien by appropriate language. Waiver and forfeiture, the Court said, are distinct concepts, and the appellate court, by using the terms interchangeably, had obscured the issue. Indeed, said the Court, forfeiture, defined as a failure to make timely assertion of a right, was inapplicable in the instant case, since Rail Terminal had properly asserted its lien in the employees action in accordance with the statutory procedure for protecting an employers lien rights. The real question, then, was whether waiver had occurred by the employers failure to assert or at least to reserve its lien rights in the settlement documents.

The Supreme Court found that fundamental principles of contract law compelled the conclusion that no such waiver had occurred and that Rail Terminal was entitled to a lien on the settlement proceeds. Citing *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 326 (2004), the court pointed out that waiver arises from an affirmative act, is consensual, and consists of an intentional relinquishment of a known right. *Gallagher*, slip op. at 17. Although plaintiff correctly characterized the employers alleged lien as a claim, the Court did not agree that such claim was included in the language full and final settlement of all claims under the Workers Compensation Act. When the contract as a whole was considered, it was apparent that the claims released were those of the *employee*, particularly since specific language in the contract referred to temporary total compensation, permanent partial disability and medical, surgical and hospital expenses. Thus, the parties did not contemplate and the settlement contract did not describe a claim by Rail Terminal to enforce its lien rights under 820 ILCS 305/5(b).

What about the general release rule? Plaintiff argued that the settlement contract constituted a general release; that Rail Terminal was aware of its employees pending injury claim when it settled with him; and that, since a general release is a release of all claims, the employers alleged lien rights were included in the contract language. The court answered this contention by again pointing out that the settlement contract was explicitly limited to the settlement of Gallaghers claims against his employer, and was therefore not a general release of the kind described in *Farm Credit Bank of St. Louis v. Whitlock*, 144 Ill. 2d 440 (1991). The court noted that, even if the contract were construed as a general release, it was not sufficiently specific to justify a conclusion that Rail Terminal had waived its workers compensation lien, because waiver of a workers compensation lien must be explicitly stated. *Slip op.* at 24. The Court adopted the language of the appellate court below, which had stated that waiver of a workers compensation lien must be more explicitly and affirmatively stated in a settlement agreement and cannot simply be implied by a lack of any reference to that lien. *Slip op.* at 24.

The Court then pointed out that the adoption of the explicit-waiver rule was consistent with those decisions which emphasize the importance of protecting the employers lien rights in litigation involving the plaintiff-employee and third

parties. See, e.g., *In re Estate of Dierkes*, 191 Ill. 2d 326 (2000), holding that an employers reimbursement of workers compensation payments from an employees third-party recovery is *crucial* to the workers compensation scheme. [Courts emphasis].

The Court concluded by pointing out that the Fourth District Appellate Court, in deciding *Borrowman v. v. Prastein*, 356 Ill. App. 3d 546 (2005), had erred in failing to apply the fundamental principles of contract construction to the settlement contract at issue in that case. Instead of considering the contract in its entirety, it focused narrowly on the language full, final and complete settlement, overlooking language following that phrase which limited the claims to those which had accrued to the employee against his employer precisely the same limitation evidenced by the language in the case under consideration. Accordingly, the decision in *Borrowman* was expressly overruled.

The letter of resignation. Nor did the letter of resignation compel a different conclusion. In referring to the language of intent to resolve any existing or potential disputes or claims arising out of Employees relationship and separation with employer, the letter did not specifically limit the kinds of disputes or claims referred to, but, like the settlement contract, it contained no specific reference to the employers workers compensation lien. Thus, neither the settlement contract nor the resignation letter was sufficient to evince the intentional relinquishment of a known right necessary to find a waiver of the employers statutory lien rights.

Tips for Practitioners. To foreclose any claim that a settlement contract does not encompass claims of the party released, which might include a non-employer, it may be well to insert language specifically stating that rights belonging to or which may accrue to the settling defendant (e.g., claims for contribution or indemnity) are not affected by the settlement and are not intended by the parties to be included in the settlement. And, in the employer context, even though the language used by the parties withstood the plaintiffs challenge in *Gallagher*, the express reservation of the employers lien rights under the Workers Compensation Act should foreclose a contest on that issue.

Cross-References. See Larson's Workers' Compensation Law Part 13 (Ch.110 et seq.): Third Party Actions.

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Garcia on Suffolk Construction Co., Inc v. Division of Capital Asset Management

2008 Emerging Issues 780

Garcia on Suffolk Construction Co., Inc v. Division of Capital Asset Management, 449 Mass. 444

By Grace V. B. Garcia

October 23, 2007

SUMMARY: Suffolk Construction teaches practitioners that rulings such as General Electric, which impact the work-product doctrine, do not as a matter of course affect the application or use of the attorney-client privilege. Practitioners must recognize that the two privileges give separate protections and know the limits of each in order to best represent their clients. In today's society, government officials and employees constantly seek the legal advice of counsel to ensure that their actions and inactions are in conformity with their public roles. By allowing such public servants the ability to have candid conversations with counsel, the public benefits because it is more likely that the public servants will obtain proper legal advice, thereby allowing them to better serve the public.

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ARTICLE: In *Suffolk Construction Co., Inc. v. Division of Capital Asset Management*, 449 Mass. 333 (2007), the Massachusetts Supreme Judicial Court answered the question of whether by enacting the Massachusetts Public Records Law, the Legislature intended to extinguish the protection provided by the attorney-client privilege to public officers or employees and governmental entities subject to that law? By answering the question in the negative, the Court made it crystal clear that the attorney-client privilege is a fundamental privilege in both the private and public sector. Now government officials are assured that they can speak freely with their legal counsel, allowing them to obtain quality legal advice, which will not be subject to disclosure.

Resolving the issue required an analysis of the state Public Records Law, the importance of the attorney-client privilege in our society, and the difference between the attorney-client privilege and the work-product doctrine.

Massachusetts Public Records Law. Massachusetts Public Records Law, Mass. Gen. Laws. ch. 66, § 10, as supported by Gen. Laws. ch. 4, § 7, provides that upon request, anyone is entitled to obtain copies of a broad array of public records. The primary purpose of the Public Records Law is to allow the public to have extensive access to governmental records. Thus, an individual has the right to obtain public records whether they have an invested interest or are merely curious.

Although the Public Records Law is generally broad in nature, it does contain many clear exemptions to the government's obligation of disclosure. Some of the exemptions from disclosure include records related to personnel rules and practices of a government, personal notebooks, certain inter- and intra-agency policy position documents,

trade secret information, and certain law enforcement investigations. See generally *Cape Cod Times v. Sheriff of Barnstable County*, 443 Mass. 587, 591-92, n.14 (2005) (listing various exemptions of the Public Records law). Thus, despite the fundamental mandates of open disclosure, the Law provides certain areas of protection that are often afforded to private persons and companies. Notable in the Public Records Law, however, is that there is no mention of the application of the attorney-client privilege.

Suffolk Construction Reiterates that the Attorney-Client Privilege is Essential. The attorney-client privilege is the oldest privilege covering confidential communications known to common law. It shields from the view of third parties all confidential communications between a client and its attorney undertaken for the purpose of obtaining legal advice. 443 Mass. at 448. The privilege is shown if one proves the following elements:

(1) that he was or sought to be a client of the attorney; (2) that the attorney in connection with the document acted as a lawyer; (3) that the document relates to facts communicated for the purpose of securing a legal opinion, legal services or assistance in a legal proceeding; and (4) that the privilege has not been waived.

Town of Norfolk v. U.S. Army Corp of Engrs., 968 F.2d 1438, 1457 (1st Cir. 1992). As the privilege can be waived simply by an intended disclosure, critical to the claimants burden of proof is that the communication was made confidentially in the course of obtaining legal advice.

For any person or entity that asserts the attorney-client privilege, public or private, he or she bears the burden of proof that the privilege exists. Specifically, one must not only prove the existence of the attorney-client relationship, but all four elements for the privilege listed above. See e.g. *Matter of the Reorganization of Elec. Mut. Lia. Ins. Co. Ltd. (Bermuda)*, 425 Mass. 419, 421 (1997). At one time, once a document had become public, regardless of the circumstances, any privilege that attached to the documents was deemed waived. 425 Mass. at 422. However, as the privilege rests with the client, the modern trend is to protect the privilege provided the client and attorney took reasonable measures to ensure confidentiality. 425 Mass. At 422. Thus, practitioners must be sure to advise their clients on the scope of the attorney-client privilege and the clients responsibilities in protecting the privilege.

Confusion with the Work-Product Privilege. The confusion that led to Suffolk Construction Co., Inc., that is, whether the attorney-client privilege in Massachusetts had been abrogated in the realm of public records requests, was based on the Courts prior holding in *General Electric Co. v. Department of Environmental Protection*, 429 Mass. 798 (1999). In *General Electric*, the Supreme Judicial Court held that the Public Records Law did not automatically exempt work-product documents from disclosure, unless those documents fell within one of the explicit exemptions contained in the Public Records Law.

The work-product doctrine differs from the attorney-client privilege in that it restricts the discovery of documents that are prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney). *Suffolk Constr.* 449 Mass. at 455 n.16. Consequently, the work-product doctrine shields an entirely different and separate category of information than that of the attorney-client privilege. The work-product doctrine gives protections to an attorneys work product, which can be discoverable upon a showing of need. In comparison, the attorney-client privilege is a privilege that belongs to the client, not the attorney, and is enforceable even after the clients death.

In deciding *General Electric*, the Court reiterated the Public Records Laws presumption that a record is public unless the record is proven to be exempt. The Court, without opining why, deemed that the Legislatures intent was to abolish the broad work-product privilege and replace it with the narrower deliberative process exemption. Based on the Public Record Laws failure to contain a clear exemption for the attorney-client privilege, Suffolk Construction unsuccessfully attempted to use *General Electric* to argue that such documents should be disclosed.

The Courts Clear Answer. Based on the fundamental differences in the attorney-client privilege and the work-product doctrine, the Supreme Judicial Court distinguished *General Electric* in holding that public entities are

entitled to assert the protection of the attorney-client privilege to the same extent as a private person or entity. In making its decision, the Court stated that there was no basis, in history or in the law, which would show any intent to abolish the privilege in the realm of public records requests. The attorney-client privilege is a basic, deep-seated, privilege that allows for the fair and effective administration of justice. *Suffolk Const.*, 449 Mass. at 446. The privilege allows clients to tell their attorneys everything--the good, the bad, and the ugly--allowing the attorney to properly perform his or her duties and render legal advice based on the full information received by the client. By permitting candid conversation between attorneys and clients, the privilege advances the public interests in the observance of law and administration of justice. 449 Mass. at 449. Now practitioners can counsel all clients, private and public alike, on the attorney-client privilege and the broad protection that it affords.

Suffolk Construction teaches practitioners that rulings such as *General Electric*, which impact the work-product doctrine, do not as a matter of course affect the application or use of the attorney-client privilege. As such, practitioners must recognize that the two privileges give separate protections and know the limits of each in order to best represent their clients.

In today's society, government officials and employees constantly seek the legal advice of counsel to ensure that their actions and inactions are in conformity with their public roles. By allowing such public servants the ability to have candid conversations with counsel, the public benefits because it is more likely that the public servants will obtain proper legal advice, thereby allowing them to better serve the public.

Cross References. MA Pleading and Practice § 26.11, § 26.12

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Grace V. B. Garcia is a Partner in the Boston office of Morrison Mahoney LLP. Ms. Garcia's practice is concentrated in the areas of commercial litigation, construction law, product liability and premises liability. In 2005, 2006, and 2007, she was recognized by Boston Magazine and Law & Politics as a Super Lawyer Rising Star. Ms. Garcia is admitted to the bars of the Commonwealth of Massachusetts and the State of New York. She is actively involved in several bar associations and serves on the Massachusetts Bar Association's Litigation Section Council. Previously, Ms. Garcia served as a member of the MBA's Business Law Section Council (2003 -- 2006), New Lawyer Section Council (2000 -- 2003), co-chair of the Boston Bar Association's New Lawyer's Section (2002 -- 2004), and the BBA's Task Force on Pro Bono and New Lawyers (2002 -- 2003). Ms. Garcia is a part of the Massachusetts Associated General Contractors Safety Committee. Additionally, after being on the Executive Committee for several years, Ms. Garcia is the co-director for the Boston Chapter of the Downtown Women's Club for the 2007-2008 year. Ms. Garcia is the author of the Massachusetts Litigation Blog. In addition, Ms. Garcia has authored several articles including: *Fundamentals of Electronic Discovery*, Boston Bar Journal (March/April 2003) and *Achieving Equitable Balance: Justice Wilkins and Chapter 93A*, Boston Bar Journal (Nov./Dec. 2000) (co-author). She has lectured for various continuing legal education programs on electronic discovery, document retention, and deposition techniques.



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Fox on Arbitration

2008 Emerging Issues 777

Fox on Arbitration

By Susan Fox

October 22, 2007

SUMMARY: The Court of Appeal of Florida, Fifth District, enforced language in an arbitration clause requiring an arbitrator to determine the scope of arbitration rather than a court. The dissent in the opinion, however, strongly criticizes the majority and contends that the arbitration clause imposed upon the consumer was unconscionable and the result of a concerted effort by Mercedes Homes to preclude personal injury suits from proceeding to trial. Susan Fox, an expert on Florida civil procedure and appellate practice, explains the Mercedes Homes case in this commentary and the impact that the decision will have on the use of arbitration clauses in Florida.

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ARTICLE: Florida's Litigation Privilege Expands to Statutory Causes of Action. Lawyers and judges enjoy a litigation privilege and immunity from suit for actions that occur in judicial proceedings. Doubts as to the applicability of that privilege and immunity as to statutory causes of action were settled by Florida's supreme court in *Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So. 2d 380 (Fla. 2007), on remand sub. nom. *Cole v. Echevarria, McCalla, Raymer, Barrett & Frappier*, 2007 Fla. App. LEXIS 15234, ____ So. 2d ____ (Fla. 1st DCA Sept. 28, 2007).

The underlying facts involve plaintiffs who defaulted on mortgage loans and received reinstatement letters from the Echevarria law firm representing mortgage holders. Echevarria's reinstatement letters stated the mortgagor faced foreclosure unless payments were brought up to date and certain additional costs were paid. Plaintiff Cole paid the disputed amounts to reinstate his mortgage, but two other plaintiffs did not reinstate their mortgages and were foreclosed. They all sued Echevarria, alleging the firm had violated the Florida Consumer Collection Practices Act (FCCPA) (See Fla. Stat. § 559.72 on prohibited practices for collecting consumer debts) and the Florida Unfair and Deceptive Trade Practices Act (FDUPTA) (Fla. Stat. § 501.201) by claiming a debt in excess of the actual costs their client incurred in the foreclosure. Specifically, the reinstatement letters claimed costs of **\$325 for title search and examination, when the only actual cost was \$55 for the search. Plaintiffs sought to certify a class of all persons who received reinstatement letters. The trial court limited the class to those persons such as Cole who paid the costs but who did not ultimately suffer foreclosure judgment or sale.**

Cole appealed to the First District, arguing the class definition was too narrow because it excluded landowners who received a reinstatement letter but who failed to reinstate and suffered foreclosure sale. Echevarria asserted that the trial court properly limited the class because of the litigation privilege barring

claimants involved in judicial mortgage foreclosure actions from suing for conduct occurring in judicial proceedings. The First District found the litigation privilege did not apply because the suit was a statutory cause of action. *Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 896 So.2d 773, 777 (Fla. 1st DCA 2004). The First District reversed and remanded for expansion of the class to all those who received a reinstatement letter regardless of whether they reinstated the mortgage or suffered foreclosure. *Id.*

The Supreme Court, in a majority opinion written by Justice Anstead held that the litigation privilege applies in all causes of action, whether for common-law torts or statutory violations and quashed the decision of the First District. *Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So. 2d 380 (Fla. 2007). As such, the court approved a conflicting decision of the Third District in *Boca Investors Group, Inc. v. Potash*, 835 So.2d 273 (Fla. 3d DCA 2002) which held that the litigation privilege can be applied to statutory causes of action. The case was remanded to the First District for further consideration; concurring and dissenting opinions strongly suggested the privilege did not apply to the pre-suit letters. On remand, the First District agreed and allowed the class action to go forward as to all who received reinstatement letters.

Echevarrias Real Impact on Immunity Under the Florida Litigation Privilege. The first issue addressed by the supreme court was application of the litigation privilege to statutory causes of action. The privilege was traditionally limited to defamation actions.

In the leading case of *Hoar v. Wood*, 44 Mass. 193 (1841), Chief Justice Shaw expressed the reasoning behind the privilege as follows: "Subject to this restriction (of relevancy), it is, on the whole, for the public interest, and best calculated to subserve the purposes of justice, to allow counsel full freedom of speech, in conducting the causes and advocating and sustaining the rights, of their constituents; and this freedom of discussion ought not to be impaired by numerous and refined distinctions." *Id.* at 197-198.

The rule was adopted in Florida in *Myers v. Hodges*, 53 Fla. 197, 44 So. 357 (1907), in which a libel suit for statements contained in a complaint was dismissed based on qualified litigation privilege. Later, the court extended the privilege to other tortious conduct, stating "absolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior . . . so long as the act has some relation to the proceeding." *Levin, Middlebrooks, Mabie, Thomas, Mayes Mitchell, P.A. v. United States Fire Insurance Co.*, 639 So.2d 606, 608 (Fla.1994). The justification behind immunizing "other misconduct occurring during the course of a judicial proceeding" was that adequate remedies exist for such misconduct. *Levin*, 639 So. 2d. at 608. These remedies include the trial court's contempt power, as well as the disciplinary measures of the court system and bar.

Following these decisions, courts in Florida had applied the litigation privilege in such diverse actions as civil conspiracy and tortious conduct in interfering with custody and visitation rights. *See Van Horn v. McNabb*, 715 So.2d 380, 381 (Fla. 4th DCA 1998); *Rushing v. Bosse*, 652 So.2d 869, 875-76 (Fla. 4th DCA 1995) (affirming a dismissal for a count of civil conspiracy, holding that "absolute immunity would be afforded to any conduct occurring during the course of the adoption proceeding, regardless of whether the conduct involved a defamatory statement or other tortious behavior"). Applying Florida law, federal courts have applied the privilege to civil fraud claims for fraudulent inducement in signing settlement agreements. *See Green Leaf Nursery v. E.I. DuPont De Nemours & Co.*, 341 F.3d 1292, 1302-03 (11th Cir.2003); *Jackson v. BellSouth Telecom.*, 372 F.3d 1250, 1275 -1277 (11th Cir.2004).

In extending the litigation privilege to all causes of action, the supreme court stated that the policy reasons focus on the judicial nature of the proceedings, not whether they were initiated under common law or statute. *Echevarria*, 950 So. 2d at 384. "It is the perceived necessity for candid and unrestrained communications in those proceedings, free of the threat of legal actions predicated upon those communications, that is at the heart of the rule." Therefore, the rationale upon which the court had relied in extending the litigation immunity privilege to all tortious causes of action, likewise applied to extending it to statutory causes of action: "Just as participants in litigation must be free to engage in unhindered communication, so too must those participants be free to use their best judgment in prosecuting or defending

a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct." *Id.* Accordingly, the court ruled the litigation privilege applies across the board to actions in Florida, and absolute immunity attaches to all acts having a reasonable relation to the proceedings.

The case was remanded to the First District, to determine whether the case should proceed despite the litigation privilege. The separate opinions gave insight into some of the issues on remand. Primarily, the firm's liability would turn on whether the reinstatement letters are covered by the litigation privilege. Justice Parientes concurring opinion, in which Justice Cantero joined, states that the threshold issue is whether the reinstatement letters were sent "in the due course of the judicial proceedings or as necessarily preliminary thereto." Justice Wells concurred in part and dissented in part with an opinion stating that the litigation privilege does not extend to the reinstatement letters. Wells reasoned that the reinstatement letters were not a required condition precedent to foreclosure and were not related to the prosecution or defense of a foreclosure suit. Justice Bell seemed to agree with Justice Wells, but concurred in part and dissented in part without opinion.

On remand, the First District held the class action should go forward as to all who received the reinstatement letters without regard to the litigation privilege. "The causes of action for unfair debt collection and unfair trade practices are based on the act of **making an unlawful demand in the reinstatement letter**, not the ultimate consequence of the letter." *Cole v. Echevarria, McCalla, Raymer, Barrett & Frappier, 2007 Fla. App. LEXIS 15234, ____ So. 2d ____* (Fla. 1st DCA Sept. 28, 2007). The court reasoned that whether or not the individual receiving the letter actually reinstated the mortgage would be immaterial because the act of sending the letter seeking to collect the unlawful charge triggers the violation of the FCCPA. With regard to FDUTPA, the prospective class member need not show payment of the illegitimate costs to demonstrate reliance. Rather, the operative event, was the transmission of the reinstatement letter.

Caution by Attorneys is Necessary Despite Echevarria Ruling. The court's decision and the opinion on remand makes clear that attorneys can be held liable for non-courtroom conduct, specifically, for unfair debt collection and unfair trade practices based on the act of making an unlawful or fraudulent demand in a pre-suit letter.

Moreover, the Florida Supreme Court's reasoning in *Echevarria and Levin*, and the holdings themselves, make clear that simply "relating to" the judicial proceeding is not enough to create litigation immunity. The allegedly tortious conduct must have been taken to prosecute or defend the lawsuit. When actions giving rise to claims have nothing to do with prosecution or defense of an adversary proceeding, the attorney may be liable. *Clough Marketing Services, Inc. v. Main Line Corp, 2007 U.S. Dist. LEXIS 34425 (N.D.Ga.2007)* (allowing tort action arising out of a bankruptcy proceeding in which party shown as receiving funds in a settlement stipulation never received payment.)

Practice Tips

§ Pre-Suit Demands. *Echeverria* gave relief to Florida lawyers from FCCPA (Fla. Stat. § 559.55) and FDUTPA (Fla. Stat. § 501.201) claims arising out of lawsuits, but created a huge new area of potential liability. While statutory causes of action are not exempt from the litigation privilege, FCCPA and FDUTPA do create liability for illegitimate or unlawful pre-suit demands. The extent of this potential liability is not yet well defined, but caution should be taken in drafting letters making pre-suit demands for payment. These should not demand reimbursement of exaggerated, phantom or potentially illegitimate costs or fees. Pre-suit letters that are required by law may still be protected by the litigation privilege. For example, the Fourth District explained in *Pledger v. Burnup & Sims, Inc., 432 So.2d 1323, 1326 (Fla. 4th DCA 1983)* that publications necessarily preliminary to judicial proceedings include pre-suit communications that are required by statute or by contract as a condition precedent to suit are entitled to the privilege. Under this reasoning, necessary preliminary statements (i.e., demand letters, notices of intent to file suit, etc.) should be protected by the litigation privilege.

§ Communications Outside Judicial Proceedings. There appears to be no protection for voluntary statements that

are not "necessary." As such, a variety of other conduct outside the courtroom might be implicated by the *Echeverria* decisions. For example: voluntary statements made to police prior to the instigation of criminal charges or to a government official on a matter factually related to the forthcoming lawsuit may be qualifiedly privileged, while voluntary statements to private individuals are not privileged at all. *Fridovich v. Fridovich*, 598 So.2d 65, 69 (Fla. 1992). Another ripe area for debate is whether the litigation privilege will be extended to "litigating in the press." Statements to the media prior to the initiation of any judicial proceedings might be actionable. On the other hand, some may argue that because of public expectations, media attention becomes part of the forum of litigation, and to deny litigants protection for statements made in this "forum" would contravene the policies of the litigation privilege.

For Additional Discussion on Immunity, see *Florida Torts*, § 5.08 Immunity Arising From Judicial Process (1-5 Florida Torts § 5.08).

For Additional Discussion on the Florida Unfair and Deceptive Trade Practices Act, see *LexisNexis Practice Guide: Florida Business Torts*, Chapter 2 Unfair Trade Practices (1-2 LN Practice Guide: FL Business Torts 2.01); also for a discussion on other state consumer protection laws see *Business Torts*, Chapter 19 State Consumer Protection Laws (2-19 Business Torts § 19.02).

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Fox on Lawyer Immunity

2008 Emerging Issues 778

Fox on Lawyer Immunity

By Susan Fox

October 22, 2007

SUMMARY: Attorneys are generally aware of the litigation privilege and the protection it affords them when engaged in litigation. The Supreme Court of Floridas recent decision in Echevarria expanded the litigation privilege from common law causes of action to statutory causes of action as well. Susan Fox, expert on civil and appellate procedure, explains the implications of Echevarria on the litigation privilege and what precautions are needed to avoid attorney liability.

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ARTICLE: Home Warranties and Tort Claims. An innocent-sounding construction contract provision for a home warranty paid for by the builder and a separate warranty booklet containing an arbitration clause resulted in a decision compelling arbitration with regard to a homebuyers personal injury claim arising from negligent construction in *Mercedes Homes, Inc. v. Colon*, ___So. 2d ___, 2007 Fla. App. LEXIS 12347, (Fla. 5th DCA August 10, 2007). The Fifth District reversed the denial of the builders motion to compel arbitration and held that the arbitration agreement clearly and unmistakably required the arbitrator to decide, in the first instance, the scope of the arbitration provision and the enforceability of any limitation of the right to pursue a claim for personal injuries. A dissenting opinion strongly criticizes enforcement of the broad arbitration clause in the limited warranty and argued that arbitration clauses are being used as part of a scheme to eliminate corporate liability for negligence actions.

Luis Colon bought a home from Mercedes Homes, Inc. The construction contract called for Mercedes to, among other things, install sod. Sometime after moving in, Mr. Colon fell in his yard due to allegedly improperly laid sod. He filed a personal injury claim against Mercedes, which moved to compel arbitration. The construction contract itself did not contain an arbitration provision, but a warranty provided to the buyer months later included an arbitration clause. The warranty was a limited one and excluded negligence claims ("you are waiving your right to seek damages... [for] negligence and strict liability"). After Colon filed suit, the builder moved to compel arbitration. The trial court rejected this motion and stated that the issue whether the warranty documents constituted a waiver of any personal injury claim was an issue to be determined judicially, not an arbitration issue.

The arbitration clause at issue stated: "This arbitration agreement shall be deemed to be a self-executing arbitration agreement. Any disputes concerning the interpretation or enforceability of this arbitration agreement, including without

limitation, its revocability or voidability for any cause, the scope of arbitrable issues, and any defense based upon waiver, estoppel or laches, shall be decided by the arbitrator."

The Fifth District reversed and held that the arbitration agreement required the arbitrator, not the trial court, to determine the scope of arbitrable issues, and thus, the builder's motion to compel arbitration with respect to Colons personal injury claim should have been granted. The court stated its ruling was "compelled" by the case of *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995), in which the Supreme Court had stated that "who" should decide the arbitrability of a dispute "is simply a matter of contract between the parties." *First Options*, 514 U.S. at 942, 115 S.Ct. 1920.

Since the language of the arbitration agreement clearly and unmistakably requires the arbitrator to decide, in the first instance, the scope of the arbitration provision and the enforceability of any purported limitation of Mr. Colon's right to pursue a claim for personal injuries, the Fifth District held the trial court erred in denying Mercedes' motion to compel arbitration.

The court also found support for its decision in the Second District's decision in *Mercedes Homes, Inc. v. Rosario*, 920 So.2d 1254 (Fla. 2d DCA 2006) involving the same home warranty and arbitration agreement but in which the buyers had sued for breach of contract and fraud. The Second District held that the trial court should have compelled arbitration because the arbitration agreement "clearly states that disputes regarding the interpretation of the arbitration clause, including the scope of arbitrable issues, will be decided by the arbitrator." *Rosario*, 920 So.2d at 1256 .

The majority rejected the dissents suggestion that, at the least, the court should remand the case to the trial court to consider the issue of unconscionability, stating "Colon's issues on appeal did not include an argument that the provision was unconscionable."

Judge Griffins Blistering Dissent. A lengthy dissent by former Chief Judge Jacqueline R. Griffin, expresses concern that individual consumers are being deceived into signing agreements that appear to benefit them but that actually waive important legal rights, deny access to courts, obligate consumers to pay "administrative costs" (arbitration fees) equally with the corporate seller, and give the seller undue advantage in selecting and influencing the arbitrator. In Judge Griffins words the scheme is one "whose ambitious end is the elimination of personal injury claims."

Judge Griffins dissent explains that this scheme involves three documents with "seemingly innocuous component[s]" which form a lethal combination constituting waiver, but in a way that would never be apparent to an average layperson. First, the construction contract gives the buyer a limited warranty. Second, after several months of delay, the buyer is asked to fill out an application for the warranty which, in the fine print, turns out to be a contract between buyer and seller and not a warranty. Third, additional provisions are attached in a 31 page warranty booklet in which the buyer agrees to arbitration and waives personal injury claims from the warranted items. "This is a key provision whose purpose is to transmogrify a warranty exclusion into a release." The separation in time and in different documents makes it hard to connect the dots and discover the waiver effect of the documents.

"A casual examination of these documents might lead a careless reader to think that, if the claim is for a personal injury and the warranty expressly excludes any claim for personal injury, there would be nothing to arbitrate." According to Judge Griffin, however, since it is clear that the claim is not covered by the warranty, it would make no sense that the question of whether the warranty operates as a bar to any personal injury claim would be decided in arbitration by the arbitrator. She felt that the court should have followed *Nunez v. Westfield Homes of Florida, Inc.*, 925

So.2d 1108 (Fla. 2d DCA 2006) and *Grosseibl v. J. Chris Howard Builders*, 739 *So.2d* 1255, 1257 (*Fla. 5th DCA* 1999) holding that arbitration agreements placed in a separate warranty agreement do not cover any non-warranty disputes or require arbitration of non-warranty claims. These decisions should have compelled a conclusion that the personal injury claim was not arbitrable, Judge Griffin said.

Another key element to the scheme is to avoid court interpretation of the terms of the arbitration agreement because it would be "nearly impossible" to convince a court to view this series of documents as a release of liability for personal injury, according to Judge Griffin. The final and most important phase of the scheme is to "[f]ind a for-profit arbitration service with a serious-sounding name suggesting expertise . . . and specify them by name in the printed form contract . . . provid[ing] the economic incentive to rule in favor of the seller that is so woefully lacking in judicial proceedings."

Judge Griffin felt the majority's initial error lay in its application of the *First Options v. Kaplan* case (514 U.S. 938). Since the arbitration agreement contained in the purported third-party warranty must be confined to the warranty, in her opinion, the provision relied on by the majority gave the arbitrator the power to decide what is or is not within warranty arbitration, nothing more. Since Colon's claim was not a warranty claim, there was nothing for the arbitrator to decide.

Judge Griffin further criticized the courts failure to require that there be "clear and unmistakable" language indicating an agreement to arbitrate arbitrability. She stated a more correct resolution of this case may also be found in the Florida Supreme Court's decision, *Seifert v. U.S. Home Corp.*, 750 *So.2d* 633 (*Fla. 1999*), deciding the arbitrability of a tort claim against a home builder for the negligent design and construction of an air conditioning system that pulled in carbon monoxide from the garage into the house, causing personal injury. The duty of reasonable care at issue was a duty owed generally to anyone who might foreseeably be injured, not just the other contracting party. Thus, the tort claim was not covered by the arbitration provision in the contract for the purchase and sale of the home, according to the *Seifert* court.

Strategic Considerations.

. **Counsel for Individual Home Buyers.** If possible, counsel clients during the purchase of a new home or other big ticket items on some of the potential pitfalls of the various home warranty and other warranty documents being used. However, in most instances by the time an attorney gets involved on the consumer side it is too late to counsel a client not to sign a limited warranty containing an arbitration clause. At this stage, about the only thing a lawyer can do under *Mercedes* is to challenge the unconscionability of brazenly loaded warranties that denigrate the legal rights of consumers. Provisions such as allowing the seller to pick who gets to be the arbitrator; when, where, how much it costs; what claims are excluded; what damages are excluded; what statutory remedies are excluded; what discovery is allowed; what notice provisions are required; what shortened statutes of limitation apply; what prerequisites even to the right to arbitrate are all tilted in the sellers favor; and waivers and releases buried in fine print. As Judge Griffin points out, one commentator famously remarked that the complete embrace of arbitration provisions would allow "birds of prey" to "sup on workers, consumers, shippers, passengers and franchisees." This court dodged the issue of unconscionability finding it was not adequately argued on appeal, therefore, a lawyer challenging such agreements would have to make a direct challenge that could not be side-stepped.

. **Counsel for Corporations and Businesses Using Arbitration Clauses.** Business interests that favor the use contracts containing arbitration clauses will find a certain level of relief in the *Mercedes* decision. However, Judge Griffin in her dissent has clearly placed on notice her discern for contracts drafted using the broadest possible arbitration language buried in innocent or advantageous-sounding fine print in warranty or other related documents. Judge Griffins dissent in all likelihood will be favored in other corners of the judiciary as well. Needless to say, this issue should be a fertile one for future judicial and legislative action. In fact, legislative action may be on the way for consumers. United States Sen. Ted Kennedy, Sen. Russ Feingold and Rep. Hank Johnson have proposed a bill that would eliminate pre-dispute binding mandatory arbitration clauses in consumer contracts, entitled *The Arbitration Fairness Act of 2007* (2007 Bill Tracking H.R. 3010 and 2007 Bill Tracking S. 1782).

. **Arbitration Alternatives.** Lawyers who draft arbitration provisions and those who represent consumers might also want to look at *James v. Zachritz*, 2006 OK CIV APP 46 (Okla. Ct. App. 2006). In this Oklahoma case, the parties had a valid arbitration agreement, apparently using the AAA commercial rules, but the plaintiff sought relief in the state small claims court under AAA commercial rules, Section R-1, stating: "Consumers are not prohibited from seeking relief in small claims court for disputes or claims within the scope of its jurisdiction, even in consumer arbitration cases by the business." The Oklahoma court held that, "the provision of the AAA allowing small claims in consumer cases is consistent with public policy favoring arbitration and we find no reason to interfere with the parties' agreement to apply the AAA rules." In Florida "small claims" are those in which the demand or value of property involved does not exceed **\$5,000 exclusive of costs, interest, and attorneys' fees. Fla. Sm. Cl. R. 7.010. This monetary limitation on damages may be more acceptable to both parties than a referral to arbitration. The cost of a small claims proceeding can be significantly lower than the fee of a paid arbitrator.**

For Additional Information on Arbitration, see *LexisNexis Practice Guide: Florida Contract Litigation*, Chapter 5: Determining Whether to Pursue Alternative Dispute Resolution or Litigate, 1-5 LN Practice Guide: FL Contract Litigation 5.syn; *LexisNexis Practice Guide: Florida Business Torts*, Chapter 2 Unfair Trade Practices, 2.21 Evaluate Arbitration Clause, 1-2 LN Practice Guide: FL Business Torts 2.21; *Florida Torts*, § 26.37 Arbitration of Fraud Claims, 1-26 Florida Torts § 26.37; *Murray on Contracts*, Chapter 6 Abuse of Bargain, Unconscionability, Good Faith, and Illegality, 1-6 Murray on Contracts § 95.

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Sinclair on Miller v. Highland County

2008 Emerging Issues 775

Sinclair on Miller v. Highland County, 274 Va. ___, ___ S.E.2d ___, 2007 Va. LEXIS 119 (2007)

By Prof. Kent Sinclair

October 19, 2007

SUMMARY: In a broad-ranging decision that clarifies Virginia law considerably in the area of challenges to land use decisions of localities, the Supreme Court teaches us the ways that important canons of statutory construction should be used in analyzing who is intended under modern legislation to be the party-defendant in land use decision challenges. The limitation of declaratory judgment relief is applied in yet another context in this opinion as well, making it doubly important for practitioners. This commentary, written by Professor Kent Sinclair and Gessner H. Harrison, delves into the implications of this decision.

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ARTICLE: One of the perennial traps in Virginia practice involves commencing suit against the wrong party. All too often, the result is that the suit is a nullity, or fails to toll the running of the statute of limitations. A second trap that has ensnared a number of practitioners in the last 10 years involves divining when declaratory relief may be sought in Virginia. This highly restricted form of relief, subject to narrow interpretation in Virginia, as exemplified in a series of decisions over the past decade.

In a broad-ranging decision that clarifies Virginia law considerably in the area of challenges to land use decisions of localities, the Supreme Court teaches us the ways that important canons of statutory construction should be used in analyzing who is intended under modern legislation to be the party-defendant in land use decision challenges. The limitation of declaratory judgment relief is applied in yet another context in this opinion as well, making it doubly important for practitioners.

In its 2007 decision in *Miller v. Highland County*, the Supreme Court heard appeals challenging a county board of supervisors' approval of a conditional land use permit. After a statutory analysis that has revealing implications for future cases, the Court holds that the county board is itself a required party defendant one that must be timely joined. The Court further holds that Va. Code Ann. § 15.2-2232 does not create a third-party right of action to challenge a planning commissions determination that a proposed use is in substantial accord with a comprehensive plan. The consequences were severe: The judgment in the first appeal was reversed and the case dismissed for failure to timely join the board. In the other collected appeal, the court sets forth the requirements for asserting a valid request for declaratory relief, and in a rare move in Virginia affirms the granting of summary judgment for a permit applicant and the county board because plaintiffs, who were adjoining landowners of the property being considered in the land use

dispute, failed to assert a valid request for declaratory relief. Among the statutes construed in important ways in this decision are the misnomer provisions of Va. Code Ann. §8.01-6; land use provisions and procedural concepts embodied in Va. Code Ann. §§ 15.2-2232 and Va. Code Ann. § 15.2-2285, and the statutes governing declaratory judgments in Virginia, Va. Code Ann. §§ 8.01-184 *et seq.*

Factual Background. Leading to these collected appeals, a wind-power development concern applied to the county for a conditional use permit to build an electric generation substation. After conducting a public hearing, the county's governing board granted the permit, finding that it was compatible with surrounding uses, consistent with the intent of the zoning ordinance and the land use element of the comprehensive plan, and that it would be in compliance with all other statutes and ordinances.

In the *Miller* case, the county boards resolution conditioned the permit upon receipt of all required state and federal approvals and review pursuant to Va. Code Ann. § 15.2-2232. Several months later, upon application of the permit applicants, the planning commission held a public hearing and reviewed the permit under Va. Code Ann. § 15.2-2232, determining that it was in "substantial accord with the comprehensive plan as required by Va. Code Ann. § 15.2-2232.

Plaintiffs in the first two cases reviewed on appeal in *Miller v. Highland County* were owners of property adjoining the proposed wind turbine site. They brought suit alleging that the board acted in an arbitrary and capricious manner, and without authority, in approving the zoning height amendment. Some of the plaintiffs argued that the "substantial accord" finding must precede board action in order for the approval to be valid.

All of these plaintiffs in *Miller* filed pleadings in which they named Highland County, Virginia as a defendant in the bill of complaint, and one did not also name the county board as a party. All parties filed motions for summary judgment and, after conducting a hearing, the circuit court granted partial summary judgment in favor of the county and the permit applicants. After a trial the court upheld the county's action.

In a separate declaratory judgment action also reviewed in the *Miller* appeal, other nearby residents sued the county board, and other defendants, for declaratory relief on the theory that planning commission's decision that the application was in substantial accord with the comprehensive plan was not properly before the commission after the county board's action, and that the commission's decision was not in accord with governing law, with the comprehensive plan, and was arbitrary, capricious and void. The circuit court held a hearing and granted summary judgment in favor of the permit applicant and the county without addressing the issue of whether Va. Code Ann. § 15.2-2232 provided a right of action permitting the commission's decision to be challenged.

How Separate is The County from The County Board? A key issue in the *Miller* case was whether the circuit court erred in denying the defense plea in bar. That plea was interposed on the basis of the plaintiffs failure to name the county board itself as a party to the action within 30 days after the Boards decision as required by Va. Code Ann. § 15.2-2285 (F). The plea contended that the Supreme Courts well-known decision in *Friends of Clark Mountain Found., Inc. v. Board of Supervisors*, 242 Va. 16, 406 S.E.2d 19 (1991), essentially held that a local governing body is a required party to an action contesting a decision by that governing body. Thus the case was barred, according to the plea in bar, because the named defendant, Highland County, Virginia is not the legal equivalent of the Board of Supervisors of Highland County, because Highland County is a locality, while the Board is a governing body.

The plaintiffs in *Miller* argued that Highland County, Virginia is a locality as defined by Va. Code Ann. § 15.2-102, and that Va. Code Ann. § 15.2-1404 subjects a locality to being sued in its own name regarding all matters connected with its duties. On this theory, Va. Code Ann. §15.2-2285(F) would not mandate that a local governing body be named in an action challenging one of its decisions, but only requires that such an action be filed within 30 days of the local governing bodys decision.

The Court had previously held in *Board of Supervisors v. Board of Zoning Appeals*, 268 Va. 441, 604 S.E.2d 7 (2004), that a person aggrieved by a local governing bodys decision may, pursuant to Va. Code Ann. § 15.2-1404,

contest that decision by naming the locality as the defendant.

How to Parse These Statutes. As always in Virginia appeals, the reviewing court views the interpretation of statutory provisions to be a pure question of law that the court is permitted to reconsider de novo on appeal, as the Court recently held in *Budd v. Punyanitya*, 273 Va. 583, 591, 643 S.E.2d 180, 184 (2007), and *Boynton v. Kilgore*, 271 Va. 220, 227, 623 S.E.2d 922, 925 (2006). Thus, effective arguments will turn most upon statutory construction and less on precedent.

Boilerplate case law, such as *Chase v. DaimlerChrysler Corp.*, 266 Va. 544, 547, 587 S.E.2d 521, 522 (2003), and *Halifax Corp. v. First Union National Bank*, 262 Va. 91, 99, 546 S.E.2d 696, 702 (2001), has made it clear that the resolution of issues such as these will be cast in terms of a determination of the legislative intent a matter the Court bases upon the literal words used in the statute. Examples of this approach prior to *Miller* include *Crawford v. Haddock*, 270 Va. 524, 528, 621 S.E.2d 127, 129 (2005), and *Woods v. Mendez*, 265 Va. 68, 74, 574 S.E.2d 263, 266 (2003).

One of the most common situations involves multiple statutes that arguably apply to aspects of the same transaction. In *Miller* the Supreme Court reiterates its general canon of construction that when construing statutes that impact the same subject, the putatively conflicting provisions are harmonized whenever possible. This approach is well established, as *Peerless Ins. Co. v. County of Fairfax*, 274 Va. 236, 244, 645 S.E.2d 478, 483 (2007), *Alliance to Save the Mattaponi v. Commonwealth*, 270 Va. 423, 439-440, 621 S.E.2d 78, 87 (2005), and the cases therein cited demonstrate.

In *Miller* the Court concludes that, as employed in the statutes relevant to the land use dispute before it, the terms locality and board of supervisors are *not* synonymous or interchangeable. The Supreme Court noted that Title 15.2 of the Code, Va. Code Ann. § 15.2-100 *et seq.*, which addresses the matters raised in these appeals, provides distinct definitions of the two terms. A locality, within the meaning of Title 15.2, must be construed to mean a county, city, or town as the context may require according to Va. Code Ann. § 15.2-102. In contrast, under that same section of the Code the term [b]oard of supervisors refers to the governing body of a county.

The Court in *Miller* demonstrated that comparison of provisions governing other topics can provide useful demonstrations of the meaning of terms under dispute. Thus the Court noted that Title 15.2 contains several additional statutes that illustrate the General Assembly's intent to recognize governing bodies as entities distinct from their respective localities. These statutes clarify that although localities are given certain powers by statute, those powers may only be exercised through the authority of the governing bodies. For example, Va. Code Ann. § 15.2-1401 provides that, generally, all powers granted to localities shall be vested in their respective governing bodies.

What is the Governing Body? The Supreme Court found that particularly applicable to the subject area of the *Miller* appeal, Va. Code Ann. § 15.2-1425 gives the governing body of each locality the authority to adopt, as appropriate, ordinances, resolutions and motions. Thus, while providing that [a]ny locality may, by ordinance, classify the territory under its jurisdiction for purposes of land use, Va. Code Ann. § 15.2-2280, the General Assembly has vested the actual power to make such decisions in each locality's governing body.

Under these provisions, and Va. Code Ann. §§ 15.2-1401 and Va. Code Ann. § 15.2-1425, the Supreme Court concluded that the governing body of a locality is a distinct legal entity authorized in Title 15.2 to exercise the statutory powers of that locality.

On that building block, the Court turned to the question whether this distinct legal entity must be joined as a party defendant in a legal action contesting its legislative exercise of a zoning power, focusing on the language of Va. Code Ann. § 15.2-2285(F), under which the *Miller* litigation was filed contesting the board's decision granting the requested permission. This key statutory provision states:

Every action contesting a decision of the local governing body adopting or failing to adopt a proposed zoning ordinance or amendment thereto or granting or failing to grant a special exception shall be filed within 30 days of the

decision with the circuit court having jurisdiction of the land affected by the decision. However, nothing in this subsection shall be construed to create any new right to contest the action of a local governing body.

Obviously, in drafting Va. Code Ann. § 15.2-2285(F), the General Assembly employed plain language in providing a right of appeal from various zoning decisions of a local governing body. The statute fixes a 30-day period from the date of the decision by the local governing body for filing an action in the circuit court contesting such decision. In that context the Court noted the complete absence of any language in Va. Code Ann. § 15.2-2285(F) referring to a locality as indicating a legislative intent that only the governing body, the entity that rendered the contested decision, be a required party defendant in an action challenging that decision.

In large measure, this outcome is consistent with the well-known *Friends of Clark Mountain* decision (construing a predecessor statute to current Va. Code Ann. § 15.2-2285(F)). Looking back on that decision, and on its intervening decision in *Riverview Farm Assocs. v. Board of Supervisors*, 259 Va. 419, 426, 528 S.E.2d 99, 102103 (2000), the Court in the recent *Miller* appeal found the precedent clear that a local governing body is a required party defendant to an action brought under Va. Code Ann. § 15.2-2285(F) contesting certain types of zoning decisions, including the type at issue here, made by the governing body.

General Versus Specific Laws Which One Controls? Alternative statutes, such as the provision in Va. Code Ann. § 15.2-1404, which details the manner in which an action may be brought against a locality, and speaks in terms of a localities power to sue or be sued in its own name in relation to all matters connected with its duties, is deemed a general provision, which must yield under the principle that more specific legislation will be applied where there are both general and specific provisions touching upon a subject. Here the general provision did not address the issue whether a board of supervisors is a required party defendant in a legal action contesting that boards exercise of its legislative power, but merely states that a locality may be a plaintiff or be named as a defendant in a legal action involving the localities duties.

A similar fate met arguments that service of process provision in Va. Code Ann. §§ 15.2-1404 and Va. Code Ann. § 8.01-300 affect this issue. The Court held that those statutes actually manifest the Legislatures intent that a locality and its governing body are not interchangeable terms but have separate legal identities that must be observed in initiating an action against either as a party defendant in a legal action.

Holding on Suing Counties. Based on our consideration of the several statutes its prior decision in *Friends of Clark Mountain*, the Court in *Miller* concluded that in an action under Va. Code Ann. § 15.2-2285(F) contesting a decision of a local governing body, that body is a required party defendant against whom suit must be initiated within the time limit specified in the statute. Thus, the Court holds that the Board was a required party defendant to Millers action.

Misnomer is No Help in Such Situations. The Court underscored the seriousness of a failure to name the correct party in Virginia, by finding that a subsequent correction to add the Board as a party to the present appeal or to correct as a misnomer the naming of Highland County, Virginia and name the Board in Highland Countys stead was unavailable. Even if such remedies could in some cases be employed on appeal which the Court expressly declined to address it found that the misnomer remedy is inappropriate here. Because the board was a required party to Millers action under Va. Code Ann. § 15.2-2285(F), the board could not be added as a party after the 30-day period from the date of the Boards decision had run. As in the leading cases where plaintiff lacks standing, such as *Braddock, L.C. v. Board of Supervisors*, 268 Va. 420, 426, 601 S.E.2d 552, 555 (2004) (action filed by person without standing is nullity and could not be resurrected by addition of parties after 30-day period set by Va. Code Ann. § 15.2-2285(F) had expired), or *Harmon v. Sadjadi*, 273 Va. 184, 198, 639 S.E.2d 294, 301302 (2007) (action filed by person without standing was nullity and did not toll applicable statute of limitations), the effect here is also fatal.

The Court holds that the plaintiffs could not employ the statutory remedy provided by Va. Code Ann. § 8.01-6 for correcting a misnomer because, under traditional case law going back for a century and recently summarized in *Cook v.*

Radford Cmty. Hosp., Inc., 260 Va. 443, 451, 536 S.E.2d 906, 910 (2000) (citing cases), a misnomer occurs when the right person or entity is incorrectly named. In the present case, by contrast, the plaintiff neighbors did not incorrectly name the right entity, but named a different entity. Therefore, the Supreme Court holds that it was error for the circuit court to deny the plea in bar, and the appeal was dismissed.

Declaratory Relief Also Elusive. Several other landowners who own property near the wind turbine project site had filed a motion for declaratory judgment in the circuit court, and they *did* name the county as a party defendant. While they avoided the fatal defect of failing to name the necessary entity as a defendant, their case founders because of the narrow scope of declaratory relief in Virginia.

Here the declaratory action sought to invalidate the planning commissions determination that permission to go forward with the project was in substantial accord with Highland Countys comprehensive plan. These plaintiffs asked the circuit court to declare that the planning commission did not have jurisdiction or authority to review the conditional use permit after it was issued by the board. Alternatively, they asked the circuit court to declare, among other things, that the planning commission decision was not in accord with law, was not in accord with the existing County comprehensive plan, and was arbitrary and capricious, and void. While the defendants challenged the right of these plaintiffs to bring any such action, the trial court sidestepped the declaratory judgment arguments and granted summary judgment for the defense on the merits.

On appeal, however, the Supreme Court turned immediately to the assignment of cross-error arguing that these plaintiffs action was barred because Va. Code Ann. § 15.2-2232 does not create a private third-party right of action to challenge a planning commissions finding that a proposed use is in substantial accord with a comprehensive plan. The Highland County Board pointed out in its brief on appeal that under Va. Code Ann. § 15.2-2232(B) only a property owner who has been denied a conditional use permit may appeal a planning commissions substantial accord determination, and that this right of appeal lies only to the local governing body. These contentions rested heavily on the Courts decision three years before in *Shilling v. Jimenez*, 268 Va. 202, 597 S.E.2d 206 (2004).

It was conceded that there is no specific statutory right to appeal a decision by the planning commission. However, these plaintiffs used that fact to support an argument that because of the absence of other remedies a declaratory judgment action provides the only mechanism for review of the planning commission determination at issue. Thus they sought to place this case in the general pattern of prior Supreme Court decisions holding that only where there are no traditional causes of action that will provide a remedy is recourse to declaratory relief permitted in Virginia.

A circuit court has the power to issue declaratory judgments under Va. Code Ann. §§ 8.01-184 through Va. Code Ann. § 8.01-191. Pursuant to this authority, circuit courts may make binding adjudications of right in cases of actual controversy when there is antagonistic assertion and denial of right. The provisions of Va. Code Ann. § 8.01-184 and related sections have been extensively construed in recent years in leading cases that include *Hoffman Family, L.L.C. v. Mill Two Assocs. Pship*, 259 Va. 685, 692, 529 S.E.2d 318, 323 (2000); *Blue Cross & Blue Shield v. St. Marys Hosp.*, 245 Va. 24, 35, 426 S.E.2d 117, 123 (1993); and *Erie Ins. Group v. Hughes*, 240 Va. 165, 170, 393 S.E.2d 210, 212 (1990).

Declaratory Relief in Virginia. The purpose of the declaratory judgment statutes is to provide a mechanism for resolving uncertainty in controversies over legal rights, without requiring one party to invade the asserted rights of another in order to permit an ordinary civil action for damages. A key Code provision creating this cause of action is Va. Code Ann. § 8.01-191, and it has been construed in numerous cases as creating a limited charter to obtain declaratory relief. Case law on this topic was summarized in some detail in *Hoffman*, 259 Va. 685, 693, 529 S.E.2d 318, 323.

In Virginia, therefore, the remedy that may be obtained in a declaratory judgment action is preventive relief, available upon assertion of an actual controversy, as illustrated in *Chaffinch v. Chesapeake & Potomac Tel. Co.*, 227 Va. 68, 72, 313 S.E.2d 376, 378 (1984), and *Williams v. Southern Bank of Norfolk*, 203 Va. 657, 662, 125 S.E.2d 803,

807 (1962).

In its recent *Miller* decision the Supreme Court stresses that Virginias declaratory judgment statutes do *not* create or alter any substantive rights, or bring any other additional rights into being. The intent of the declaratory judgment statutes is not to give parties greater rights than those which they previously possessed, but to permit the declaration of those rights before they mature. In other words, the intent of the act is to have courts render declaratory judgments which may guide parties in their future conduct in relation to each other, thereby relieving them from the risk of taking undirected action incident to their rights, which action, without direction, would jeopardize their interests.

In this aspect of the appeals reviewed in *Miller*, the Court concluded that the pleadings filed by the second group of neighbors did not assert a valid request for declaratory relief because, among other reasons, the pleadings do not seek preventive relief but effectively attempt to create a right of appeal that does not exist by statute.

Va. Code Ann. § 15.2-2232, which addresses the planning commissions duty to render a substantial accord determination in certain cases, provides in what the Court now labels plain language that only the owner of the property at issue, or the owners agent, may appeal to the governing body from a substantial accord determination of the planning commission. Notably, the statute does not provide third parties with a right of appeal from such a determination.

Thus the Court emphasizes in *Miller* a general restriction on declaratory judgment in Virginia arising from the fact that the statutes creating the declaratory judgment remedy may not be used to attempt a third-party challenge to a governmental action when such a challenge is not otherwise authorized by statute. This decision was foreshadowed in *Shilling*, 268 Va. 202, 205206, 597 S.E.2d 206, 208, where a neighboring landowner filed a declaratory judgment action asking a circuit court to declare void the creation of a certain family subdivision approved under an ordinance permitting conveyances to members of a landowners immediate family, contending that the subdivision was wrongfully approved by local officials based on misrepresentations of fact made by the applicant. In *Shilling* the Court had said, 268 Va. 202, 208, 597 S.E.2d 206, 209210, that the complainants did not have a third-party right of action to enforce a countys application of its subdivision ordinance in a declaratory judgment suit when there was no specific statutory authorization allowing third parties this right.

Miller applies this same rationale, concluding that the declaratory judgment statutes are not intended to provide, and do not create, a right of appeal that does not otherwise exist. In attempting to create such a right the second group of neighbors failed to state a cause of action. Thus the circuit court erred in concluding that these parties had a right to bring an action in the circuit court challenging the planning commissions substantial accord determination.

As a result of these holdings, both sets of neighbors who attempted to sue challenging the conditional use permit at issue in *Miller* were barred from relief.

Cross-References Research Leads

For an overview on parties and necessary parties, see Kent Sinclair & Leigh Middleditch, Virginia Civil Procedure (4th ed.) Chapter 5 (Parties) and § 5.17 (Misjoinder and Nonjoinder). See *generally* Virginia Benchbook Civil, Chapter 1 § V (Parties). See also Charles E. Friend & Kent Sinclair, Friend's Virginia Pleading and Practice (2nd ed. 2006), Chapter 5 (Parties) and § 5.02 (Necessary Parties).

An overview of the Virginia law of "misnomer, including the statutory embodiment of these principles in Code § 8.01-6 can be found in Sinclair & Middleditch, Virginia Civil Procedure (4th ed.) Chapter 5 (Parties) and § 5.8 (Misnomer). See also Charles E. Friend & Kent Sinclair, Friend's Virginia Pleading and Practice (2nd ed. 2006), Chapter 5 (Parties) and § 5.08 (Misnomer).

Background on declaratory relief in Virginia, with its unique limitations, can be found in Sinclair & Middleditch, *Virginia Civil Procedure* (4th ed.) Chapter 3 (Remedies in Virginia Practice), and § 3.10 (Declaratory Relief). *See* Charles E. Friend & Kent Sinclair, *Friend's Virginia Pleading and Practice* (2nd ed. 2006), Chapter 30 (Declaratory Judgments). *See also* John Costello, *Virginia Remedies*, Chapter 16 (Ancillary Remedies) and § 16.09 (Declaratory Judgment).

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Bowman on Protecting New Clients Interests

2008 Emerging Issues 770

Bowman on Protecting New Clients Interests

By Addison M. Bowman

October 18, 2007

SUMMARY: Hawaii Rule of Professional Conduct 1.9(a) protects the confidential information of a lawyers former client. Addison M. Bowman discusses the necessity to protect a new client whose interests in a proposed representation are adverse to the current interests of the lawyers former client, who is a party in the present matter.

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ARTICLE: Summary

Hawaii Rule of Professional Conduct 1.9(a) protects the confidential information of a lawyers former client. Addison M. Bowman discusses the necessity to protect a new client whose interests in a proposed representation are adverse to the current interests of the lawyers former client, who is a party in the present matter.

Analysis

Background. The principal obligation that a lawyer owes to a former client is to protect the former clients confidential information, and this obligation informs HRPC 1.9(a): A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that persons interests are materially adverse to the interests of the former client unless the former client consents after consultation. The point of rule 1.9(a) is that the former clients confidences are likely to be relevant and potentially usable in any new litigation matter or transaction that is substantially related to the former clients matter, and the posture of the new or prospective client, who the rule assumes is now opposing the lawyers former client, creates an incentive for the lawyer to exploit the former clients confidences against the former client in the course of representing the new client. See *Otaka, Inc. v. Klein*, 71 Haw. 376, 386, 791 P.2d 713, 718-19 (1990) (old Canon 4, pre-HRPC analysis).

Rule 1.9(a), which codifies *Otaka*, forbids any such new engagement without the former clients consent. Rule 1.9, however, is devoted entirely to protection of the former client and does not address potential disadvantages to current clients in instances where lawyers obtain their former clients consent and then proceed against them.

The problem. Lawyer intends to represent New Client in a matter that is substantially related to Former Clients matter, and Former Client is an adverse party in the current proceeding or transaction. Rule 1.9(a) requires Lawyer to

decline the new representation unless the former client consents after consultation. As Comment [12] to rule 1.9 points out, Disqualification from subsequent representation is for the protection of former clients and can be waived by them. Accordingly, Lawyer solicits and obtains Former Clients consent. The questions treated in this commentary all concern the necessity to protect New Client in these circumstances: Will it be necessary to obtain New Clients informed consent? What should be the content of the consultation with New Client? What is the stuff of New Clients consent?

The HRPC 1.9(a), 1.7(b) paradigm. A lawyers current client opposes that lawyers former client in a matter that is substantially related to the subject matter of the representation of the former client. Rule 1.9(a), solicitous of the former clients confidences, prohibits the new representation unless the *former* client consents. But if the lawyer proceeds with the new clients matter, either with the former clients consent or without consent in violation of rule 1.9, then the new client is at risk because of the lawyers continuing obligations and loyalty to the former client. See, *e.g.*, *In re Roseland Oil & Gas, Inc.*, 68 S.W.3d 784, 788 (Tex. App. 2001) (discussing precarious position in which [a lawyer] may be forced to make the choice between zealously representing his clients and maintaining the confidentiality of information received from his former clients); C. Wolfram, *Modern Legal Ethics* 362 (1986) (The threat of treachery is directed not only at former clients. . . . Most obviously, if a lawyer attempts to protect the . . . interests of the former client, the second client will receive only a hobbled representation).

The risk to the current client occasioned by loyalty to a former client triggers the application of Haw. Rule of Prof'l Conduct 1.7(b), requiring that the lawyer, at a minimum, obtain the current clients informed consent before proceeding against the former client:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyers responsibilities to another client or to a third person, or by the lawyers own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation. . . .

Comment [4] to rule 1.7 explains: Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyers other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client.

In the problem presented here, the anticipated material limitation that could adversely affect the representation of New Client arises from the possibility that Lawyers loyalty to her Former Client may cause her to pull her punches against Former Client, either because Former Clients consent may have been inadequately informed or because friendship with and loyalty to Former Client may adversely affect Lawyers representation of New Client in some previously unforeseen manner.

ABA and ALI approaches. ABA Model Rule of Professional Conduct 1.7(a)(2) forbids representation of a current client whenever there is a significant risk that the representation . . . will be materially limited by the lawyers responsibilities to another client, a former client or a third person unless each affected client gives informed consent, confirmed in writing. Prior to 2002, when this rule was amended by the ABA, it read just as HRPC 1.7(b) still reads. Indeed, MRPC 1.7 was the original model for HRPC 1.7, following the Hawaii drafters general practice to adopt the ABA model rule whenever feasible. That the rule 1.9(a)/1.7(b) paradigm that is the subject of this commentary was one target of the 2002 amendment to ABA model rule 1.7 is confirmed in the ABA comment: In addition to conflicts with other current clients, a lawyers duties of loyalty and independence may be materially limited by responsibilities to former clients under rule 1.9 or by the lawyers responsibilities to other persons

The American Law Institute, in its *Restatement of the Law Third, The Law Governing Lawyers* § 132 (2000), offers its rule 1.9 counterpart, entitled, A Representation Adverse to the Interests of a Former Client:

Unless both the affected present and former clients consent to the representation . . . a lawyer who has represented a client in a matter may not thereafter represent another client in the same or a substantially related matter in which the interests of the former client are materially adverse.

The *Restatement* comment explains:

[A] substantial risk of material and adverse effect . . . to the interests of the present client [can arise] because of the lawyers continuing duties to a former client The lawyers obligations to the former client might constrain the lawyer in representing the present client effectively, for example, by limiting the questions the lawyer could ask the former client in testimony.

Thus both the ABA and the ALI expressly treat the need for present client consent in any instance in which the present client is arrayed against the lawyers former client in a matter substantially related to the former representation, and both caution that the need for the present clients informed consent arises from the possibility that loyalty to the former client might adversely affect or inhibit the representation of the present client.

Resolution of the problem in Hawaii. Former Client is treated as a third person under HRPC 1.7(b), and the possibility of material limitation triggering the application of the rule and requiring New Clients consent will occur, in this authors opinion, (1) in every substantially related matter in which the former clients consent is obtained and (2) in any other matter in which the lawyers independent professional behavior could foreseeably be compromised by an instinct to pull punches against the former client.

If the matters are related to such an extent that Former Clients consent is required and obtained, notice that the consultation that necessarily informs Former Clients consent entails a conference and discussion about the former representation and the otherwise protected material that will in all likelihood be exposed and exploited in the service of New Client and to Former Clients apparent detriment. Such a discussion presents the potential (1) to evoke current gratitude and (2) to rekindle old loyalties. Indeed, Former Client may even recognize and seek to exploit the good will that is generated by her altruistic concession of consent to her former lawyers request. And even in an unrelated new matter in which the consultation and consent requirements of rule 1.9 are not triggered, Lawyer must ask herself if a residue of loyalty and trust resulting from the former engagement could conceivably skew the quality of present representation from the straight and true. In any such case, consent of New Client should be sought and obtained. It seems good practice in any event to advise New Client that her adversary is Lawyers Former Client, rather than leaving the matter to New Clients discovery at some other point in the course of the representation.

Practice Tips

Detecting the conflict of interest. Comment [1] to rule 1.7 cautions: The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest. As a practical matter, this means that the conflict search must be targeted to discover if any adverse or potentially adverse party in the present matter is a current or former client of Lawyer. If the matter is litigation, then the names of all parties, as well as parents and subsidiaries of entity parties, should inform the conflict search procedure. If the matter is a transaction, then all parties to the transaction, as well as parents and subsidiaries, are at least potentially adverse. Buyer and seller, borrower and lender, and various co-venturers are adverse for conflict detection and avoidance purposes. *Cf. In re Horine*, 661 N.E.2d 1206, 1207 (Ind. 1996) (buyer and seller were directly adverse); ABA/BNALawyers Manual on Professional Conduct 51:114 (direct adversity in transactions), 51:115 (sale of a business); Committee on Professional and Judicial Ethics, New York City Bar Assn, Formal op. 2001-2 (inherently adverse interests of borrower and lender).

Consent of Former Client. When the matters in question are substantially related, the conflict that triggers rule 1.9(a) presupposes that Lawyer has in her possession (if not in her present recollection) confidential material protected by rule 1.6 (Confidentiality of Information) that will have relevance and probative value in the current matter or proceeding. Before deciding whether or not to seek Former Clients consent, Lawyer should examine the file in Former Clients case to see what is available and potentially usable in the service of Present Client, because Former Clients acquiescence in adverse use of any such material will be a *sine qua non* of Former Clients consent. See Comment [12]

to rule 1.9 (A waiver is effective only if there is disclosure of the circumstances, including the lawyers intended role in behalf of the new client). In order for the consent to be fully informed, the consultation should also anticipate the context or contexts in which such adverse use would be occasioned. Although not required by HRPC 1.9, the consent should be in writing because this is good practice. The ABA rule requires written consent, and written consent has the desirable effect of settling disputes about the adequacy of consultation and the validity of consent.

Consent of New Client. New Client should be apprised of the fact of Lawyers previous representation of a current adversary. As suggested above, this is good practice even in cases that do not trigger rule 1.9. In cases governed by rule 1.9, New Client should be advised about the conflict and about Lawyers intention to seek Former Clients consent. The reason for this is that, if New Client is unwilling to commit to an engagement whose validity is conditioned upon Former Clients consent, then such unwillingness might just as well be elicited at the get-go for it will surely surface when New Clients consent, informed by revelation of the rule 1.9 problem and Former Clients consent after consultation, is sought in the necessary course of events. For her consent to be valid, New Client needs to know not only that Lawyer intends to be loyal and trustworthy but also that Lawyer has met with Former Client and discussed Lawyers obligation of undivided loyalty to New Client. Here, as in the HRPC 1.9 context, written consent is not required but is, nonetheless, strongly recommended.

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McDonnell on Vision Point of Sale, Inc. v. Ginger Haas

2008 Emerging Issues 765

McDonnell on Vision Point of Sale, Inc. v. Ginger Haas

By Joseph B. McDonnell

October 18, 2007

SUMMARY: The Illinois Supreme Court has clarified issues regarding a Rule 216 Request to Admit as a discovery device; the adequacy of a response to such a request; and the appropriate inquiry into whether good cause exists under Rule 183 for an extension of time to respond to a Request to Admit. This commentary, written by Joseph B. McDonnell, discusses the import and potential extensions of this important decision.

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ARTICLE: The Illinois Supreme Court has corrected certain misconceptions regarding requests to admit under Ill. Sup. Ct., R 216, and, in addition, has clarified the procedure to be utilized by trial judges in determining whether good cause exists under Ill. Sup. Ct., R 183 for allowing additional time to respond to a request to admit.

In *Vision Point of Sale, Inc. v. Haas*, 2007 Ill. LEXIS 1159 (Ill. 2007), the Court held that, in weighing a request for additional time under Ill. Sup. Ct., R 183, the trial court must focus on the plaintiffs demonstration of good cause and may not consider either the lack of prejudice to the non-moving party or any conduct of the non-moving party which is unrelated to the good cause requirement.

Background. It is not uncommon in litigation that a party responding to a Request to Admit under Ill. Sup. Ct., R 216 may file a response that is deficient either in form or in substance. Or, in rare cases, the deadline (28 days under the rule) may run before the response is filed. In either situation, the requesting party will undoubtedly move, under Ill. Sup. Ct., R 216(c), that the requests be deemed admitted. Since allowance of such a motion may materially affect the outcome of the litigation, it is incumbent upon the responding partys counsel (assuming the deficiency can be corrected) to convince the trial judge that additional time should be allowed to amend the partys response to comply with the provisions of Ill. Sup. Ct., R 216. This entails a motion under Ill. Sup. Ct., R 183, which permits the Court, for good cause shown, to extend the time for filing any pleading required by the rules to be done within a certain period. The relief may be granted either before or after the time has expired.

Nature of Requests to Admit. In an earlier case, the Supreme Court had held that Ill. Sup. Ct., R 183 allows the circuit court the discretion to permit a late response to a request to admit. *Bright v. Dicke*, 166 Ill. 2d 204 (1995). This was at a time when there was fairly substantial support for the argument that requests to admit were evidentiary in nature, rather than a part of the discovery process, and that, since a failure to respond amounted to an admission of the

facts in question, the court was without power to permit an extension of time to respond or to amend responses. Following its decision in *Bright* (in which the argument was rejected), the Court had amended its Ill. Sup. Ct., R 201(c) to specifically include requests to admit as part of the discovery process.

The Court had also held in *Bright* that, in determining whether good cause existed to allow additional time to respond, the mere absence of inconvenience or prejudice to the opposing party was irrelevant. In the wake of that decision, the appellate court had, in several cases, fashioned a rule that mistake, inadvertence, or attorney neglect would not suffice as the sole basis for establishing good cause to support an extension. *Hammond v. SBC Communications, Inc.*, 365 Ill.App.3d 879 (2006); *Robbins v. Allstate Insurance Co.*, 362 Ill.App.3d 549 (2005); *Larson v. O'Donnell*, 361 Ill.App.3d 388 (2005); *Cothorn v. Thompson*, 357 Ill.App.3d 279 (2005); *Glasco v. Marony*, 347 Ill.App.3d 1069 (2004). In addition, the appellate court, in the decision under review, had interpreted *Bright* to hold that the trial court, in considering an Ill. Sup. Ct., R 183 motion for extension of time, could consider the totality of the circumstances presented by the record.

Ill. Sup. Ct., R 183: The Correct Focus. In addressing the issues, the Supreme Court emphasized that the moving party has the burden of demonstrating good cause for an extension of time under Ill. Sup. Ct., R 183, and that that burden is not satisfied by arguing or demonstrating lack of prejudice to the opponent. The Court held that such a motion must stand on its own merits and cannot be aided by consideration of matters not pertinent to the issue, including unrelated instances of the opposing party's conduct with respect to discovery. *Vision Point of Sale, Inc.*, slip op. at 12.

Procedural problems. The case arose as a result of what both the circuit court and the appellate court had perceived to be a procedural irregularity. Plaintiffs timely response to defendants request to admit was signed (on the final page of the answers) only by plaintiffs attorneys, but was accompanied by a certificate under 735 ILCS 5/1-109 over the signature of plaintiffs corporate representative. On defendants motion to strike the responses and deem the requests admitted, the circuit court found the responses insufficient under Ill. Sup. Ct., R 216 and granted the motion. After initially denying plaintiffs oral motion for additional time under Ill. Sup. Ct., R 183 to file amended responses to include the representatives signature on the last page of the responses, the trial judge, exasperated over the defendants recalcitrance in complying with discovery rules, reversed its ruling. Considering the totality of the circumstances, the court then held that good cause had been demonstrated under Ill. Sup. Ct., R 183 for the extension sought by plaintiff. After the appellate court affirmed, the Supreme Court allowed defendants petition for leave to appeal.

The Holding. The Supreme Court first addressed the scope of the inquiry attendant to an Ill. Sup. Ct., R 183 motion for extension of time. In reviewing its holding in *Bright v. Dicke*, 166 Ill. 2d 204 (1995), the Court pointed out that the party there seeking relief had not explained in its motion for extension of time why the deadline had not been met. Accordingly, the Court there held that good cause had not been demonstrated. In the case at bar, however, plaintiff had made a good faith argument for the application of 735 ILCS 5/1-109 as complying with the requirements of Ill. Sup. Ct., R 216.

The Court then observed that a line of cases decided by the appellate court (identified above) had engrafted on its *Bright* decision the rule that mistake, inadvertence or attorney neglect cannot provide the sole basis for a good cause finding for an extension of time under Ill. Sup. Ct., R 183. Such limitation, said the Court, had never been suggested in *Bright*; this after-decided rule of the appellate court had improperly limited the discretion of the circuit courts in considering objective evidence bearing on the good cause requirement. Those decisions, accordingly, were overruled. *Vision Point of Sale, Inc.*, slip op. at 16.

Although the court thus expanded the basis for a party's demonstration of good cause for an extension of time, it does not mean that an opponents non-compliance with discovery rules or orders can be a part of the Ill. Sup. Ct., R 183

inquiry. Good cause must be established by the party seeking relief; misconduct of the party's adversary, even though it may be addressed by the court in determining appropriate sanctions for discovery violations under Ill. Sup. Ct., R 219(c), is not properly considered in determining good cause for an extension of time. *Vision Point of Sale, Inc.*, *slip op. at 12*.

Affidavit vs. Verification. The alternative mode of certification by verification under 735 ILCS 5/1-109 is commonly used by practitioners in filing and serving documents in litigation. The statute makes it clear that the same penalties apply to a willfully false certification as to perjury. The content of the certification is expressly set forth in the statute. In *Vision Point*, the Court held that both the circuit court and the appellate court had erred in their application of the statute. An earlier appellate court decision had erroneously construed the statute to require that a party responding to an Ill. Sup. Ct., R 216 request sign the responses and, in addition, provide a sworn statement attesting to their accuracy. *Moy v. Ng*, 341 Ill. App. 3d 984 (2003). The high court held that Ill. Sup. Ct., R 216 contains no such requirement and that a certificate under 735 ILCS 5/1-109 was sufficient to comply with the sworn statement requirement of Ill. Sup. Ct., R 216. To the extent that *Moy v. Ng* held otherwise, it was overruled. *Vision Point of Sale, Inc.*, *slip op. at 18*.

Local Rule vs. Supreme Court Rule. In a final touch, having overruled at least half-a-dozen cases, the Court negated a local circuit court rule which required the filing with the clerk of both requests to admit and responses thereto. Ill. Sup. Ct., R 216, the Court noted, requires only the serving, not the filing, of responses (as is true of discovery generally) and any local rule which imposes additional requirements violates the general administrative and supervisory authority of the Supreme Court under the Illinois Constitution. Illinois Const., Art. VI, § 16. The local rule, therefore, was of no effect. *Vision Point of Sale, Inc.*, *slip op. at 20*.

Tips for Practitioners. While Ill. Sup. Ct., R 216 serves the purpose of facilitating the trial process by eliminating matters as to which no real dispute exists, it may also prove a trap for the unwary if not properly addressed and responded to in a timely fashion. It remains good practice, if at all possible, to serve one's responses within the 28 days required by rule. Matters which are legitimately contested must be specifically denied or reasons given as to why the answering party cannot truthfully admit or deny them.

If additional time is needed (and absent a stipulation with opposing counsel), an Ill. Sup. Ct., R 183 request for extension must focus on why more time is necessary and reference to extraneous matters must be avoided. Where a mistake, either by the client or by counsel, has resulted in the deadline being missed, counsel should candidly set forth the facts to establish the good cause required by Ill. Sup. Ct., R 183. Given the courts preference for settling disputes on the merits rather than through technical violations of the rules, such an approach is preferable to one which raises issues having little or nothing to do with the party's duties under Ill. Sup. Ct., R 216.

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Mr. McDonnell's trial practice has included the defense of legal malpractice suits, product liability actions,

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Dorsaneo on Trespass to Try Title Actions, Martin v. Amerman and H.B. 1787

2008 Emerging Issues 759

Dorsaneo on Trespass to Try Title Actions, Martin v. Amerman and H.B. 1787

By William V. Dorsaneo III

October 17, 2007

SUMMARY: The 80th Legislative Session amended section 37.004 of the Uniform Declaratory Judgments Act, which may have abrogated a 2004 decision of the Texas Supreme Court concerning the availability of declaratory judgment actions to resolve boundary disputes. This commentary, written by William V. Dorsaneo, III, author of the renowned treatise Texas Litigation Guide, discuss Martin v. Amerman and the implications of H.B. 1787 on boundary disputes.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: Overview *Martin v. Amerman*, 133 S.W.3d 262 (Tex. 2004); Tex. Civ. Prac. & Rem. Code § 37.004 (c)

Recent legislation may have abrogated a 2004 decision of the Texas Supreme Court concerning the availability of declaratory judgment actions to resolve boundary disputes. This is a good thing as far as it goes. Unfortunately, however, it is past time for the abo-lition of trespass to try title actions as the exclusive method of determining land title dis-putes generally.

Analysis

Texas Supreme Courts *Martin v. Amerman* Decision. In *Martin v. Amerman* [*Martin v. Amerman*, 133 S.W.3d 262, 265267 (Tex. 2004)], the Texas Supreme Court deter-mined that because the Property Code provides that a trespass-to-try-title action is the sole method of determining title to real property a plaintiff cannot use the Uniform De-claratory Judgments Act to obtain relief in a boundary dispute between adjoining land-owners [Tex. Prop. Code § 22.001].

A trespass to try title action is the traditional statutory method for resolving land title dis-putes between a party claiming the legal or equitable title and another party asserting a conflicting possessory interest in the disputed land. The plaintiff must claim an owner-ship interest in real property and can prevail only by establishing that interest as a valid and superior one. An action in trespass to try title is purely statutory [Tex. Prop. Code § 22.00122.004; see *Martin v. Amerman*, 133 S.W.3d 262, 264265 (Tex. 2004) (noting that statutory trespass-to-try-title action replaced common-law action in ejectment)] and is governed by special pleading and proof requirements established by the Texas Rules of Civil Procedure [Tex. R. Civ. P. 783809]. Although a trespass to try title action is the method for determining title to real property [Tex. Prop. Code § 22.001(a)], it does not apply to all real property interests [see *Grasty v. Wood*,

230 S.W.2d 568, 571 (Tex. Civ. App. --Galveston 1950, writ rehd n.r.e.) (nonpossessory interest, such as overriding royalty interest, is not suitable for trespass to try title action)]. Success in a trespass-to-try-title action depends on the strength of the petitioner's title, not the weakness of the adversary's claim [*Martin v. Amerman*, 133 S.W.3d 262, 265 (Tex. 2004); *Land v. Turner*, 377 S.W.2d 181, 183 (Tex. 1964); *Hejl v. Wirth*, 161 Tex. 609, 343 S.W.2d 226 (1961)]. See Dorsaneo, *Texas Litigation Guide* § 251.02 for a detailed discussion of the ways to establish title.

At the time *Martin v. Amerman* was decided Section 37.004 of the Uniform Declaratory Judgments Act provided generally that:

[a] person interested under a deed, will, written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status, or other legal relations thereunder

[Tex. Civ. Prac. & Rem. Code § 37.004(a)]. In addition, Section 37.003 provides more generally that declaratory relief is available in any proceeding in which declaratory relief is sought and a judgment or decree will terminate the controversy or remove an uncertainty [Tex. Civ. Prac. & Rem. Code § 37.003(c) *see generally* Dorsaneo, *Texas Litigation Guide* § 45.04]. Thus, parties to boundary disputes or other types of cases traditionally brought as trespass-to-title actions sometimes sued for declaratory relief instead because proceeding under the DJA offers the following advantages:

- . DJA procedures, particularly the pleading and proof requirements, are less technical than trespass-to-try-title action requirements;

- . Resort to usual discovery rules is as expedient or more expedient than the process of obtaining an abstract of title and survey of the land;

- . An award of additional injunctive relief might aid to enforcement of a possessory right in the disputed property; and

- . The court has the discretion to award attorneys fees [see Tex. Civ. Prac. & Rem. Code § 37.009] without a prerequisite claim of adverse possession.

In a pre-*Martin* opinion, the Texas Supreme Court stated, albeit in dicta, that a declaratory judgment was available to litigate a boundary dispute [*Brainard v. State*, 12 S.W.3d 6, 29 (Tex. 1999), *disapproved*, *Martin v. Amerman*, 133 S.W.3d 262, 267-268 (Tex. 2004)]. Accordingly, although a boundary dispute was traditionally litigated in an action in trespass to try title [*Hunt v. Heaton*, 643 S.W.2d 677, 679 (Tex. 1982) (boundary disputes may be tried by trespass-to-try-title action); *Plumb v. Stuessy*, 617 S.W.2d 667, 669 (Tex. 1981)], some courts of appeals permitted declaratory judgment actions seeking a declaration of the boundary, rather than a determination of title to the disputed land [see *Goebel v. Brandley*, 76 S.W.3d 652, 655-656 (Tex. App. --Houston [14th Dist.] 2002, no pet.) (because suit sought only declaration of location of boundary line, not determination of title, declaratory judgment suit and award of attorneys fees was proper), *overruled*, *Martin v. Amerman*, 133 S.W.3d 262, 268 (Tex. 2004)].

Other courts refused to permit a declaratory judgment action if the case involved a title determination, and if the DJA was invoked to avoid the procedural requirements and limitations of a trespass-to-try-title action [*McRae Exploration & Prod., Inc. v. Reserve Petroleum Co.*, 962 S.W.2d 676, 685 (Tex. App.--Waco 1998, pet. denied) (because suit to determine which of competing deeds was effective did not involve question of validity or construction of deed, it could not proceed as declaratory judgment action) *Ely v. Briley*, 959 S.W.2d 723, 727 (Tex. App.--Austin 1998, no pet.) (because trespass to try title is exclusive remedy, award of attorneys fees is unavailable under DJA) *see McNally v. Friends of WCC, Inc.*, 113 S.W.3d 875, 881 (Tex. App.--Dallas 2004, no pet.); *Barfield v. Holland*, 844 S.W.2d 759, 771 (Tex. App.--Tyler 1992, pet. denied)].

In *Martin v. Amerman* [*Martin v. Amerman*, 133 S.W.3d 262, 262267 (Tex. 2004)], the Texas Supreme Court sided with the latter group of courts, holding that the trespass-to-try-title statute is an exclusive remedy in a boundary dispute, so that the parties may not obtain attorneys fees by proceeding under the Declaratory Judgments Act. The Court reasoned that any determination of the boundary line between adjoining parcels necessarily determines title to the disputed portion of the tracts, so that a boundary dispute ultimately presents a question of title, regardless of how the issue is framed in the pleadings [*Martin v. Amerman*, 133 S.W.3d 262, 266267 (Tex. 2004), citing *Permian Oil Co. v. Smith*, 107 S.W.2d 564, 568 (Tex. 1937); *Freeman v. McAninch*, 87 Tex. 132, 9899 (Tex. 1894)]. Because a question of title is implicated, and a trespass-to-try-title action is the method for determining title to real property [see Tex. Prop. Code § 22.001(a)], the Court concluded that the remedy available in an action for trespass to try title is the only appropriate one in a boundary dispute or other action that necessarily involves a determination of title [*Martin v. Amerman*, 133 S.W.3d 262, 267 (Tex. 2004); see also *Kenedy Meml Found. v. Dewhurst*, 90 S.W.3d 268, 289 (Tex. 2002) (dispute over shoreline was one over title to property, so DJA did not permit fee award against government)].

Amendment of Declaratory Judgments Act. As a result of 2007 legislation, Section 37.004 of the Uniform Declaratory Judgments Act was amended to allow a person described in Subsection (a) to use a declaratory judgment action to resolve a land title dispute under this chapter when the sole issue concerning title to real property is the determination of the proper boundary line between adjoining properties [Tex. Civ. Prac. & Rem. Code § 37.004(c) (added by Acts 2007, 80th Leg., ch. 305--effective 6/15/07)].

Hence, all of the benefits provided by the DJA should now be available in boundary litigation and, perhaps as significantly, all of the technical difficulties confronting litigants previously required to use trespass to try title actions have been ameliorated by the 2007 legislation. As the Court explained in *Martin v. Amerman*, the strict pleading and proof requirements applicable to trespass-to-try-title actions have sometimes produced harsh results [133 S.W.3d at 265]. What the Court did not explain, however, is the particularly onerous wrinkle described in *Hejl v. Wirth*, 343 S.W.2d 226, 227 (1961) which provides that under then (and now) well-settled (but nonetheless ridiculous) law that if the plaintiff fails to establish title by one of the methods for doing so, the effect of a take nothing judgment is to vest title in the defendant!

But not all boundary disputes involve the construction or validity of contracts, wills, deeds or statutes [see e.g., *McRae Exploration & Prod., Inc. v. Reserve Petroleum Co.*, 962 S.W.2d 676, 685 (Tex. App. --Waco 1998, pet. denied, see also Dorsaneo, *Texas Litigation Guide* § 280.01)], therefore, the placement of the statutory authorization to use DJA actions to resolve boundary disputes in Section 37.004 raises another issue. Can the statutory amendment be construed to include all boundary disputes? In most boundary disputes, the plaintiff will be a person interested in the land with respect to which the boundary is disputed under a deed, will, written contract or other writings constituting a contract even if no issue as to the construction or validity of the instrument is involved in the boundary dispute. Hence, it may be argued that the statutory amendment authorizes a person described by Subsection (a) of Section 37.004 . . . to obtain declaratory relief under this chapter according to Section 37.003(c)s broader provision. Under this interpretation, relief under the DJA is available to a person interested under a deed, will, written contract or other writings constituting a contract seeking to establish a boundary line under any of the theories that are available to claimants in disputed boundary cases. See Dorsaneo, *Texas Litigation Guide* § 280.01 (discussion of theories used to resolve boundary disputes).

Proposed Legislation Was Better. As originally proposed by Representative Will Hartnett, HB 1787 was a broader piece of legislation which permitted declaratory relief to obtain a determination under [the Declaratory Judgments Act] of title to lands, tenements, or other real property.) [H.B.1787; Com. Report (The purpose of this bill is to permit a declaratory judgment action with respect to title to real property.)] Unfortunately, the original bill ran into legislative difficulty and was amended before passage.

The original bill would have worked a much more beneficial change in Texas procedural law than the amended one. Normal pleading, discovery and proof principles applied generally under the Texas Rules of Civil Procedure, coupled with the general availability of declaratory relief provide the same benefits as trespass to try title law practice

did in the nineteenth century, without all of the arcane complexity and sometimes harsh results that follow mandatory use of trespass to try title actions to resolve land title disputes. For the same reasons, the legislature should seriously consider the elimination of trespass to try title actions altogether. Only then will the technical traps inherent in trespass to try title litigation be eliminated.

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William V. Dorsaneo, III is the Chief Justice John and Lena Hickman Distinguished Faculty Fellow and Professor of Law at Southern Methodist University's Dedman School of Law in Dallas, Texas, where he teaches a variety of litigation courses. He is also the principal author of the widely used and often cited twenty-six volume Texas Litigation Guide published by Matthew Bender & Company, the co-author of the five-volume Texas Civil Trial Guide, the co-author of three casebooks entitled Cases and Materials on Civil Procedure, Texas Civil Procedure: Pre-Trial Litigation, and Texas Civil Procedure: Trial and Appellate Practice, and several other volumes on Texas litigation subjects.

Professor Dorsaneo served as the Reporter to the Combined Committee appointed by the Texas Supreme Court, the Court of Criminal Appeals and the Texas Legislature to draft the Texas Rules of Appellate Procedure and for the last fifteen years he has served as the Chairman of the Appellate Rules Sub-committee of the Advisory Committee to the Texas Supreme Court. He is also the Chairman of the Texas Supreme Courts Task Force for Revision of the Texas Rules of Civil Procedure and a member of the American Law Institute.

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Sinclair on Boots, Inc. v. Singh

2008 Emerging Issues 761

Sinclair on Boots, Inc. v. Singh, 274 Va. ___, 649 S.E.2d 695 (Va. 2007), 2007 Va. LEXIS 99 (2007)

By Prof. Kent Sinclair and Gessner H. Harrison

October 17, 2007

SUMMARY: Non-refundable deposits do not per se penalize unsuccessful purchasers. In *Boots, Inc. v. Singh*, the Supreme Court of Virginia provides valuable guidance to practitioners, buyers, and sellers regarding damages that are available to a seller under Virginia contract law for a prospective buyer's non-performance, addressing the circumstances under which a non-refundable deposit provision in a sales contract may be held to be an unenforceable penalty. The Court's resolution of this question in *Boots*, in which it held a non-refundable deposit provision to be valid and enforceable, is helpful due to the frequent inclusion of non-refundable deposit provisions in real estate and other types of sales contracts. The case has significant implications for all "liquidated damages" issues in Virginia. This commentary, written by Professor Kent Sinclair, discusses the import and potential extensions of this important decision.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: In its recent decision in *Boots, Inc. v. Singh*, 274 Va. ___, 649 S.E.2d 695 (Va. 2007), 2007 Va. LEXIS 99 (2007), the Supreme Court of Virginia provides valuable guidance to practitioners, buyers, and sellers regarding damages that are available to a seller under Virginia contract law for a prospective buyer's non-performance, addressing the circumstances under which a non-refundable deposit provision in a sales contract may be held to be an unenforceable penalty. The Court's resolution of this question in *Boots*, in which it held a non-refundable deposit provision to be valid and enforceable, is helpful due to the frequent inclusion of non-refundable deposit provisions in real estate and other types of sales contracts. The case has significant implications for all "liquidated damages" issues in Virginia.

Background. Pursuant to a contract for the purchase of a restaurant business and certain real estate for \$1.5 million, plaintiff, as the prospective buyer, deposited \$50,000 with the attorneys hired to perform the closing of the sale. The contract provided that the sale was contingent upon the purchaser's ability to obtain financing and that the deposit would become non-refundable if the purchaser did not terminate the contract in writing within 40 days, but this period was extended for an additional 22 days upon agreement of the parties so as to permit plaintiff additional time in which to secure the required financing. However, plaintiff did not obtain such financing by either the expiration of the extended termination period or by the closing date specified in the contract.

Approximately three months after the closing date had passed without the sale closing, in a letter to the closing attorneys, the seller declared the contract to be in default and demanded payment of the \$50,000 deposit. A little under one month later, the seller contracted to sell the business and real estate at issue to a third party for \$1.3 million. Upon learning of this sale, the plaintiff, who had just obtained a commitment letter securing the necessary financing, demanded that his deposit be refunded. Soon thereafter, the closing attorneys filed an interpleader action naming both the plaintiff and the seller as parties, and deposited the contested funds with the circuit court, which proceeded to hold that the provision making the deposit non-refundable was an impermissible penalty or forfeiture and not a valid liquidated damages clause. The seller then appealed the order directing that the funds be paid over to the plaintiff.

General Principles. The Court analyzed the issue of whether the non-refundable deposit provision of the contract constituted an unenforceable penalty by stating the following well-settled principles of Virginia contract law regarding liquidated damages provisions:

. **Actual damages uncertain and liquidated damages not disproportionate to probable loss.** Relying on *O'Brian v. Langley School*, 256 Va. 547, 551, 507 S.E.2d 363, 365 (1998); *301 Dahlgren Ltd. P'ship v. Board of Supervisors of King George County*, 240 Va. 200, 202-03, 396 S.E.2d 651, 653 (1990) and *Taylor v. Sanders*, 233 Va. 73, 75, 353 S.E.2d 745, 746-47 (1987), the Court in *Boots* explained that "parties to a contract may agree in advance about the amount to be paid as compensation for loss or injury which may result from a breach of the contract when the actual damages contemplated at the time of the agreement are uncertain and difficult to determine with exactness and when the amount fixed is not out of all proportion to the probable loss." *O'Brian*, 256 Va. at 551, 507 S.E.2d at 365; *301 Dahlgren Ltd. P'ship*, 240 Va. at 202-03, 396 S.E.2d at 653, and *Taylor*, 233 Va. at 75, 353 S.E.2d at 746-47. The Court further explained that "A liquidated damages clause will be construed as an unenforceable penalty when the damage resulting from a breach of contract is susceptible of definite measurement, or where the stipulated amount would be grossly in excess of actual damages." *O'Brian*, 256 Va. at 551, 507 S.E.2d at 365; *Brooks v. Bankson*, 248 Va. 197, 208, 445 S.E.2d 473, 479 (1994); and *301 Dahlgren Ltd. P'ship*, 240 Va. at 203, 396 S.E.2d at 653).

. **Challenger's burden.** Again, relying on its prior opinion in *O'Brian*, the Court specified that the party challenging the validity of a liquidated damages clause has the burden of proof on the issue of whether the opposing party's damages are susceptible of definite measurement or the stipulated damages are grossly in excess of the actual damages suffered. *O'Brian*, 256 Va. at 551, 507 S.E.2d at 365.

. **Examples of proportional liquidated damages amounts.** The Court cited its holdings in two prior cases, *Taylor* and *Brooks*, as examples of liquidated damages amounts that it considered to be valid and enforceable. Significantly, it explained that the non-refundable deposit amounts in those cases amounted to 4.6 percent and 10 percent of the respective purchase prices stated in the contracts at issue. *Taylor*, 233 Va. at 76, 353 S.E.2d at 747, and *Brooks*, 248 Va. at 209, 445 S.E.2d at 480.

Key Issue: Sufficiency of purchaser's evidence. In its recent decision in *Boots*, the resolution of the question of whether the non-refundable deposit provision of the contract constituted an unenforceable penalty turned on the sufficiency of the evidence presented by the plaintiff in its effort to challenge the enforceability of that provision as a liquidated damages clause.

As the Court explained, because the plaintiff had failed to terminate the sales contract in writing within the 40-day period as extended by the agreement of the parties, the deposit became non-refundable under the plain language of the contract. The seller was therefore entitled to payment of the deposit unless the plaintiff could prove that the seller's damages were susceptible of definite measurement or that the deposit amount was grossly in excess of actual damages.

Attempting to meet its burden, the plaintiff argued that even though the price that the seller eventually obtained from the third party appeared to be **\$200,000 less than what it would have received had the plaintiff been able to close the sale by the deadline date**, the profit realized by the seller in the sale to the third party was "[r]oughly,

the same" because the seller would have had to pay a commission of \$239,000 to a broker if the plaintiff had closed. Indeed, as the plaintiff argued, because it did not have to pay such a commission on the sale to the third party, the seller actually gained \$39,000 more in profit than it otherwise would have.

In addressing the plaintiff's arguments, the Court explained that under the rule as stated in *O'Brian*, the non-refundable deposit provision would only be invalid if the actual damages contemplated at the time of the agreement were uncertain and difficult to determine with exactness and the amount of the non-refundable deposit was not out of all proportion to the probable loss. The Court then concluded that it would be pure speculation to say it was certain, *at the time the contract was signed*, that the seller would be able to obtain a sale of the restaurant more than six months later for "[r]oughly, the same" amount. The Court further found that the plaintiff had presented no evidence at all relating to damages contemplated by the parties at the time of the sales contract, and that it had failed explain how one could conclude that, at that time, the seller's damages in event of default were certain and not difficult to determine. Finally, the Court also found that the plaintiff had offered nothing to show that the amount of the non-refundable deposit would be out of all proportion to any probable loss, particularly where that amount represented a mere 3.3% of the purchase price, and that amount was less than other amounts, in terms of percentage, that the Court had previously upheld as enforceable in prior cases. *See Taylor*, 233 Va. at 76, 353 S.E.2d at 747 (4.6% amount upheld) and *Brooks*, 248 Va. at 209, 445 S.E.2d at 480 (10% amount upheld). As a result, the Court held that the trial court had erred in ruling that the non-refundable deposit constituted an unenforceable penalty as opposed to a valid and enforceable liquidated damages clause. Accordingly, it reversed the trial court's judgment and remanded the case for the entry of an order directing payment of the \$50,000 deposit to the seller.

Importance of ruling. As can be gleaned from the Court's analysis in *Boots*, it is important for both buyers and sellers to ascertain, as best they can, what the probable damages flowing from non-performance of a contract will be. This is so because, from a buyer's perspective, it is crucial that there be some evidence that can be relied upon for the argument that a seller is actually "better off" as a result of the buyer's non-performance--in other words, evidence that the breach was an efficient one. This evidence was lacking in *Boots*, and contributed to the adverse ruling suffered by the plaintiff. On the other hand, sellers also have a vested interest in ascertaining such damages, to avoid the risk that the non-refundable deposit will be deemed unenforceable--particularly if the deposit amount, expressed as a percentage of the contract price, exceeds those amounts that the Court has previously held to be valid in *Taylor*, *Brooks*, and now *Boots*.

Cross-References Research Leads

For an overview on damages principles in Virginia generally, see Kent Sinclair & Leigh Middleditch, Virginia Civil Procedure (4th ed.) Chapter 3 (Remedies in Virginia Practice) and § 3.2 (Damages). *See* Charles E. Friend & Kent Sinclair, Friend's Virginia Pleading and Practice (2nd ed. 2006), Chapter 23 (Damages) and §§ 23.01 (Nature, Types and Amount of Damages) and 23.02 (Compensatory Damages). *See also* John Costello, Virginia Remedies, Chapter 21 (Damages) and § 21.02 (The Goals of Remedies) and § 21.04 (Measurement of the Loss); § 11.09 (Damages and Choice of Remedy: Law and Equity), and § 18.10 (Contracting Away from Remedies and Damages Rules).

Detailed analysis of liquidated damages law in Virginia can be found in Sinclair & Middleditch, Virginia Civil Procedure (4th ed.) § 3.2 (E) (Liquidated Damages). *See also* Charles E. Friend & Kent Sinclair, Friend's Virginia Pleading and Practice (2nd ed. 2006), § 23.09 (Liquidated Damages). *See also* John Costello, Virginia Remedies, Chapter 21 (Damages) and § 1.07 (Liquidated Damages).

For a model jury instruction on liquidated damages in Virginia, with Sources & Authority notes citing cases,

see Virginia Model Jury Instructions Civil, Chapter 45 (Contracts) and Civil Jury Instr. No. § 45-45 entitled "Damages: Liquidated," *citing* among other sources the authorities noted above, and Michie's Jurisprudence of Virginia & West Virginia, 1 M.J., Contracts, § 1 and 1 M.J., Contracts, § 98 (2004).

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Professor Sinclair, an active member of the Virginia Bar, teaches the program in Virginia Law & Practice at the University of Virginia School of Law. He is Professor of Law and served for many years as Associate Dean of the Law School. He has written more than a dozen books, and is the author of Sinclair & Middleditch, Virginia Civil Procedure (4th ed. 2003 and annual supplements), and co-author of Friend & Sinclair, Virginia Pleading and Practice (2nd ed. 2007 with annual supplements). Both of these treatises are published by Lexis Law Publishing. Professor Sinclair is Chair of the Advisory Committee on Rules of Court for Virginia, and has served as Reporter for the Virginia Model Jury Project for a number of years. He has served on the Board of Governors of the Litigation Section of the Virginia Bar Association and the Boyd-Graves Conference on Virginia Law. He edits the Virginia Court Rules and Practice Service for Lexis Law Publishing and is a frequent lecturer at continuing education programs for attorneys and Virginia judges.

Gessner H. Harrison has experience as a judicial clerk and as a practicing attorney, and presently serves as Senior Staff Attorney in the office of the Reporter of Decisions for the Supreme Court of Virginia. He holds both J.D. and M.B.A. degrees, with advanced course work in legal research and information management. Mr. Harrison plays a major role in the Model Jury Instructions program in Virginia, and is primarily responsible for the identification of all new developments in Virginia law, and the finalization of jury instructions for the electronic and looseleaf jury instructions volumes, published by Lexis Law Publishing, covering all areas of civil causes of action and criminal developments. He has collaborated with Professor Sinclair on numerous projects in diverse areas of Virginia law.



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Garcia on Sheehan v. Roche Bros. Supermarkets, 448 Mass. 780 (Mass. 2007)

2008 Emerging Issues 757

Garcia on Sheehan v. Roche Bros. Supermarkets, 448 Mass. 780 (Mass. 2007)

By Grace V. B. Garcia

October 16, 2007

SUMMARY: *Grace V. B. Garcia on Massachusetts Adoption of Mode of Operation Approach to Analyze Premises Liability Cases The Massachusetts Supreme Judicial Court, in Sheehan v. Roche Brothers Supermarkets, Inc., 448 Mass. 780 (2007), joined nineteen other states in adopting the mode of operation approach to analyze premises liability cases. This commentary, written by Grace V. B. Garcia, a partner in the Boston office of Morrison Mahoney LLP, discusses what this means for both plaintiffs and defendants in slip and fall accidents that occur in self-service stores.*

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**ARTICLE: Massachusetts Adopts Mode of Operation Approach
to Analyze Premises Liability**

Defense practitioners in slip and fall cases against self-service stores must now think carefully before filing motions for summary judgment based on lack of notice of a hazardous condition. The Massachusetts Supreme Judicial Court, in *Sheehan v. Roche Brothers Supermarkets, Inc., 448 Mass. 780 (2007)*, has made a major change in the way in which premises liability cases must be proven and defended, and Massachusetts is now the twentieth state to adopt the mode of operation approach to analyzing such cases. As a result of this decision, which will be applied retroactively, it is anticipated that there will be a significant increase in the number of cases based on slip and falls on store property and a significant decline in the number of potential summary judgment motions in these cases. Practitioners in this area will now be required to evaluate the case early on and to contemplate potential settlement or the need to prepare for trial.

Sheehan Follows Typical Fact Pattern in Slip and Fall Cases in Self Service Stores. The plaintiff in *Sheehan* slipped and fell while walking in the produce department of the defendants grocery store. After the plaintiff fell, he noticed the pulp of a grape on the floor. The store manager also testified to seeing a small piece of grape. The plaintiff sustained significant injuries, including a subdural hematoma, requiring a month of hospitalization and three weeks in a rehabilitation facility. Although the lower court granted summary judgment based on plaintiffs inability to show that the defendant store owner had actual or constructive notice of the hazard, Massachusetts highest court, the Supreme Judicial Court, reversed.

Strategy Under the Traditional Approach. Historically, Massachusetts had viewed premises liability cases using the traditional approach. That approach, which was based on the Restatement, holds as follows:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

Restatement (Second) of Torts, § 343 (1965). Adhering to the Restatement, Massachusetts required that, in order to succeed in a premises liability case against a grocery store, the plaintiff show that the grocery store caused the substance to be on the floor and that the store had actual knowledge of a hazardous presence or that the substance had been on the floor for so long that the store should have been aware of the condition. This approach often caused defense practitioners to seek summary judgment based on an argument that the plaintiff could not prove that the substance had been there for a significantly long period of time, and they were often successful. *See e.g. Oliveri v. Massachusetts Bay Transp. Auth.*, 363 Mass. 165 (1973) (acknowledging that in the majority of cases, recovery has been denied to the plaintiff where he has attempted to establish the time element by circumstantial evidence consisting for the most part of a description of the foreign substance).

New Strategies Under the Modern Approach. Massachusetts departed from the traditional approach in order to acknowledge modern merchandising techniques. *Sheehan*, 448 Mass. at 783, n. 3. The Supreme Judicial Court noted that grocery stores have changed from individualized clerk-assisted to self-service operations and that the modern approach to analyzing premises liability focuses on the reasonable foreseeability of a patrons carelessness as opposed to the stores actual or constructive notice of a hazard. *Sheehan*, 448 Mass. at 784.

The Court found that it was unjust to require a plaintiff to prove the precise hazard that caused his or her injury because often the plaintiff may not be able to conduct a prompt investigation or make a determination of the exact cause of the accident. Thus, the mode of operation approach, as adopted in Massachusetts, is as follows:

where an owners chosen mode of operation makes it reasonably foreseeable that a dangerous condition will occur, a store owner could be held liable for injuries to an invitee if the plaintiff proves that the store owner failed to take all reasonable precautions necessary to protect invitees from these foreseeable dangerous conditions.

Sheehan, 448 Mass. at 786.

While plaintiffs still must meet the burden of establishing notice of the hazard, that burden is lightened: the burden is met once the plaintiff shows that the dangerous condition was reasonably foreseeable within the scope of the defendants self-service mode of doing business. This appears to be a significantly low notice threshold in comparison to the actual or constructive notice that plaintiffs were required to prove under the traditional approach. In addition to establishing notice, the plaintiff also must prove that the store owner failed to take reasonable measures commensurate with the risks involved with self-service mode of operation to prevent injury to invitees and bears the burden of persuading the jury that the defendant acted unreasonably. *Sheehan*, 448 Mass. at 786 (quoting *Chiara v. Frys Food Stores of Ariz., Inc.*, 152 Ariz. 398, 401 (1987)). This approach is not meant to impose strict liability on defendants. Rather, a self-service store owner is only liable if a plaintiff proves that a reasonably foreseeable danger existed and the owner failed to take adequate steps to prevent the injury. *Sheehan*, 448 Mass. at 790.

***Sheehan* Is a Refinement, and Not a New Rule.** Although defense practitioners may find *Sheehan* to be a radical departure from the traditional approach, the Supreme Judicial Court indicated that it was not rejecting the Restatement relied upon for the traditional approach, but rather was simply modifying part (a) of that analysis. *Sheehan*, 448 Mass. at 788. In fact, in its decision, the Court found that the Restatement supported the mode of operation approach based on Comment e to the Restatement, which requires a store owner to make far greater preparation to secure the safety of his

patrons that a householder will make for his social or even his business visitors. *Sheehan*, 448 Mass. at 788.

Consequently, in embracing the mode of operation approach, the Supreme Judicial Court made it clear that it was not adopting a new rule, rather it was merely refining the elements of proof in premises liability cases. Therefore, this refinement is to be applied retroactively. *Sheehan*, 448 Mass. at 791, n.9. Practitioners must be aware that due to the three-year statute of limitation period for torts, the mode of operation approach will be used for cases that have occurred before the April 17, 2007 *Sheehan* ruling.

Strategic Implications of *Sheehan*. Based on the *Sheehan* decision, the plaintiffs burden of proof is significantly less when proving negligence against a self-service store. Conversely, the defendants burden is greater: the defendant must show that it had taken all of the necessary precautions in light of the potential risks.

After *Sheehan*, defense practitioners must carefully consider whether or not to spend the time and effort to file a summary judgment motion. Although historically summary judgment motions in negligence cases have been disfavored, the *Sheehan* decision has basically made all premises liability cases too fact dependent to allow for summary judgment. Indeed, in 2006, the Supreme Judicial Court stated that in negligence cases, We generally consider . . . whether a defendant exercised reasonable care, the extent of the damage caused, and whether the defendant's breach and the damage were causally related to be the special province of the jury. *Jupin v. Kask*, 447 Mass. 141, 147 (2006). This disfavor, together with the requirements of the mode of operation approach, make it likely that summary judgment motions will not be granted in the majority of cases.

Although the Court did not define self-service operations, the Court noted that this approach applied where an owners chosen mode of operation makes it reasonably foreseeable that a dangerous condition will occur. Thus, it should be expected that *Sheehan* will have a broad application, applying to all stores that are not purely clerk-assisted operations. If a practitioner represents a small store that is arguably not self-service, however, the practitioner should contend that *Sheehan* does not apply but rather the traditional approach should be used to access liability.

Finally, practitioners that represent all store owners should ensure that the store has performed a detailed risk assessment and has implemented all necessary precautions. This will assist with the defense of any future litigation.

For additional information about summary judgment and premises liability see, Massachusetts Pleading and Practice § 34.50 (function of motion for summary judgment); Massachusetts Pleading and Practice § 8.332 (complaint in slip and fall case); Massachusetts Pleading and Practice § 33.47.1 (sample interrogatories-negligence-slip and fall); Massachusetts Pleading and Practice § 34.50 (sample request to produce slip and fall); Premises Liability Law and Practice § 8A.04 (specific types of hazardous conditions in slip and fall accidents).

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Grace V. B. Garcia is a Partner in the Boston office of Morrison Mahoney LLP. Ms. Garcias practice is concentrated in the areas of commercial litigation, construction law, product liability and premises liability. In 2005, 2006, and 2007, she was recognized by Boston Magazine and Law & Politics as a Super Lawyer Rising Star.

Ms. Garcia is admitted to the bars of the Commonwealth of Massachusetts and the State of New York. She is actively involved in several bar associations and serves on the Massachusetts Bar Association's Litigation Section Council. Previously, Ms. Garcia served as a member of the MBA's Business Law Section Council (2003 -- 2006), New Lawyer Section Council (2000 -- 2003), co-chair of the Boston Bar Association's New Lawyer's Section (2002 -- 2004), and the BBA's Task Force on Pro Bono and New Lawyers (2002 -- 2003).

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Sinclair on Collins v. Shepherd

2008 Emerging Issues 696

Sinclair on Collins v. Shepherd, 649 S.E.2d 672, 2007 Virginia LEXIS 116 (Sept. 14, 2007)

By Prof. Kent Sinclair

October 9, 2007

SUMMARY: Local rules are again raising the specter of balkanized procedure in the Virginia Trial Courts. In Circuit and District Courts, aggressive docket management based on local rules is unacceptable. In *Collins v. Shepherd*, the circuit court sua sponte entered an order of dismissal with prejudice pursuant to a local rule providing for the dismissal of cases not served upon the defendant within one year of filing, the Supreme Court held the local rule invalid because it conflicts with Virginia Code §§ 8.01-335. Without a rule or statutory basis for its actions in dismissing a case where service of process was not completed, the circuit court was therefore without authority to dismiss the case pursuant to the local rule. In a related ruling the Court held that the plaintiff's failure to challenge the dismissal order until after the expiration of the twenty-one day limitation period in Rule 1:1 was no bar to review because the subject order was void ab initio, and thus was subject to challenge at any time. This commentary, written by Professor Kent Sinclair, discusses the import and potential extensions of this important decision.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: In a recent civil case for personal injury damages where the circuit court sua sponte entered an order of dismissal with prejudice pursuant to a local rule providing for the dismissal of cases not served upon the defendant within one year of filing, the Supreme Court held the local rule invalid because it conflicts with Virginia Code §§ 8.01-335. Without a rule or statutory basis for its actions in dismissing a case where service of process was not completed, the circuit court was therefore without authority to dismiss the case pursuant to the local rule. In a related ruling the Court held that the plaintiff's failure to challenge the dismissal order until after the expiration of the twenty-one day limitation period in Rule 1:1 was no bar to review because the subject order was void ab initio, and thus was subject to challenge at any time.

Background. One local circuit court in Virginia adopted a local rule of Court that contained a provision stating that [i]f any civil action is not served within the time provided by Va. Sup. Ct. R. 3:5(e), the Clerk shall prepare a notice of dismissal and send such notice to counsel for the plaintiff.

In the recent *Collins* case, a personal injury lawsuit, a bare *one week* after the expiration of a one-year period following the filing of the action, the circuit court, in accord with its local rule, mailed to plaintiff's attorney a Notice of Dismissal stating that the circuit court would shortly thereafter dismiss this case because the defendant had not been served with process within one year after the filing of the action, "unless the [c]ourt finds that [plaintiff] has exercised

due diligence to have timely service on [the defendant]. Plaintiff's counsel did not appear on or before the date designated in the notice of dismissal, and two weeks later the court entered an order dismissing the suit with prejudice.

As often happens in instances of startling dismissals, attempts to use the nonsuit statute followed. In *Collins*, on ex parte motion of the plaintiff the circuit court initially vacated its prior dismissal order and reinstated the case on the docket. Then on the same day the circuit court by separate order granted the plaintiff's motion to nonsuit the case. In response to the apparent use of the nonsuit to salvage the plaintiff's case, defendant then sought reconsideration, asserting that plaintiff's motion to vacate the dismissal order was barred under Va. Sup. Ct. R. 1:1 because of plaintiff's failure to challenge the dismissal order within 21 days of its entry. Defendant argued in that application that because of the expiration of the 21-day period after its order, the circuit court was without jurisdiction or authority to enter the dismissal order.

The circuit court then vacated the order granting plaintiff a nonsuit, held a hearing and ultimately ruled that the underlying dismissal order was a valid use of a docket control procedure created to deal with moribund cases where no service has been made within a year and the plaintiff has failed to exercise due diligence to effectuate service. The circuit court concluded that this docket control procedure was not inconsistent with the provisions of Virginia Code § 8.01-4, authorizing circuit courts to adopt such docket control procedures so long as they do not abridge the substantive rights of the parties. This set the stage for the appeal in *Collins*.

Overview of the "Local Rules" Landscape. It may be important to note before describing the Supreme Court's assessment of this particular local rule to note that we have been in a "quiet period" concerning local rules for a few years following a flurry of protests and legislative activities in the late 1990s. Local Rules proliferated to the point that the Lawyers' Weekly ran articles about general district court "blindsiding" by local practice, and circuit court local rules were attacked as sophisticated Virginia practice became more statewide in nature. Delegate Joannou authored an amendment to Virginia Code § 8.01-4 intended to "clamp down" on local Rules. That statute which governs both district court and circuit court local rule enactments provides the authority for limited local rules, focusing on rules "necessary to promote proper order and decorum and the efficient and safe use of courthouse facilities and clerks' offices." Even this grudging charter for the creation of local rules is expressly limited by the provision that no "substantive rights" may be affected by those rules. The statute, as amended in 1999 and again in 2000, reads today as follows:

The district courts and circuit courts may, from time to time, prescribe rules for their respective districts and circuits. Such rules shall be limited to those rules necessary to promote proper order and decorum and the efficient and safe use of courthouse facilities and clerks' offices. No rule of any such court shall be prescribed or enforced which is inconsistent with this statute or any other statutory provision, or the Rules of Supreme Court or contrary to the decided cases, or which has the effect of abridging substantive rights of persons before such court. Any rule of court which violates the provisions of this section shall be invalid.

The courts may prescribe certain docket control procedures which shall not abridge the substantive rights of the parties nor deprive any party the opportunity to present its position as to the merits of a case solely due to the unfamiliarity of counsel of record with any such docket control procedures.

Obviously, "docket control procedures" come in for special scrutiny under the second paragraph of Virginia Code §8.01-4, quoted above. The evident legislative concern was for trial and motion scheduling procedures that could catch counsel from distant locales unaware, with prerequisites or limitations that do not generally apply in Virginia practice being enforced to prevent, truncate or peremptorily schedule pretrial or trial proceedings to the detriment of anyone not fully conversant with local practice.

The legislative gyrations of 1999 and 2000 threatened to outlaw or abolish all local rules, but ended up allowing such rules under a regime that stresses the importance of local procedures not affecting substantial rights (often thought to mean, among other things, dispositions affecting viability of claims, motions or defenses). Against that background

the circuit court whose rule was under scrutiny in *Collins* created a docket-control procedure to "enforce" the one-year service provisions of the Rules and Virginia Code, Title 8.01, and the appeal in that case presented the Court with the first full-blown opportunity since the reshaping of Virginia Code §8.01-4 to address the proper role of local rules of court and the relationship between such regulations and statewide law, in the Rules of Court and in statutes.

In its decision in *Collins*, the Supreme Court deemed the issues respecting the validity of the local docket-weeding rule to be purely questions of law, which means that in Virginia the Court is free to engage in a ground-up or "de novo" consideration of the validity of the local procedure. In an opinion by Justice Lawrence Koontz, considered by many to be a master of Virginia procedural intricacies and entanglements, a 4-to-3 majority of the Court held the local docket-clearing rule invalid.

Norfolk's Local Rule 2(F)(3), a part of the "Civil Case Management Administrative Plan" had been originally adopted by the Circuit Court of the City of Norfolk in 1998. The plan itself had as its stated purpose, what the Supreme Court in *Collins* acknowledged as "the laudable goal" of concluding all civil cases, except by leave of court and in suits for divorce, within twelve months of filing. In an apparent effort to achieve that goal, the Norfolk Local Rules in Rule 2(F)(3) provided that:

If any civil action is not served within the time provided by Va. Sup. Ct. R. 3:5(e), the Clerk shall prepare a notice of dismissal and send such notice to counsel for the plaintiff.

In the *Collins* litigation itself, plaintiff filed a case seeking damages for personal injuries allegedly resulting from the negligent operation of a motor vehicle by the defendant, but did not serve her with process. Within days after one year transpired from the date of filing, the circuit court, in accord with its local rule, mailed to Collins attorney a Notice of Dismissal stating that the circuit court on Friday, October 7, 2005 at 9:00 a.m. . . . pursuant to Supreme Court Rule [3:5(e)] and *Nelson v. Vaughan*, 210 Va. 1 [168 S.E.2d 126] (1969), will dismiss this case because [Shepherd] has not been served with process within one year after the filing of the . . . Motion for Judgment . . . unless the [c]ourt finds that [Collins] has exercised due diligence to have timely service on [the defendant].

As noted above, Collins did not appear on or before the date designated in the notice of dismissal, and the dismissal, nonsuit, and enforcement of dismissal described above then followed.

Challenges to the Local Rule. On appeal, Collins argued that the local rule is invalid because it abridges his "substantive right to take a nonsuit and refile his case." Further he contended that the Norfolk local rule conflicted with the procedures for discontinuance set forth in Virginia Code § 8.01-335, and that it permits dismissal of a case that was never served on the defendant in contravention of Va. Sup. Ct. R. 3:5(e).

Va. Sup. Ct. R. 3:5(e), the current Part Three embodiment of the long-standing one-year principle, provides that [n]o order, judgment or decree shall be entered against a defendant who was served with process more than one year after the institution of the action against that defendant unless the court finds as a fact that the plaintiff exercised due diligence to have timely service on that defendant. However, unlike the local rule, Va. Sup. Ct. R. 3:5(e) does not expressly contemplate dismissal of cases not served within a year, although such cases are potentially subject to dismissal under Va. Sup. Ct. R. 3:5(e) upon motion by the defendant as the Supreme Court held over a decade ago in *Gilbreath v. Brewster*, 250 Va. 436, 440, 463 S.E.2d 836, 837 (1995).

Despite the local rules reference to Va. Sup. Ct. R. 3:5(e), the Supreme Court found that the critical question was whether the circuit court had the authority to adopt a local rule that essentially translated Va. Sup. Ct. R. 3:5(e) into a mode of procedure for the court dismissing unserved cases *sua sponte*. Collins asserted that the circuit court did not have such authority because the local rule violates the provisions of Virginia Code § 8.01-4.

The Supreme Court remarked that while Virginia Code § 8.01-4 delegates to circuit courts the authority to establish rules regarding the management of their courts and the handling of cases, "[c]learly, however, Virginia Code § 8.01-4 denotes that such authority must be carefully exercised so that local rules do not encroach upon statutes, Rules of Court,

or case law."

Based in part on the language in Virginia Code § 8.01-4 expressly stating that local rules must not abridge the substantive rights of the parties or deprive any party from having a case heard on the merits, the Supreme Court found that the General Assembly's intention was that local rules govern the administration, but not become the determining factor in the ultimate outcome, of cases.

In the *Collins* opinion the Court noted that by operation of a procedure effectuated solely by its local rule the circuit court dismissed Collins case with prejudice without the case being heard on the merits. The Court observed that in the absence of this local rule, "Collins would have retained the right to take a nonsuit and refile his civil action beyond the one-year limitation period established by the local rule," in accord with Virginia Code § 8.01-380 and case authority such as *Berry v. F&S Fin. Mktg.*, 271 Va. 329, 332-33, 626 S.E.2d 821, 823 (2006), *Waterman v. Halverson*, 261 Va. 203, 208, 540 S.E.2d 867, 869 (2001), and *McManama v. Plunk*, 250 Va. 27, 32, 458 S.E.2d 759, 762 (1995)). The Supreme Court therefore held in *Collins* that:

"The dismissal under a local rule of a case that the plaintiff would otherwise be able to pursue under the Code, case law, and Rules of Court exceeds the authority delegated to circuit courts under Virginia Code § 8.01-4.

An important part of the analysis of the validity of this local rule was the fact that it is in tension with another Title 8.01 provision one which deals directly with the power of a court to dispose of cases where they are inactive on the docket for a period of time. This provision, Virginia Code § 8.01-335, governs circuit courts authority to discontinue inactive cases, and provides, in relevant part, that:

[A]ny court in which is pending an action, wherein for more than two years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket and the action shall thereby be discontinued. However, no case shall be discontinued if either party requests that it be continued. The court shall thereafter enter a pretrial order pursuant to Va. Sup. Ct. R. 4:13 controlling the subsequent course of the case to ensure a timely resolution of that case. If the court thereafter finds that the case has not been timely prosecuted pursuant to its pretrial order, it may strike the case from its docket. The clerk of the court shall notify the parties in interest if known, or their counsel of record at his last known address, at least fifteen days before the entry of such order of discontinuance so that all parties may have an opportunity to be heard on it. Any case discontinued under the provisions of this subsection may be reinstated, on motion, after notice to the parties in interest if known or their counsel of record, within one year from the date of such order but not after.

Any court in which is pending a case wherein for more than three years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket and the action shall thereby be discontinued. The court may dismiss cases under this subsection without any notice to the parties. The clerk shall provide the parties with a copy of the final order discontinuing or dismissing the case. Any case discontinued or dismissed under the provisions of this subsection may be reinstated, on motion, after notice to the parties in interest, if known, or their counsel of record within one year from the date of such order but not after.

Under Virginia Code § 8.01-335(A), the earliest point at which the circuit court may discontinue a pending case is after two years of inactivity, and even then discontinuance may be ordered only if neither party requests a continuance or the parties fail to abide by a schedule set by the court following a continuance. In the *Collins* decision, the Supreme Court noted that a case must be inactive for three years before a circuit court may dismiss it *sua sponte* under Virginia Code § 8.01-335(B). Additionally, Virginia Code § 8.01-335 provides the parties to a discontinued case the opportunity to reinstate the case within one year of the discontinuance.

The Court found that, in comparison to Virginia Code § 8.01-335, Local Rule 2(F)(3) would "drastically expand the circuit courts authority to dismiss an inactive case by permitting dismissal, *sua sponte*, after one year rather than after two or three years." It should also be noted that unlike Virginia Code § 8.01-335 the Norfolk local rule did not provide

an opportunity for revival of a discontinued case, thus the Court found that it "totally ignore[d] the statutory distinction between a discontinuance and a dismissal with prejudice."

Given the strictures of Virginia Code § 8.01-4, which among many other limitations expressly states that [n]o rule . . . shall be prescribed or enforced which is inconsistent with . . . any . . . statutory provision, the court found the inconsistency between the Norfolk Local Rule and Virginia Code § 8.01-335 to be "palpable and beyond debate." Thus the circuit court did not have the authority under Virginia Code § 8.01-4 to adopt a local rule permitting the *sua sponte* dismissal with prejudice of cases not served within a year of the filing date, and the local rule to that effect was simply invalid. As a consequence, the dismissal ordered in the *Collins* case itself was in error.

In concluding its analysis the Court rejected the argument that Collins failure to challenge the dismissal order until after the twenty-one day period set forth in Va. Sup. Ct. R. 1:1 barred relief from the dismissal. The Supreme Court, however, found that under longstanding precedent such as *Evans v. Smyth-Wythe Airport Commn*, 255 Va. 69, 73, 495 S.E.2d 825, 828 (1998); *Lapidus v. Lapidus*, 226 Va. 575, 579, 311 S.E.2d 786, 788 (1984); and *Anthony v. Kasey*, 83 Va. 338, 340, 5 S.E. 176, 177 (1887), an order is *void ab initio*, rather than merely voidable, if it is beyond the court's power. In that situation the order is a complete nullity that may be attacked directly or collaterally by all persons, anywhere, at any time, or in any manner, as the Court had explained in detail in *Singh v. Mooney*, 261 Va. 48, 52, 541 S.E.2d 549, 551 (2001).

In this case, the procedure utilized by the circuit court to enter the dismissal order was done pursuant to a local rule that, under Virginia Code § 8.01-4, the circuit court was not authorized to adopt. Thus the Court concluded that the mode of procedure utilized by the circuit court was one that it could not lawfully adopt. Accordingly, the dismissal order was *void ab initio* and subject to challenge at any time, the "21-day rule" notwithstanding.

The message for local courts in Virginia, and practitioners handling cases in the more management oriented courts, is that every statewide requirement in Rules of Court and particularly in statutes takes precedence and can invalidate a local provision that is in any material way inconsistent with the freedoms or procedures specified in the governing statewide provisions.

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Professor Sinclair, an active member of the Virginia Bar, teaches the program in Virginia Law & Practice at the University of Virginia School of Law. He is Professor of Law and served for many years as Associate Dean of the Law School. He has written more than a dozen books, and is the author of *Sinclair & Middleditch, Virginia Civil Procedure* (4th ed. 2003 and annual supplements), and co-author of *Friend & Sinclair, Virginia Pleading and Practice* (2nd ed. 2007 with annual supplements). Both are treatises on Virginia law published by Lexis Law Publishing. Professor Sinclair is Chair of the Advisory Committee on Rules of Court for Virginia, and has served as Reporter for the Virginia Model Jury Project for a number of years. He has served on the Board of Governors of the Litigation Section of the Virginia Bar Association and the Boyd-Graves Conference on Virginia Law. He edits the *Virginia Court Advance Rules and Practice Service* for Lexis Law Publishing and is a frequent lecturer at continuing education programs for attorneys and Virginia judges.



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Fox on Parker v. Parker, 950 So.2d 388

2008 Emerging Issues 661

Fox on Parker v. Parker, 950 So.2d 388

By Susan Fox

October 8, 2007

SUMMARY: The Florida Supreme Court recently clarified in *Parker* when relief from judgment can be obtained if fraudulent evidence is presented at trial and the time constraints in seeking such relief. Susan Fox, an expert on Florida Appellate Practice, discusses *Parker* and provides practical insights on what constitutes extrinsic and intrinsic fraud and how to proceed if counsel suspects material falsehoods in either testimony or documents offered at trial in a paternity suit or other civil case.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: A party has only one year to seek relief from a judgment based on deception and false testimony accord-ing to *Parker v. Parker, 950 So. 2d 388 (Fla. 2007)*. In so ruling, the Florida high court resolved a conflict between Floridas district courts and agreed with the majority of other states which have also found that lies about paternity in a divorce action are intrinsic fraud, not extrinsic fraud, and thus an underlying di-vo-rce judgment was not subject to collateral attack.

Richard and Margaret Parker were married in 1996 and had a child two years later. In 2001, in her disso-lution petition, Margaret represented that Richard was the child's biological father. A final judgment was entered, dissolving the marriage and incorporating a marital settlement agreement acknowledging Rich-ard as the father and requiring him to pay child support. Fifteen months later, Richard had a DNA test conducted and discovered that he was not the child's biological father. Richard filed an independent civil action against Margaret claiming fraud. The trial court dismissed the action with prejudice.

On appeal, the Fourth District held that "the issue of paternity misrepresentation in marital dissolution proceedings is a matter of intrinsic fraud. It is not extrinsic fraud, or a fraud upon the court, that can form the basis for relief from judgment more than a year later." *Parker v. Parker, 916 So. 2d 926 (Fla. 4th DCA 2005)*. The Fourth District certified conflict with *M.A.F. v. G.L.K., 573 So. 2d 862 (Fla. 1st DCA 1990)* which had reached the opposite result. In *M.A.F.*, the First District held that when a wife knows that her husband is not the father of her children, and the husband does not know, concealment of that knowledge in a divorce proceeding involving child support is extrinsic fraud upon the court; as such, the husband's later attack on the judgment was not barred by the doctrine of *res judicata* or the one year limitation of ac-t-ions provision of FLORIDA RULES OF CIVIL PROCEDURE § 1.540(b).

The Importance of Defining Intrinsic or Extrinsic Fraud for Relief of Judgment. To resolve the issues, the supreme court analyzed the difference between intrinsic and extrinsic fraud for purposes of a motion for relief from judgment. This distinction is important because of the one-year limitation for filing a motion for relief from judgment under FLORIDA RULES OF CIVIL PROCEDURE § 1.540(b) which permits relief from judgments on grounds of fraud "whether heretofore denominated intrinsic or extrinsic." However, this rule further provides: "This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order, or proceeding or to set aside a judgment or decree *for fraud upon the court.*" FLORIDA RULES OF CIVIL PROCEDURE § 1.540(b).

The distinction between intrinsic fraud and extrinsic fraud (or fraud on the court) has been characterized as "elusive," particularly where the circumstances appear to be somewhat of a "hybrid" nature. *Guerriero v. Schaub*, 579 So. 2d 370, 371 (Fla. 4th DCA 1991). "Extrinsic fraud" is conduct which prevents a party from presenting his case or trying an issue before the court, and the prevention itself becomes a collateral issue to the cause; whereas "intrinsic fraud" is the presentation of misleading information on an issue before the court that was tried or could have been tried.

Margaret Parkers false misrepresentation concerning paternity was intrinsic fraud, according to the court, because it "concerned an issue that could have been raised in the dissolution proceedings, rather than an issue collateral to those proceedings." As such the court rejected the First Districts earlier reasoning that a husband had "no affirmative duty . . . to question" paternity "absent a sound basis to doubt otherwise." *M.A.F. v. G.L.K.* at 863 .

Extrinsic fraud or "fraud on the court" had been recognized as a difficult concept. If given a broad application so as to comprehend any type of misrepresentation by a witness or party which induced an incorrect factual determination by the trier of fact, judgments would be subject to frequent attack by independent actions, and the time for such attacks would be limited only by laches. *Alexander v. First National Bank*, 275 So. 2d 272 (Fla. 4th DCA 1973) (finding no extrinsic fraud when plaintiff in foreclosure and deficiency judgment case misstated amount of indebtedness). Accordingly, Florida courts had consistently rejected efforts to reopen claims based on perjury, *Truitt v. Truitt*, 383 So. 2d 276 (Fla. 5th DCA 1980), concealment of information, *August v. August*, 350 So. 2d 794 (Fla. 3d DCA 1977), fraudulent misrepresentation, *Erhardt v. Erhardt*, 362 So. 2d 70 (Fla. 2d DCA 1978), and the like. At the same time, the courts had allowed relief based on fraudulent inducement when a settlement agreement was based on fraudulent misrepresentations. *Brown v. Brown*, 432 So. 2d 704 (Fla. 3d DCA 1983).

Beware -- Court Preference is for Termination of Litigation. In its unanimous decision in *Parker v. Parker*, the supreme court came down strongly in favor of policy considerations that result in terminating litigation over allowing relief from judgments based on deception. Moreover, the court asserted a policy of protecting children over protecting the interests of a defrauded parent. Although the husband in *Parker* may have been innocently defrauded, as an adult, he was presumed aware of the high incidence of infidelity and able to act to ensure that the biological ties he deemed essential were present before entered into a settlement agreeing to pay child support. At the same time, the court noted the psychological devastation that disestablishment of paternity can have on a child. "The law should discourage adults from treating children they have parented as expendable when their adult relationships fall apart. It is the adults who can and should absorb the pain of betrayal rather than inflict additional betrayal on the involved children," the *Parker* court stated, quoting Theresa Glennon, *Expendable Children: Defining Belonging in a Broken World*, 8 Duke J. Gender L. & Pol'y 269, 275 (2001).

In so ruling, the Florida court joined Alabama, Arkansas, Oklahoma, South Carolina, Texas, and Vermont which have similarly held that a wife's misrepresentation regarding paternity in a dissolution of marriage proceeding constitutes intrinsic fraud, not extrinsic fraud. See, e.g., *Anonymous v. Anonymous*, 473 So. 2d 502 (Ala. Civ. App. 1984); *Graves v. Stevison*, 81 Ark. App. 137, 98 S.W.3d 848 (2003); *Miller v. Miller*, 956 P. 2d 887, 905 (Okla. 1998); *Mr. G. v. Mrs. G.*, 320 S.C. 305, 465 S.E.2d 101, 103 (App. 1995); *Temple v. Archambo*, 161 S.W. 3d 217 (Tex. App. 2005); *Godin v. Godin*, 168 Vt. 514, 725 A.2d 904 (1998). Nevada alone is mentioned as standing "in the minority," in *Love v.*

Love, 114 Nev. 572, 959 P.2d 523 (1998) finding this type of fraud to be extrinsic because it prevents the husband from knowing he has a claim or defense. The Florida court resolved Nevada's concern about deceived husbands by placing a duty on the husband to question paternity or at least to discover the existence of fraud within a one-year window after the divorce or be forever barred. The court noted the recent adoption of Fla. Stat. § 742.18 (2006) which provides the means and procedures by which a male may petition the trial court to disestablish paternity and terminate a child support obligation. Moreover, the court suggested that any further relief to defrauded males should come from the legislature.

The court's resolution of this dispute provides insight into an evolving view of the nature of paternity in Florida. This issue is discussed at length in the Fourth District's opinion and approved by the supreme court. The *Parker* opinion suggests it is unwise to upset established parent-child relationships, because the fact that a person has stood in the position of parent in the child's eyes must be given consideration. In earlier decisions, such as, in *Daniel v. Daniel*, 695 So. 2d 1253 (Fla. 1997), the Supreme Court had declared it the well-settled rule of law in this state that "a person has no legal duty to provide support for a minor child who is neither his natural nor his adopted child and for whose care and support he has not contracted." In contrast, *Parker* suggests that standing in as a child's father and failing to question paternity does create a duty of support.

The *Parker* decision, while rendered in the family law context, has important ramifications in civil cases. *Parker* strongly suggests that neither deception, false testimony nor falsified documents that result in a judgment will be considered extrinsic fraud. Accordingly, it will be important for trial counsel to closely examine all assumptions concerning testimony or documents presented at trial. None of these types of fraud can be the basis of a motion to vacate which is filed more than one year after the judgment.

Key Strategic Considerations. In light of the *Parker* decision, counsel should never rely upon the truth of the opposing party's testimony or documents. If adequate time to explore these areas has not been given in advance of trial, or if new matters not previously investigated arise at trial, investigation must continue after trial to discover material falsehoods. Opposing evidence, even if outrageously false, will not be a basis for relief more than one year after the judgment. As such, the *Parker* case may be cited, for example, as an additional basis for objecting to surprise or last minute witnesses or documents at trial. The inability to conduct ordinary scrutiny of evidence in discovery coupled with the *Parker* ruling may be adequate prejudice to avoid last minute additions.

A party who discovers that a judgment was based on false testimony may be forced to take several actions simultaneously. If the judgment is appealed, it should be noted that the pendency of an appeal does not extend the one-year limit for filing a Rule § 1.540(b) motion. See, e.g., *Weiss v. Berkett*, 907 So. 2d 1181, 1183 (Fla. 3d DCA 2005); *Flemenbaum v. Flemenbaum*, 636 So. 2d 579, 580 n. 1 (Fla. 4th DCA 1994); *Molinos Del S.A. v. E.I. DuPont de Nemours and Co.*, 947 So. 2d 521, 524 (Fla. 4th DCA 2006). As such, counsel may have to proceed on dual paths of seeking relief from a judgment and appealing it at the same time. In that instance, counsel would have to seek relinquishment of jurisdiction from the appellate court in order to obtain a hearing on the motion for relief from judgment.

If extrinsic fraud is alleged, an independent action alleging fraud on the court, not a motion on Rule § 1.540, must be filed. *Parker*, 950 So. 2d at 392 (explaining that allegations of extrinsic fraud must be brought as an independent action); *Romero v. Romero*, 959 So. 2d 333, 338 (Fla. 3d DCA 2007). If counsel is uncertain whether the fraud will be deemed intrinsic or extrinsic and the one year period has not expired, the motion under Rule § 1.540 would logically be pursued first.

In the specific example presented in *Parker*, DNA testing should become a more customary procedure in dissolution of marriage actions. Best practices would dictate that an attorney representing a putative father recommend testing as a standard procedure in such cases. As the court points out, such testing can be performed without drawing

blood or other invasive sampling techniques. Testing hair and other materials easily collected without the knowledge or cooperation of the subject is increasingly available. At the same time, both parties may have strategic concerns that would cause them to settle without formal testing. The mother may wish to avoid testing if she harbors any doubt about paternity and does not wish to risk losing all child support. A putative father may agree to pay some support despite his doubts in order to avoid rejecting or abandoning children he has parented. The practitioner must caution the parties that these decisions are to be viewed as final and may not be revisited at a later date, except within the one-year window for relief from judgment. In effect, the *Parker* decision creates a one-year window after the divorce to perform any DNA testing after which questioning of paternity is forever barred.

Settlement Agreements May Provide Remedies for Misrepresentation. Parties settling civil or commercial litigation may be able to circumvent the result in *Parker* by careful drafting of a settlement agreement. The husband in *Parker* may have protected himself by including a provision in the agreement that stated his reliance on the truthfulness of the wife's representations and that he would have a right to sue in contract for any monies wrongfully paid based on such representations. A right to sue in contract would be subject to the five-year limitations period of Fla. Stat. § 95.11(2)(b). In the paternity context addressed in *Parker*, such a provision could be void as against public policy for the reasons discussed by the court, however, in civil and commercial cases, such a provision should be enforceable. Among other things, careful attention would have to be given to the drafting of a general release given in connection with the settlement.

For Additional Discussion on Paternity See: *Florida Family Law*, Chapter 90 Paternity (5-90 Florida Family Law § 90.syn). *Disputed Paternity Proceedings*, Chapter 3 Evidentiary and Related Issues in Paternity Proceedings (1-3 Disputed Paternity Proceedings 3.syn), Chapter 2 Paternity Proceedings, § 2.07 Postjudgment Proceedings (1-2 Disputed Paternity Proceedings § 2.07), and Chapter 4, Conducting the Paternity Trial, § 4.25 Motion for New Trial Due to Newly Discovered Evidence (1-4 Disputed Paternity Proceedings § 4.25).

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Becker on Plaintiffs Duty to Take Defendants Affirmative Defenses

2008 Emerging Issues 610

Becker on Plaintiffs Duty to Take Defendants Affirmative Defenses, *Glozzo v. Univ. Urologists of Cleveland, Inc.*, 114 Ohio St. 3d 14

By Prof. Susan J. Becker

October 6, 2007

SUMMARY: Defendants commonly include a laundry list of affirmative defenses in their answers to avoid waiver. Many of these defenses are without merit and quietly fade into oblivion throughout the course of the litigation. The Supreme Court of Ohio's recent *Glozzo* decision, however, provides a stern reminder to plaintiffs attorneys that failure to seriously scrutinize defenses preserved in an opponent's answer, especially those related to alleged defects in service, may prove a fatal oversight. Professor Susan Becker, an expert on Ohio and federal civil procedure, explains the *Glozzo* case in this commentary and provides practical tips for evaluating and responding to affirmative defenses.

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: An Apparently Ordinary Lawsuit. From the filing of Frank Glozzos complaint on November 14, 2003 until the eve of trial in March 2005, the *Glozzo* case appeared to proceed as a medical malpractice case that was destined to reach trial on the merits, or at least settlement on the courthouse steps. On the morning of trial, however, plaintiffs counsel found themselves on the losing end of an argument over ineffective service of process. The case serves as a stern reminder of the power of affirmative defenses and the burden on counsel to take all defenses asserted in a responsive pleading seriously. Here is how the *Glozzo* case unfolded.

Defendants performed a medical procedure on plaintiff in June 2002. Believing that defendants had fallen below the ordinary standard of care for such procedures, plaintiff timely hand delivered a letter to defendants. This act provided the notice authorized by Ohio statute to extend the one-year statute of limitations by 180 days. *See* ORC Ann. 2305.113(B)(1). Plaintiff then timely filed the complaint on November 14, 2003.

The filing triggered plaintiffs obligation under Ohio Civ. R. 3(A) to perfect service within one year. Plaintiff attempted service via certified mail but that service was ineffective. The failure of service was noted on the docket and the clerks office mailed a copy of the failed notice to plaintiffs attorney. Defendants filed a timely answer that included insufficiency of service of process as one of several affirmative defenses.

The trial court set January 28, 2005 as the deadline for the parties to file dispositive motions and April 13, 2005 as

the trial date. Defendants actively participated in all pretrial stages of the litigation including attending a pretrial conference, engaging in discovery, exchanging expert reports and filing motions in limine. The Supreme Court of Ohio later characterized defendants conduct as mounting a vigorous defense on the merits. *Glozzo* at 12.

A Fatal Flaw Revisited. Nine days before the date set for trial, and more than two months after the trial courts deadline for filing of dispositive motions, defense counsel filed a motion to dismiss based on insufficiency of service. The trial court denied the motion due to its tardiness. Undeterred, defendants renewed their motion on the day of trial. Following oral argument, the trial court granted defendants motion to dismiss. The trial court reasoned that: (1) the failure of service prohibited the case from commencing during the one-year period required by Ohio Civ. R. 3(A); (2) the defendants had properly preserved the insufficiency of service of defense in their answer; and (3) the courts own deadline for dispositive motions did not bar its consideration of defendants tardy motion.

Appeals Court Sides with Plaintiff. Plaintiffs counsel prevailed in a split decision on their initial appeal. In *Glozzo v. Univ. Urologists of Cleveland, Inc., Cuyahoga App. No. 86371, 2006 Ohio 1726, 2006 Ohio App. LEXIS 1586* (April 6, 2006), Ohios Eighth District Court of Appeals relied on its own precedent to conclude that appellees voluntarily submitted themselves to the jurisdiction of the court and waived any objection to defective service by participating in the litigation. *Id.* at 13. The dissenting judge, however, opined that dismissal was not only allowed but indeed compelled by Supreme Court of Ohio precedent including *First Bank of Marietta v. Cline, 12 Ohio St.3d 317, 466 N.E.2d 567 (1984).* *Id.* at 18.

The Supreme Court of Ohio Reinstates Dismissal. The Court was unreceptive to the legal and equitable arguments plaintiff advanced to support the appellate courts restoration of the case.

Plaintiffs Legal Arguments Rejected. The Court found no ambiguity in the language of Ohio Civ. R. 12(B). This rule, the Court explained, gives a party responding to a claim the option of asserting certain defenses *either* in a motion to dismiss filed prior to the responsive pleading or in the pleading itself. *Glozzo* at 7.

The defenses of lack of personal jurisdiction, improper venue, and insufficiency of process or of service of process are only waived, the Court observed, if (1) a party elects to file motion prior to a responsive pleading and fails to include these defenses in that motion, or (2) a party declines to file a motion and then fails to include these defenses in the responsive pleading. *Glozzo* at 8, citing Ohio Civ. R. 12(H)(1). The Court observed that the *Glozzo* defendants properly utilized the second option including their insufficiency of service defense in their answer rather than immediately filing a motion to dismiss. *Glozzo* at 12.

In addition to the literal language of the rule, the Court agreed with the Eighth District dissenting judge that the Courts 1984 decision in *First Bank of Marietta v. Cline, 12 Ohio St. 3d 317 (Ohio 1984)* compelled dismissal of Glozzos lawsuit. In *Cline*, the defense of insufficiency of service was raised in the first responsive pleading, but the defendant did not pursue a motion to dismiss until all the evidence had been presented at trial. The *Cline* Court held that defendants failure to request a hearing on the service issue prior to trial did not waive the defense. *Glozzo* at 10. The *Glozzo* Court affirmed that holding: In our interpretation of the rule in *Cline*, we determined that a properly asserted and preserved defense may be raised even after trial has begun. Nothing in the facts here causes us to reconsider that conclusion. *Glozzo* at 11.

This language has application well beyond the *Glozzo* defendants insufficiency of service of process defense. The *Glozzo* language extends to all Ohio Civ. R. 12(B) defenses preserved in an answer, specifically lack of personal jurisdiction, improper venue, and insufficiency of process.

Plaintiffs Equitable Claims also Prove Unpersuasive. The Court was unsympathetic to Glozzos argument that the trial court abused its discretion by entertaining defendants motion to dismiss after the courts own deadlines for dispositive motions had passed. It is important to note that the Court did not reject this challenge to the trial courts dismissal as being per se meritless. Rather, the court rejected this particular plaintiffs abuse of discretion argument for

being conclusory and failing to demonstrate how the specific facts of this case support that position. *Glozzo* at 11.

In theory, the Courts resolution of Glozzos abuse of discretion argument invites counsel confronted with similar situations to fashion more fact-intensive and perhaps creative arguments as to why the trial court abused its discretion by ignoring its own dispositive motion deadline. Counsel would need to emphasize how they reasonably relied on the deadline and how the trial courts decision to ignore the deadline prejudiced their case. In practice, however, it is difficult to envision exactly what facts or arguments would have proven compelling to this Court. Stated differently, the plaintiffs seemingly reasonable reliance on the passage of the dispositive motion deadline as extinguishing any potential dispositive motions in the case, paired with the extreme prejudice resulting from the trial courts unanticipated erasure of that deadline, seem to make the argument for the plaintiff. Unfortunately for Mr. Glozzo, only a single dissenting justice shared this view. *Glozzo* at 19-20.

Continuing with its unsympathetic assessment of plaintiffs procedural plight, the Court rejected plaintiffs equitable argument that defendants tardy filing of the motion to dismiss encourages legal gamesmanship and prevents the efficient administration of justice. *Glozzo* at 15. The Court again rebuffed plaintiffs argument based on the unambiguous requirements of the civil rules. In affirming the trial courts dismissal of the case, the Court opined: The obligation is upon plaintiffs to perfect service of process; defendants have no duty to assist them in fulfilling this obligation. Whether appellants' conduct constituted gamesmanship or good litigation strategy, they followed the rules. If such behavior should not be permitted in the future, the proper avenue for redress would be to seek to change those rules. *Glozzo* at 16-17.

Citations and Cross References. The federal rules of civil procedure on waiver of defenses are essentially identical to the Ohio rules. See *Fed.R.Civ.P. 12(B)* and (H) (*USCS Fed Rules Civ Proc R 12*). Federal courts are split on whether a defendant waives the right to pursue a motion to dismiss by preserving the grounds for the motion in an answer and then filing the motion after participating in the litigation. *Cp., e.g., Rentz v. Swift Transportation, Co., Inc., 185 F.R.D. 693 (D. Ga. 1998)* (holding that defendants did waive right to assert insufficient service in a motion to dismiss after extensive participation in the litigation), and *Snodgrass v. Roberts Dairy, 82 F.R.D. 626 (D. Neb. 1979)* (finding no waiver where defendant asserted motion to dismiss seven months after preserving insufficiency of service defense in answer). Anderson's Ohio Pretrial Litigation Practice: Chapter 3 Responsive Pleadings (1-3 Ohio Pretrial Litigation § 3.syn); Anderson's Ohio Pretrial Litigation Practice: Chapter 11 Pretrial Motion Practice, (2-11 Ohio Pretrial Litigation § 11.syn).

Practice Tips

- . Carefully scrutinize affirmative defenses filed in response to an original claim, counter claim or cross claim.
- . If the need for remedial measures is identified in those defenses for example effectuating proper service, amending the complaint, or adding or substituting a party -- take the necessary steps immediately.
- . If unsure about the validity of any of an opponents affirmative defenses, use contention interrogatories to force the opponent to reveal the factual and legal basis for those defenses.
- . Recognize that the passing of the courts deadline for dispositive motions is not carved in stone and the trial court has significant discretion to ignore that deadline even after it had passed.

Illustrative Examples. Although not addressed in *Glozzo*, attorneys should also keep in mind that a defendant can assert the defenses of failure to state a claim, failure to join an indispensable party, and lack of subject matter jurisdiction at trial, even if the defendant has not preserved those defenses in an the answer or otherwise raised them prior to trial. Ohio Civ. R. 12(H)(2) and Ohio Civ. R. 12(3). Plaintiffs counsel avoid unpleasant surprises at trial by fully investigating any information revealed during discovery or other pretrial proceedings suggesting that one or more of

these defenses may prove viable.

As a general rule, the lengthy list of affirmative defenses set forth in Ohio Civ. R. 8(C) are waived if not included in a responsive pleading. Ohio attorneys should note, however, that even that rule has an escape clause. Ohio Civ. R. 15(A) allows a party to seek leave of court to amend an answer and further directs that Leave of court shall be freely given when justice so requires.

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Professor Susan J. Becker graduated magna cum laude from Cleveland State University's Cleveland-Marshall College of Law in 1983. Following a two-year clerkship with the Honorable Judge Robert Krupansky of the U.S. Court of Appeals for the Sixth Circuit, she worked for five years as a litigation associate at Jones, Day where her practice areas included products liability, employment law, and commercial litigation at both the trial and appellate level in state and federal courts. She joined the full-time faculty of Cleveland-Marshall College of Law in 1990 where she teaches Civil Procedure, Remedies, Contracts, Pretrial Practice, Legal Ethics, and Sexual Orientation and the Law. Her publications focus primarily on civil litigation and civil justice reform and include two books: *Discovery of Current and Former Employees* (ABA 2005) and *The Law of Professional Conduct in Ohio* (LexisNexis forthcoming fall 2007) with Lloyd Snyder and Jack Guttenberg. Since 2003 Professor Becker has served on the Supreme Court of Ohio's Commission on Rules of Practice and Procedure and currently chairs the Commission's Civil Rules Committee. She has been a member of the Advisory Group for the U.S. District Court for the Northern District of Ohio since 1995 and co-chaired the Advisory Groups Committee on Professionalism from 1999 to 2005. Professor Becker also maintains a modest pro bono legal practice.



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Bisceglie on Williamson v. PricewaterhouseCoopers LLP

2008 Emerging Issues 496

Bisceglie on Williamson v. PricewaterhouseCoopers LLP

By Kyle C. Bisceglie

September 14, 2007

SUMMARY: The NY Ct. of Apps. found the continuous representation doctrine inapplicable to toll the three-year statute of limitations for accounting malpractice claims where the firm provided only annual audits governed by separate annual engagement letters. Kyle Bisceglie, a Partner at Olshan Grundman, examines this decision and considerations that remain, including whether on-going services related to the audit would toll the statute of limitations.

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ARTICLE: Annual Audits Alone Will Not Support Application of Continuous Representation Doctrine

In *Williamson v. PricewaterhouseCoopers LLP*, 9 N.Y.3d 1, 2007 N.Y.LEXIS 1455 (2007), the Court of Appeals addressed for the first time the continuous representation doctrine in the context of an accounting malpractice claim. By unanimous opinion, the Court found the doctrine inapplicable where the plaintiff alleged that the accountants performed only annual audit engagements. Each audit was done pursuant to a separate engagement letter "for the provision of separate and discrete audit services" for year-end financial statements, rather than there being on-going services that related back to the services in the years being challenged. The Court noted the plaintiff's fatal failure to allege "further representation regarding the audits" by reexamination audit or otherwise, and found the allegation of a "continuing professional relationship" insufficient to warrant application of the continuous representation doctrine.

The continuous representation doctrine has its origins in the continuous treatment doctrine from medical malpractice actions. Key to the application of that doctrine is the requirement that the plaintiff receive "continuous treatment for the same illness, injury or condition" which gave rise to the challenged conduct. The continuous treatment doctrine does not apply to periodic examinations or treatment of other conditions, nor does it apply where the continuing services are unrelated to the services being challenged.

As it did in its decisions in the legal malpractice area (see, e.g., *Shumsky v. Eisenstein*, 96 N.Y.2d 164, 750 N.E.2d 67, 726 N.Y.S.2d 365 (2001)), in *Williamson* the Court of Appeals applied these same principles in the accounting context. The Court looked in the pleadings for some indication of "mutual understanding" by the parties to the engagement that the auditors would provide further representation as to a past audit, or for an on-going cause or condition emanating from those past audits. Citing annual engagement letters and lack of remedial or advisory services, the Court of Appeals found "the purpose underlying the continuous representation doctrine would not be served by its

application here."

This case is significant for the definitiveness and breadth of its finding that annual audits alone will not support application of the continuous representation doctrine.

Williamson in Context of Non-medical Professional Malpractice Claims. CPLR§ 214(6) provides a three-year statute of limitations for non-medical professional malpractice claims whether pled as tort claims or as contract claims. The statute applies to lawyers, accountants and architects, but not to insurance agents, brokers or actuaries. See *Chase Scientific Research, Inc. v. NIA Group, Inc.*, 96 N.Y.2d 20, 725 N.Y.S.2d 592, 749 N.E.2d 161 (2001); *Castle Oil Corp. v. Thompson Pension Employee Plans, Inc.*, 299 A.D.2d 513, 750 N.Y.S.2d 629 (2d Dep't 2002). A malpractice claim accrues when the malpractice is committed, not when it is discovered. See *Glamm v. Allen*, 57 N.Y.2d 87, 439 N.E.2d 390, 453 N.Y.S.2d 674 (1982); *McDermott v. Torre*, 56 N.Y.2d 399, 437 N.E.2d 1108, 452 N.Y.S.2d (1982). In the context of accounting malpractice, accrual occurs upon the client's receipt of the accountant's work. *Ackerman v. Price Waterhouse*, 252 A.D.2d 179, 683 N.Y.S.2d 179 (1st Dep't 1998).

The Court of Appeals first applied the continuous treatment doctrine to toll medical malpractice claims in *Borgia v. City of New York*, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962). This was codified in 1975 in CPLR § 214-a. The Court of Appeals applied the continuous representation doctrine to legal malpractice claims in *Greene v. Greene*, 56 N.Y.2d 86, 95, 436 N.E.2d 496, 501, 451 N.Y.S.2d 46, 51 (1982); see also *Glamm*, 57 N.Y.2d at 93, 439 N.E.2d at 393, 453 N.Y.S.2d at 677. The Court has also made clear that the doctrine requires an expectation of continued representation on the specific subject matter supporting the malpractice claim. See *McCoy v. Feinman*, 99 N.Y.2d 295, 785 N.E.2d 714, 795 N.Y.S.2d 693 (2002).

Williamson squarely applies the rationale of the doctrine in unaltered form to audits. Unlike legal engagements or medical treatment, which can continue for years and may, unexpectedly, require further professional attention after substantial hiatus, auditing services are more regimented, annual engagements that end when the auditors sign and deliver the audit opinion. Refusal to apply the continuous representation doctrine to audits limits auditors' exposure to malpractice claims by eliminating the tolling of the limitations period.

How Far Does *Williamson* Go? Practitioners will naturally ask if there are any remaining circumstances that warrant application of the continuous representation doctrine to toll claims against auditors. The *Williamson* Court would permit tolling where the plaintiff challenged past audit services and the accountant was performing other on-going accounting services that relate to that audit. These are narrow circumstances. The Court of Appeals has already decided in the context of a legal malpractice claim that the continuous representation doctrine provides tolling "only where the continuing representation pertains specifically to the matter in which the attorney committed the alleged malpractice." *Shumsky*, 96 N.Y.2d at 168, 750 N.E.2d at 71, 726 N.Y.S.2d at 369. Just when those other on-going accounting services are related to the audits is the remaining question. In *Ackerman*, continuous representation was found where accountants were accused of repeatedly using an improper accounting method and were "handling" an apparently related IRS audit of partnerships in which the individual plaintiffs participated. *Ackerman*, 252 A.D.2d at 205, 683 N.Y.S.2d at 196. However, the rationale of *Williamson* brings into question the *Ackerman* Court's use of "repeated improper accounting" as well as what it meant by "handle" the IRS audit.

How to measure whether services are related for purposes of the continuous representation doctrine was inconclusively tested recently in the context of a legal malpractice claim pending before the NY Supreme Court in *Deep v. Boies*, 2007 N.Y. Misc. LEXIS 5688 (August 9, 2007). The defendants pointed out that they represented the plaintiff in a copyright litigation and in "separate and distinct" transactional matters. The plaintiff argued that there was a "mutual understanding" that defendants would represent him in a "comprehensive effort" to exploit his intellectual property. The Court relied on the lack of a specific engagement letter to deny the defendants' request for summary judgment.

Strategic Considerations for Accountants, Professionals and Insurers. *Williamson* reemphasizes the importance of annual engagement letters for audits, compilations, and review assignments, especially those involving high risk clients.

To some extent, this is common practice and AICPA standards and professional liability policies encourage accountants to prepare engagement letters with clients annually. However, best practices dictate that any additional services should be engaged separately to further delineate between those services and the audit services. This is particularly true of services of an on-going nature, such as a dispute with the IRS that relates to an audit, or reaudit services where the accountant is re-examining prior years' work, or consulting services.

Strategic Considerations for Management and Plaintiffs. Williamson and the three-year statute of limitations in CPLR § 214(6) increase the difficulty of maintaining malpractice actions against professionals arising from long-percolating but recently discovered financial improprieties. However, where accountants are involved in fraud, the plaintiff is entitled to a statute of limitations of six years from commission of the fraud, or two years from the date the plaintiff discovered or should have discovered it. *See Linden v. Moskowitz*, 294 A.D.2d 114, 743 N.Y.S.2d 65 (1st Dep't 2002); *Cappelli v. Berkshire*, 276 A.D.2d 458, 713 N.Y.S.2d 756 (2d Dep't 2000). Additionally, a plaintiff may still have the six-year statute of limitations for contract claims that are truly independent of malpractice-related allegations, such as claims for excessive charges, indemnification (*In Re: Estate of Edward Hyman*, 2007 N.Y. Misc. LEXIS 5644 (July 25, 2007)), or other express breaches of the engagement letter that do not sound in malpractice.

Attorneys counseling companies that retain auditors should negotiate the engagement agreement to provide for extension of any statute of limitations to "upon discovery" rather than "accrual." The next line of defense is early engagement of forensic examiners and case theory development. The practitioner should consider use of a tolling agreement during investigation. Additionally, in every audit, accountants make substantial use of prior work that is carried forward into the most current audit engagement. This may include prior years' working papers, carry-forward or permanent files, past financial statements or auditor's reports. In particular, the carry-forward or permanent file may contain significant audit documentation from prior years. The Appellate Division opinion in *Williamson* barely touched on the argument that continuous representation may be shown by the auditor's use and reliance on this documentation in the current audit year's workpapers. *Williamson v. PricewaterhouseCoopers LLP*, 32 A.D.3d 179, 184, 817 N.Y.S. 2d 61, 65 (1st Dep't 2006).

For additional discussion of the continuous representation doctrine see: New York Civil Practice: CPLR (Weinstein, Korn & Miller) P 214.25 (continuous representation doctrine and tolling limitations period in action against professional); New York Civil Practice: CPLR (Weinstein, Korn & Miller) P 214.26 (who is a "professional" and preclusion of contract statute of limitations); *CPLR Manual* § 2.18 (statutes of limitations for malpractice actions other than medical, dental or podiatric); LexisNexis AnswerGuide New York Civil Litigation § 4.11 (determining the applicable limitations period); Warren's Negligence in the New York Courts § 15.08 (application of the three-year statute of limitations for malpractice actions); Warren's Negligence in the New York Courts § 12.26 (overview of professional malpractice and statute of limitations); New York Practice Guide: Negligence § 6.02 (time periods for professional malpractice and when they begin to run).

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Revision of the FRCP (2007)

2008 Emerging Issues 3059

Moore's Federal Practice, Revision of the Federal Rules of Civil Procedure (2007)

By Moore's Federal Practice

September 1, 2007

SUMMARY: This pamphlet drawn from Moore's Federal Practice addresses the numerous Civil Rule changes scheduled to take effect on December 1, 2007, including new Rule 5.2 and extensive stylistic revisions to Rules 1 through 86. Click on the link below to see a synopsis and preface by Lee H. Rosenthal, U.S. District Judge, Southern District of Texas, as well as the rules revisions and style amendments.

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Goldsmith on Streamlining Collection Matters using new Cal Rule of Court 3.740

2008 Emerging Issues 488

Goldsmith on Streamlining Collection Matters using new Cal Rule of Court 3.740

By William I. Goldsmith

September 1, 2007

SUMMARY: New Rules Adopted for Simple Civil Collection Cases by California Judicial Council In a major new Rule of Court adopted by the California Judicial Council, changes in the way simple civil collection matters are processed in court will save much wasted time in needless appearances, reducing the cost of such matters and increasing the efficiencies of the courts and practioners. Under the new rules, which went into effect July 1, 2007, collection cases less than \$25,000 arising from a transaction in which property, services, or money were acquired on credit from a business or person will become categorized separately and handled more efficiently under a new Rule of Court. This commentary, written by William I. Goldsmith of Goldsmith & Hull, who served on the Judicial Council committee that drafted these new procedural rules and is an editorial consultant to the new publication Matthew Bender Practice Guide: California Debt Collection And Enforcement of Judgments, discusses practical applications for this new rule

PDF LINK: [Click Here for Enhanced PDF of Commentary](#)

ARTICLE: On July 1, 2007, the procedure for handling most collection cases in California changed dramatically. Simple collection matters, defined as those claims of \$25,000 or less arising from a transaction in which property, services, or money was acquired on credit, suddenly became more efficient for the courts, litigants, and counsel. The California Judicial Council remedied needless appearances, judicial intervention, time, and perhaps most important of all, unjustified and ill advised monetary sanctions being levied, by eliminating the need for the vast majority of these types of matters to be processed within the fast track rules currently followed by California courts.

Prior to July 1, 2007, such straightforward collection matters were handled no differently than other civil actions, complete with multiple status conferences, case management conferences, and hearings for orders to show cause. Though arguably necessary in larger and more complex matters, in simple collection cases these protracted conferences and hearings were not only a drain on the courts' administrative staff and judicial officers, but also were costly for attorneys, plaintiffs, and defendants.

Moreover, with in excess of 95 percent of these matters being resolved by default judgment, only appearance attorneys hired by plaintiffs counsel for the day usually attended these proceedings. In most cases, the appearance attorneys spent their time merely explaining to a judicial officer what was obvious from a reading of the docket itself for example, that the defendants had skipped and thus could not be timely served, and that additional time was needed to locate and serve them, or that the Request for Entry of Default Judgment had been submitted but had not yet been acted

upon by the court.

Recognizing that in the best interests of the courts, litigants, and attorneys, changes had to be made, the Judicial Council adopted California Rule of Court 3.740 to implement streamlined procedures for collection cases. For simple collections matters as defined above, litigants will now be initially exempt from the Fast Track rules for most civil cases [Cal. Rules of Court, Rule 3.740(c),(d)].

Often, the biggest obstacle facing practitioners in simple collection actions is actually personally serving each defendant. Acknowledging that a significant number of defendants in collection cases move, and move often, and that tracking them down is getting harder because of concerns relating to identity theft, consumers' privacy rights, and the like, litigants now will have six months from the filing date to effectuate service on all defendants. If service is not made within that time, or an order for publication has not been filed, the court will schedule a hearing to ascertain why reasonable monetary sanctions should not be imposed [Cal. Rules of Court, Rule 3.740(d),(e)]. This is a significant change from the prior rule mandating that service be made within 60 days from the filing date. Personally serving defendants whose address is known is not and was never the issue. Tracking down defendants who move (skip) typically takes time and effort. The new time limits set by the Judicial Council give the practitioner a fair and reasonable amount of time to accomplish this.

But a few words to the wise: Do not wait until the last minute to file your proof of service or applications for an order for publication. Court staff will not look kindly on that. In fact, under the new provisions, these documents must be filed at least 10 court days before the order to show cause hearing [Cal. Rules of Court, Rule 3.740(e)]. For attorneys who do a great deal of this type of work, best practice dictates that you use a five-month deadline internally, to give the court and your process servers and staff enough wiggle room for any unexpected contingencies.

Once you have accomplished personal service, the court must automatically continue the order to show cause hearing for 360 days from the date the complaint was filed [Cal. Rules of Court, Rule 3.740(f)].

Once served, plaintiffs will have up to almost one full year to obtain a default judgment. Though attorneys typically are not compensated until they actually collect money, and so have every incentive to move these matters along as expeditiously as possible, errors are sometimes made in submitting the forms to court. And in some cases, the court enters the default but requests either an explanation or more documents to substantiate the claim.

In these instances, counsel must take extra time to make the necessary corrections or obtain further documentation from the client. The lesson to be learned is that it is best not to wait until the last minute to submit your request for default and judgment, so as to allow yourself enough time to correct any errors or address any questions or concerns the court may have before the 360 days run.

If any defendant files a response in the case, the matter then comes back into the Fast Track system and is handled as any other civil matter [Cal. Rules of Court 3.712(d)]. The principal aim of these new rules is to address the vast majority of collection matters that proceed by default judgment.

Finally, regardless of whether or not a response is filed, the new rules recognize that settlement is a good thing and that litigants should not be punished by being forced to appear in court merely to explain that a matter has settled. Thus, the rules now provide that upon the filing of a Notice of Settlement, the court must vacate all hearings, case management conferences, and trial dates [Cal. Rules of Court, Rule 3.741].

For additional discussion and references to the debt collection rules discussed in this commentary, see Matthew Bender Practice Guide: California Debt Collection and Enforcement of Judgments, Ch. 6, *Litigation to Recover Debts*<m>*Selecting the Appropriate Cause of Action*, § 6.19A.

For general coverage of the procedural issues in debt collection actions, see Matthew Bender Practice Guide: California Debt Collection and Enforcement of Judgment, Ch. 6, *Litigation to Recover Debts* Selecting the Appropriate Causes of Action, and Ch. 7, *Litigation to Recover Debts* Trying and Proving the Case.

For general discussion of the Trial Court Delay Reduction Act (fast track) rules, see California Forms of Pleading and Practice, Ch. 522, *Trial Court Delay Reduction* (Matthew Bender).

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Mr. Goldsmith has served as a judge pro tem and arbitrator with the Los Angeles County Superior Courts and the Los Angeles County Bar Association (attorney fee disputes). He received his B.A. degree cum laude from the University of California at Los Angeles in 1975, and his J.D. degree from La Verne University in 1978. He has an AV' rating from Martindale-Hubbell.

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