SIDEBAR

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Containing the Cost of Litigation

by J. Walter Sinclair, Esq.

February 2008

In recent years there have been an increasing number of programs and seminars addressing the reduction in the number of trials, jury and bench, in both state and federal courts across the country. The topic of the ever increasing cost of litigation is a major focus of all of these discussions. Some participants believe that the cost to get prepared for trial is preventing many meritorious matters from going to trial. In many instances, the amount at risk simply cannot justify the expense to get the case to trial.

In a recent meeting in Dallas, Texas a group of judges, in-house corporate counsel, federal and state judicial administrative officers and trial attorneys from across the United States gathered to discuss the rising cost of litigation in the American jury trial system.

The meeting was a brainstorming session, identifying various factors that were believed to affect the cost of litigation. Those included, but were not limited to: excessive discovery and discovery disputes; front end loading of discovery (especially in federal court); excessive motion practice, especially summary judgments; rising billing rates – for both attorneys and experts, along with the excessive use of expert testimony; law firm marketing and economics; the cost of mock trials, focus groups and jury consultants to evaluate the risk of trial versus the results of trial; and, finally, the cost of appeals and the uncertainty and delays they bring to the process.

There was also a detailed discussion of the judicial resources available in the systems, state and federal, and the apparent shifting of priorities within the jury system. There appears to have been a change in the paradigm from when getting to "trial" was the focus of every lawsuit. The lack of judicial resources, i.e. an adequate number of judges and staff to deal with the increasing dockets, along with the lack of experienced trial judges on the bench. All resulting in a perceived lack of meaningful judicial involvement in docketing and discovery proceedings.

Historically the paradigm of the trial was that everything that

Inside This Issue:

Upcoming Events 6

Complaints Filed 10

Circuit Decisions 18

Jury Trials 33

Visiting Judges 38

Note of Thanks 41

Officers 42

Containing the Cost of Litigation by Walt Sinclair

came before the trial was focused on getting a matter ready to go to trial. The pleadings were relatively short, i.e., notice pleadings, simply designed to put a party on notice as to why they were being sued. There was little to no discovery used solely to discover the basic and fundamental aspects of an opponent's case. Dispositive motions were not prevalent. Summary judgment motions were seldom filed, and less seldom granted. The goal was focused on preparing for and getting to trial. Gradually, over the years this paradigm seems to have shifted. Now pleadings have become much more detailed, asserting not only the obvious applicable claims, but any and every other possible derivative claim that might exist. And discovery has become an exploratory endeavor to "discover" additional claims, rather than simply develop the facts to prove the alleged claims or defenses. Every potential witness is deposed, every potential fact and document is discovered. The cost has continued to increase and increase. Dispositive motions have become frequent. Over time, it has developed that there is a significant summary judgment/dispositive motions practice in most cases with significant time designed into the case management order to accommodate them. Then, rather than going to trial, there has been an additional shift to ADR, with every party being encouraged, if not required, to try some type of ADR, at a minimum, non-binding mediation. This paradigm shift has resulted in changing both the focus and the intent of getting a case ready for trial. And, as each of these phases grow in use, the cost of getting to trial has grown exponentially.

When finally ready for trial, over time, several changes have developed. For the overworked and constantly evaluated judge, there developed a discussion of how to 'manage' one's docket. How to reduce the amount of litigation. Judicial training began to include encouragement of both mediation, and settlements. Some judges (and administrators) took this to heart and decided it was a 'failure' of the system if a matter had to be tried. That used to be the purpose of the system, the American Jury Trial.

"Every potential witness is deposed, every potential fact and document is discovered."

A fundamental right so important to our founding fathers that they made it part of the Constitution of the United States. Referred to by many of our founding fathers as one of the essential democratic rights in a system of justice. To not be judged by the government, but by one's peers.

So, what is happening to the jury trial? Many perceive it as an undesirable endeavor, leading to a lot of effort to avoid going to trial, on both the part of the bench and the bar. And, as a result, a lot of attorneys who would have been 'trying' trials in the past, now spend most of their time 'litigating' cases. Today, litigators excel in brief writing, discovery and motions. Fewer and fewer attorneys have significant experience in actually trying lawsuits. Over time, many attorneys appear to have became convinced that going to trial was just too risky, although they seldom believe that from their own experience, but rather from the risks of which they have heard. And they counsel their clients that the last thing the client wants is to leave his/her faith in the hands of 12 (or worse, 6) jurors, whom they do not know. Attorneys (and mediators, and judges) are counseling their clients to settle at all costs, rather than take the risk of going to trial. The clients begin to believe their attorneys. This results in the clients having the same concerns and no one wants to go to trial. What a shift in the paradigm of the American Jury system; and what a tremendous loss to our judicial system. The jury trial system has its problems and faults; however, it is still the best system known to man, and to those who have spent a significant amount of their time in trial, a system in which everyone should believe.

So the current paradigm has evolved to the role of pleadings, discovery and dispositive motions obfuscating the historic goal of the jury trial.

So, if you do believe in the jury trial system, and that the system is truly the best that exists, the question becomes, what can one do about it? In the discussion in Texas, the participants addressed: what can be done to reverse the shift in paradigm and return the jury trial system to a cost effective, respected system. An analysis of the Rules of Civil Procedure and case law was undertaken to identify any changes that could be attempted to reduce the cost of litigation and streamline the system. The good news for Idaho is that many of the suggestions are already being done by many on the bench. In that discussion, it was the consensus of the participants that if one

Containing the Cost of Litigation by Walt Sinclair

properly applied the existing discretion contained within the Rules of Civil Procedure and existing statutes to establish and enforce reasonable limits on discovery and motions, tailored to the specific needs of each case, the cost would come down and be appropriate for the case. From the perspective of the bench, this means judicial education of the rules, the discretion of the court and the effective application of the rules and discretions. Trial judges must be encouraged and educated to become involved in discovery and pretrial planning, when and as needed; not to micromanage the parties' trial, but to facilitate addressing the important issues, in a timely manner. The Judges need to be accessible for discovery and pretrial planning when needed and willing to get involved. From the bar's perspective, this means Attorneys must work in partnership with each other and the court to facilitate the discovery and pretrial planning process, requesting judicial assistance when and as needed, to help set appropriate limits on discovery and pretrial motions on a case-specific basis. The bench and the bar need to monitor/enforce the existing rule limits on depositions (10 per side under the federal rules, for a maximum of 7 hours per party). This may be more than needed in many cases; a minimum, not a maximum, yet not enough in other cases. Similarly, the bench and the bar need to monitor/enforce the existing rule limits on interrogatories (25 under the federal rules, including subparts). Furthermore, general and repetitive discovery objections should be reviewed with scrutiny. Only well stated and applicable objections should be countenanced.

Furthermore, the parties and the court need to discuss and establish the appropriate length of trial on a case-by-case basis. Many cases do not need as much time as the parties would suggest, but the court should not unreasonably limit the trial time available either. Every witness need not be called, every exhibit need not be submitted into evidence. The trial should be focused, and the court needs to facilitate that discussion and enforce reasonable limits fair to both sides. As a suggestion of a change that might help, it was suggested that a rule amendment be adopted to limit Requests for Admissions to only be used to establish the predicate for the admission of evidence.

"Every witness need not be called, every exhibit need not be submitted into evidence."

Many parties currently assert so many objections and devise such structured responses that little if anything is gained by asking them; while, a considerable amount of time and expense is interjected in drafting and responding to the Requests for Admission. Further, it was suggested that the rules committee consider whether the list of topics listed in Rule 9 of the FRCP (and corresponding state rules), requiring particularized pleadings be expanded to include (among others) punitive damages, and whether to require a motion for leave to submit a punitive damages claim based on a showing of the ability to meet existing punitive damages standards (such as exists currently in Idaho). Such a change would require a Rule revisions to apply across the federal, and many state judicial systems.

The consensus of the discussion in Texas was that it was believed that to keep cases moving appropriately, and to facilitate discovery disputes, informal conferences with the trial judge should be required before a party can file a discovery motion, institutionalizing the process in both the state and federal systems, a practice which is well used in the Idaho federal district court system. It was also believed that we need to reinvigorate meaningful pretrial planning discussions (Rule 16 in the Federal Rules), to reduce the frontloading of costs of discovery and to tailor and stage discovery and motion practice appropriately, on a case-specific basis. This would differ based on the type of case, the complexity of the case and the amount at stake for either or both of the parties. It would facilitate the designing of individualized discovery plans, addressing the need/scope of initial disclosures, determine what issues will be appropriate for resolution by motions and considering whether to stage discovery and motion practice.

Finally, it was felt that the bench and bar need to revisit the level of detail required in the current Federal Joint Pretrial Order rule – addressing/limiting the application of the rule to what each case reasonably requires.

A discussion ensued about the overuse of expert witnesses and the skyrocketing expense of expert witnesses. It was believed that there was an over reliance on experts by the litigants. Judges can assist to some degree in this by requiring and

Containing the Cost of Litigation by Walt Sinclair

participating in discussions of the scope of necessary expert testimony, as part of pretrial and discovery planning. Judges can also closely review the appropriateness of expert witness fee requests. Judges can consider having a neutral expert on certain subjects to diffuse the dueling expert dilemma.

Finally, there was a discussion of the ever increasing legal billing rates. It was the consensus of the in-house attorneys and the trial attorneys in attendance that this situation has developed into a dispute between the two constituencies, each trying to protect their own interests and to a degree, not being cognizant of or sensitive to the other's interests. It was agreed that for this concern to be addressed best, it must be part of a mutual dialogue between the two interested parties, rather than a directive from either. The client and the attorney need to return to the partnership that used to be the foundation of their relationship. Each respecting the needs of the other.

In conclusion, to remove a significant factor that negatively affects the jury trial, the parties, with the appropriate assistance from the court, must reduce the cost of litigation and the concurrent delays. This will require the joint effort of the bench and the bar to streamline the process, to minimize excessive discovery, to focus motion practice, and to maximize the value of the American jury trial and restore the public's confidence in the jury trial.

# # #

About the Author:

J. Walter Sinclair is a partner at the law firm of Stoel Rives where he has developed a business, corporate, and complex litigation practice associated with product, contract, mass tort, securities, agricultural and anti-trust issues.

Walt received his J.D. from the University of Idaho College of Law in 1978; and received his B.A. in Economics from Stanford University in 1975.

He is licensed to practice law in Idaho, Oregon and Washington, as well as the United States District Court for the District of Idaho, and the United States Court of Appeals for the Ninth Circuit.

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Welcome New Members!

James K. Ball, Manweiler, Breen, Boise

Sean Beck and Victor Contreras
U of I College of Law

Brook Bond
Zarian Midgley & Johnson, Boise

Richard S. Christensen
Christensen Doman, St. Maries

David P. Claiborne
Ringert Clark, Boise

Professor Patrick D. Costello
University of Idaho College of Law
Legal Aid Clinic, Moscow

Daniel J. Gordon, Chambers of
Magistrate Judge Larry M. Boyle, Boise

Sam Creason, Moscow

Michael J. Elia, Moore Baskin, Boise

Jack Gjording, Gjording & Fouser
Boise

Charles Graham, Landeck Westberg
Judge & Graham, Moscow

Amy Howe, Assistant U.S. Attorney

Rory Jones, Trout Jones, Boise

Patrick E. Miller, Paine Hamblen
Coeur d'Alene

Ted C. Murdock, Holland & Hart Boise

Kirtlan G. Naylor, Naylor & Hales Boise

Lisa J. O'Hara, Chambers of Chief
United States Magistrate Judge
Mikel H. Williams, Boise

W. Christopher, Stoel Rives, Boise

Matthew Schelstrate, Moscow

Karen O. Sheehan,
Hall Farley Oberrecht and Blanton, Boise

Greg S. Silvey, Kuna

Stephen Smith, Hawley Troxell, Boise

A Note from the Editor

This newsletter is published for you — each member of the Idaho Chapter of the FBA. Over the next few months, it is my goal to highlight your area of practice, your expertise, and most importantly — your accomplishments. I would like to forward the information to the FBA in Washington, D.C. It is my hope that when members from across the nation are looking for local Idaho counsel, they will find you through this resource.

Susie Headlee, Editor

Susie_Boring-Headlee@id.uscourts.gov

(208) 334-9373

You can help by emailing to me your name, law firm, and other relevant information, including your specific area of expertise.

Please feel free to email me with suggestions of what you would like to see in our Chapter's newsletter *Sidebar*, or any other comments or ideas.

2008 UPCOMING EVENTS

Highlights

March 19, 2008

Environmental Issues in the West
Time: 12:00 to 1:30 p.m.
Location: James A. McClure Federal Building and U.S. Courthouse, 550 West Fort Street, Boise, Idaho
Pre-registration requested - $15.00 Idaho Chapter member; $25.00 Non-member
Contact Susie Headlee at 334-9373 or via email at **Susie_Boring-Headlee@id.uscourts.gov**

April 3, 2008

Reception for U.S. District Court Magistrate Judges
Time: 4:00 p.m. to 7:00 p.m.
Location: Washington Group Building's main dining hall (Boise)
Tickets $10.00 in advance; $15.00 at the door — Chapter Members will receive a free drink ticket!
(RSVP is requested for planning purposes)

Music provided by Frim Fram 4

frim fram 4

April 4, 2008

Investiture of the Honorable Candy Dale, Magistrate Judge, U.S. District Court
Time: 2:30 p.m. with reception immediately following
Location: James A. McClure Federal Building and U.S. Courthouse, 6th Floor, Courtroom No. 1 (Boise)

May 2, 2008

Annual CLE Program
Time: 8:30 a.m. to 4:00 p.m.
Location: U.S. Federal Courthouse, Pocatello, Idaho

FEDERAL COURT PRACTICE TIP

Docket Sheet Filing Requirement

Recently attorneys James Dale and Walter Sinclair, of Stoel Rives LLP, brought to the Court's attention a little known, and somewhat ambiguous, filing requirement for removing a case from state to federal court. It involves the filing of a docket sheet from the state court proceeding, and is found in Local Rule 81.1, which requires "[a] copy of the entire state court record and the ***docket sheet*** must be provided at the time of the filing the notice of removal, . . ." Local Civ. R. 81.1 (emphasis added).

It is unclear how or why this requirement came to be. As a basis for this requirement, the Local Rule cites Federal Rule of Civil Procedure 81(c), which deals with time tables for answers and jury trial demands in removed actions. It makes no specific reference to filing requirements or to the need of filing a state court docket sheet. Our research discloses that 28 U.S.C. § 1446(a), requires the removal include "a copy of all process, pleadings, and orders served upon such defendant . . . ." However, the statute makes no mention of a docket sheet. Section 1447(b) contains similar language: "[The court] may require the removing party to file with its clerk copies of all records and proceedings in such State court . . . ." Again, there is no reference to a docket sheet.

In the past, some counsel have ignored or overlooked this local requirement. This has not been a problem, however, as the Court has not actively enforced it and has been willing to waive the requirement when asked. A recent discussion among the judges revealed the justification for the docket sheet requirement may be lost in time, especially where, as is virtually always the case, the state court pleadings are limited to only a few documents.

Barring the discovery of justification for the requirement, the Court plans to revisit Local Rule 81.1, and amend the rule to delete the requirement. The amendment process is governed by Federal Rule of Civil Procedure 83(a), requiring public notice of the Court's intent, as well as the date of effect. Unless abrogated by the Ninth Circuit Judicial Conference, the change will become effective on the date posted.

The Court also wishes to express our appreciation for Jim Dale and Walt Sinclair for noticing this problem and bringing it to our attention.

REASONABLE INVESTIGATION IN E-DISCOVERY

A recent case out of the Southern District of California has been making waves that commentators compare to great Californian earthquakes. In a Jan. 7, 2008 decision, Magistrate Judge Barbara Major issued an order with over $8.5 million in initial sanctions and a referral to the State Bar of California for further investigation. Even more troubling, the six attorneys sanctioned were among the more prominent in their fields.

The matter arose in the course of a patent infringement action in late 2005, *Qualcomm v. Broadcomm*. The case deals with e-discovery, and sets a new bar for what a court might consider a reasonable investigation. The case hinged on whether Qualcomm had participated in an online development forum that would constitute a waiver of its patent claims. In discovery Broadcomm made proper requests for any and all documents relating to the forum. Initially, discovery never seemed to be an issue where Qualcomm agreed to produce the documents after a "reasonable search." In all, Qualcomm produced 1.2 million pages of documents. Later while preparing one of its witnesses for deposition, Qualcomm discovered the existence of documents related to forum participation that were not produced. Upon discussing the discovery, several attorneys made the decision not to investigate further and not to disclose.

Needless to say, the missing information did finally come to light in a thorough cross-examination of that Qualcomm employee. After losing their trial, Qualcomm's counsel continued to stall, defending their poor discovery decisions. However, by June of 2007 they had been forced to produce an additional 46,000 critically important documents not disclosed earlier.

Was this omission the fault of Qualcomm's intentional cover-up, or was it a tactical decision of the attorneys? Whose-ever goal it was, the Judge thought it could not have been achieved without the collaboration of counsel, and six attorneys have been sanctioned for failing to conduct a "reasonable investigation," among other things.

If you think you could be more thorough in the investigations of your e-discovery responses, refer to this wonderful article discussing the case in greater detail. E-Discovery Tremors, Solovy and Byman

Even more pressing, if you think you may be on some thin ice, refer to the actual decision. Qualcomm v. Broadcomm, 2008 WL 66932 (S.D. Cal.)

A NOTE FROM PRESIDENT TRUDY FOUSER

The newsletter has changed! Even though our chapter received one of only four national awards for superior newsletters, we just can't stop trying to improve! Let us know what you think. You'll see this newsletter has added features and, hopefully, you will find it even easier to read. Since the newsletter is to assist you in your practice, let us know if you have any ideas on how to make it even better. We aren't afraid of constructive comments.

Remember that our big bash will be to celebrate all four magistrate judges — Judge Williams, Judge Boyle, Judge Bush and Judge Dale — and will be held at the Washington Group dining hall on April 3rd from 4:00 p.m. to 7:00 p.m. in Boise. Members will not only receive special name tags but also a free drink ticket! (The benefits of membership just keep on coming!)

Finally, be thinking of a lawyer you would like to nominate for our chapter's first recognition award for lawyers who have made a significant contribution to the federal judicial system. We'll be sending out the criteria in the near future but, generally, we're looking to honor a few select lawyers who, either through their representation of clients or, through their activities have made a positive impact on our local district.

Ms. Fouser began college at the University of Utah in Salt Lake City, and graduated magna cum laude from Georgia State University in Atlanta, Georgia with a degree in journalism. She obtained her law degree from the University of Idaho College of Law in Moscow, Idaho. Ms. Fouser was with the law firm of Elam & Burke in Boise, Idaho, for seventeen years, and in 2000, she joined her husband Jack Gjording in practice, which is now Gjording and Fouser, PLLC, in Boise, Idaho.

COMPLAINTS FILED IN FEDERAL COURT

Al-Bidery v. Mukasey et al, CV-08-01-S-MHW

Naturalization-Unreasonable Delay, Injunctive Relief

•Amanda Anneliese Breen, Ketchum, Idaho for Plaintiff
•Thomas E. Moss, United States Attorney for the District of Idaho;
and Michael Mukasy, Attorney Genera, Washington, D.C., for and as Defendants

Plaintiff Hassan Al-Bidery is a native citizen of Iraq and legal permanent resident of the United States. In 1991 he was taken into protective custody by the U.S. armed forces in Iraq following the first Gulf War. He spent six years in a refugee camp in Saudi Arabia, thereafter entering the U.S. as a refugee. In April, 2002, Al-Bidery applied for U.S. citizenship. In December, 2002, Al-Bidery passed the naturalization examination. As of the date of the complaint (more than five years later), Defendants have delayed his application and given no time frame for resolution.

This action comes before the Court on, *inter alia*, subject matter jurisdiction, the Declatory Judgment Act, Administrative Procedures Act, and Mandamus. Plaintiff claims he meets all necessary requirements for naturalization, even independently requesting a criminal background check from the FBI. Plaintiff claims the delay is posing significant hardship, preventing him from traveling without a U.S. Passport, sponsoring relatives who wish to obtain residency, participating in the Visa Waiver Program, vote in elections, serve on juries, or enjoying any other civic rights and responsibilities.

Plaintiff claims he has met all requirements for naturalization and that Defendants have failed to process his application within the required 120-period. Plaintiff requests the court grant his naturalization application, or to remand to Defendants with a injunctive order to complete the naturalization process within 30 days.

COMPLAINTS FILED IN FEDERAL COURT

Dumoulin v. AFG Industries, Inc., CV-07-265-S-EJL
Employment Discrimination, Federal Question Jurisdiction

- Daniel E. Williams, Huntley Park, LLP, Boise, Idaho, for the Plaintiff
- Barry Alan Johnsrud, Jackson Lewis, LLP, Seattle, Washington, for the Defendant
  and Candy W. Dale, Hall Farley Oberrecht & Blanton, Boise, Idaho, for the Defendant

Plaintiff was employed by Defendant AFG for several years when he injured his back on the job. Plaintiff claims he was wrongfully terminated for failing to show up for work. Plaintiff claims the actual reason for termination was discrimination based on his age and physical disabilities. Plaintiff brings an action seeking damages and fees based on the ADA, age discrimination acts, and similar causes of action in the Idaho Code.

Colonel v. Puls, CV-07-251-S-BLW Negligence, Diversity Jurisdiction

- David F. DeFazio of DeFazio Law Office, Jackson WY for Plaintiff
- Robert A. Anderson of Anderson, Julian & Hull, Boise, ID for Defendant

Plaintiff is a resident of Wyoming and Defendant is a resident of Florida. In June 2006, Plaintiff was traveling in Madison County, Idaho, on Highway 33. Plaintiff alleges Defendant turned on his right blinker, initiated a right turn, but quickly turn left into Plaintiff's lane, causing Plaintiff to hit Defendant's driver-side door with the front of her vehicle.

Plaintiff claims Defendant was negligent. Plaintiff was injured and has undergone continuing medical treatment since the date of the accident. Plaintiff seeks damages for pain and suffering, as well as medical expenses and other related damages.

COMPLAINTS FILED IN FEDERAL COURT

Snap Lock Industries, Inc. v. Swisstrax, Inc., CV-07-519-S-EJL

Trademark Infringement, Federal Question

- Steven B. Andersen, Holland and Hart, Boise, Idaho, and
  Robert G. Wing, Prince Yeates and Geldzahler, Salt Lake City, Utah, and
  S. Brandon Owen, Holland and Hart, Salt Lake City, Utah for Plaintiff

- Joel T. Zenger of Miller Guymon, P.C., Salt Lake City, Utah for Defendant

Both Plaintiff and Defendant are competitors in the industry of selling designer modular surface products, such as garage flooring. Plaintiff made a new version of its website in August, 2006. Plaintiff alleges in June, 2007, Defendant revised its website in an attempt to copy Plaintiff's trade dress. Defendant allegedly copied the color scheme, headings, layout and other features of the Plaintiff's website. Both party's websites now contain an information bar, three-column layout, rotating views of flooring styles and other similarities.

Plaintiff alleges Defendant is attempting to trade off the goodwill that Snap Lock has established from marketing and selling its modular flooring systems together with its distinctive trade dress. Plaintiff contends it has suffered and continues to suffer irreparable damages and lost profits. As such, Plaintiff lists trade dress infringement, unfair trade practices, and unfair competition among its causes of action and seeks to enjoin Defendant from utilizing confusing web page elements in addition to damages.

GVD Commercial Properties, Inc. v. Liquidation World, Inc., CV-08-049-N-BLW

Breach of Contract, Diversity Jurisdiction

- Michael A. Maurer of Lukins and Annis, Spokane, Washington, for Plaintiff
- Counsel for Defendant to be determined

Both Plaintiff and Defendant do business in Idaho. Plaintiff rented a large commercial building to Defendant with a lease that required a 90-day notice to vacate, as well as provisions that the Defendant would pay for all damage as a result of neglect or misuse. Plaintiff claims they were given only one-day's notice before the Defendant left the premises. Plaintiff claims the floor, a traffic door, and steel column were damaged and must be repaired or replaced. Defendant has declined to make any of these repairs. Plaintiff seeks damages for breach of contract, repair costs, replacement costs, and other fees.

COMPLAINTS FILED IN FEDERAL COURT

United States v. Craig Odegaard, CR-07-00285-N-BLW Bankruptcy Fraud

- Rafael M. Gonzales, Jr., Assistant United States Attorney, Boise, ID for the Government
- Craig D. Odegaard, Pro Se, Coeur d'Alene, Idaho

A grand jury has returned an indictment charging Craig Odegaard with three counts of bankruptcy fraud under 18 U.S.C. §§ 2 and 152(1).

Mr. Odegaard, an attorney who practiced in the areas of bankruptcy and personal injury, initiated a bankruptcy case on his own behalf in 2004. The Government alleges that he failed to disclose in his "schedules" of assets supporting the bankruptcy petition that he had an interest in, and later received, nearly $40,000 in attorney fees from three clients. The Government contends that Mr. Odegaard knowingly concealed his financial interest in these matters at the time that he filed for bankruptcy and that this concealment amounted to fraud. The case has not yet proceeded to trial.

Bovina Music v. Night Moves, Inc and Christopher Teague, CV-08-02-S-BLW

Copyright Infringement, Federal Question Jurisdiction

- B. Newal Squyres and Ted C. Murdock, Holland and Hart, Boise, ID for Plaintiffs
- Christopher Teague, *Pro Se* as President of Night Moves, Inc and Individually

Plaintiffs allege copyright infringement where Defendants, engaged in public performances of copyrighted musical compositions from which they derived financial benefit. After multiple warnings by the American Society of Composers, Authors and Publishers, Defendants have continued to cause or permit unauthorized performances of Plaintiff's material.

Plaintiffs seek a permanent injunction from further unauthorized performances as well as damages.

COMPLAINTS FILED IN FEDERAL COURT

Nez Perce Tribe v. NOAA Fisheries, et al., CV-07-247-N-BLW

Endangered Species Act, Federal Question Jurisdiction

- K. Heidi Gudgell and David J. Cummings, Nez Perce Tribe, Lapwai, Idaho, for Plaintiffs
- Michael Richard Eitel, United States Department of Justice, Environment and Natural Resources Division, Denver, Colorado, for Defendants

Plaintiff brings an action for declaratory and injunctive relief for actions and omissions of the Bureau of Reclamation (BOR). The BOR operates and maintains the Lewiston Orchards Project (LOP), determining minimum stream flows. Plaintiff claims the LOP harms the Snake River Steelhead, a species listed as endangered, through alteration of fish habitat in streams located on Nez Perce Tribal land.

NOAA Fisheries issued a LOP Biological Opinion (LOP BiOp) in March, 2006, which analyzes the effects of BOR's operation and maintenance of the LOP. Plaintiff brought an action in 2005 to compel completion of the LOP BiOp. Now Plaintiff claims the final LOP BiOp is deficient under ESA section 7 requirements because it includes no rational justification for the authorized minimum stream flow and unjustifiable drought exemptions. In addition, Plaintiffs claim the BiOp considers factors unintended by Congress.

Plaintiffs claim the result could range from continued adverse effects on the steelhead to complete species extinction.

COMPLAINTS FILED IN FEDERAL COURT

Sherie C. Campbell v. City of Boise, Kevin Holtry, and Brek Orton, CV 07-532-S-BLW
Civil Rights, 42 U.S.C. § 1983

- Randall S. Grove, for the Plaintiff
- Scott B. Muir, Assistant City Attorney, for the Defendants

After leaving a convenience store in Boise and driving for a few blocks, Plaintiff Sherie Campbell was stopped by Boise Police Officer Kevin Holtry. Officer Holtry informed her that she had exceeded the speed limit by six or seven miles an hour and that he had seen her cross the dividing line twice. Campbell produced a driver's license and registration papers for her car, but she told Officer Holtry that her proof of insurance was at home.

Officer Holtry ran a records check, in which he learned that although Campbell did not have any outstanding warrants she did have a prior infraction for failure to provide proof of insurance. He requested that she step out of the car, and she took her purse with her. A canine unit arrived at the scene. During his walk around the exterior of the car, the dog "alerted" and jumped through the open door on the driver's side, but no drugs or contraband were apparently found in the car.

Officer Holtry then arrested Campbell for driving without proof of insurance for a second time within five years, a misdemeanor. At his request, another police officer searched her purse and discovered a controlled substance. In addition to the misdemeanor charge, Campbell was charged with felony possession of a controlled substance.

Campbell filed this lawsuit in state district court, alleging that the defendants violated her constitutional rights under color of state law, 42 U.S.C. § 1983. In particular, she contends that the officers unlawfully arrested her for the misdemeanor and then searched her purse without a warrant or other authority, in violation of her rights under the Fourth and Fourteenth Amendments to the U.S. Constitution and the corresponding provisions of the Idaho Constitution. She also claims that the City of Boise failed to adequately train and supervise the officers.

The case has been removed to federal court by the defendants, who have filed their answer asserting several defenses, and a dispositive motions deadline is set for May 2008.

COMPLAINTS FILED IN FEDERAL COURT

Garrison et al v. National Rural Electric Cooperative Association et. al.

CV-07-250-EJL-MHW ERISA, Federal Question Jurisdiction

- Michael J. McMahon of Bank of Whitman, Spokane, WA for Plaintiff
- Samuel A. Diddle of Eberle, Berlin, Kading, Turnbow & McKlveen, Boise, ID and Thomas E. Henefer of Stevens & Lee, Reading PA for Defendant

Plaintiff has been employed with by the Defendants since 1983. Since 1995 she has experienced multiple, severe and ongoing medical issues. Plaintiff began receiving long-term benefits in September 2000. She is only eligible for long-term payments if she, among other requirements, is unable to substantially perform some or all of her duties. The benefits were terminated in January 2006. That same year she filed two appeals of her denial while still undergoing medical problems.

Plaintiffs' physicians have determined her to be completely disabled. Defendant's physicians, in contrast, find Plaintiff capable of performing light physical duties. Plaintiff claims Defendant's physicians rely on incomplete medical records and she has wrongfully been denied long-term disability benefits. In addition Plaintiff claims Defendants are in breach of their fiduciary duty and wrongfully withholding information. Plaintiff seeks declatory, injunctive, and related relief.

COMPLAINTS FILED IN FEDERAL COURT

United States v. Tamarack Resort LLC, CV-08-040-S-EJL

Clean Water Act, Federal Question Jurisdiction

- Deborah A. Ferguson of the United States Attorneys' Office, Boise, Idaho for the Plaintiff
- Robert A. Maynard of Perkins Coie LLP, Boise, Idaho for the Defendant

The United States, acting on behalf of the Environmental Protection Agency, is seeking injunctive relief and civil penalties for violations of the Act's storm water discharge requirements. Plaintiff alleges Defendant is subject to the acts requirements where it is engaged in construction projects, including clearing, grading and excavating activities subject to the terms of construction permits.

Damage occurs where storm waters from the construction cite discharge into the streams traversing the area and to Cascade Reservoir. This storm water contains pollutants such as concrete washout and other turbid water which has contaminated an adjacent wetland and tributaries. Plaintiff also alleges failure to prevent vehicle track-out, failure to properly stabilize a large pile of dirt at the site, as well as failure to comply with multiple other requirements of the construction permit.

RECENT NINTH CIRCUIT DECISIONS

Judge Kim McLane Wardlaw
U.S. Court of Appeals
for the Ninth Circuit

United States v. Hartog, 05-16614

Appeal from: N.D. Cal. [Larson, M.J.]

Panel: O'Scannlain, Hawkins, Wardlaw (author)

Subject Matter: Forfeiture

Holding: The panel affirmed a magistrate judge's summary judgment in favor of the United States in its civil forfeiture action against Daniel Hartog, a convicted drug smuggler and trafficker who had $1.67 million on deposit in Cayman Island bank accounts in alleged drug trafficking proceeds.

The panel held that although the district court applied the incorrect test, it properly exercised jurisdiction over the approximately $1.67 million under a plain reading of 28 U.S.C. § 1355(b). The panel held that Hartog failed to adduce a genuine issue of material fact that the funds derived from legitimate sources, and that Hartog suffered no prejudice due to the government's delay. Specifically, the panel noted a disagreement among the circuits, agreed with the analysis of the D.C. and Third Circuits, and held that the plain language of § 1355 and legislative history of the 1992 amendments makes clear that Congress intended § 1355 to lodge jurisdiction in the district courts without reference to constructive or actual control of the res. The panel also held that the District of Northern California properly exercised jurisdiction over the money in question due to several acts occurring in that district from which the forfeiture action arose. The panel applied 19 U.S.C. § 1615 rather than the subsequently enacted Civil Asset Forfeiture Reform Act, and concluded that the district court did not err in holding that the government established probable cause that the funds in question related to drug smuggling and money laundering.

RECENT NINTH CIRCUIT DECISIONS

Judge Ronald M. Gould
U.S. Court of Appeals
for the Ninth Circuit

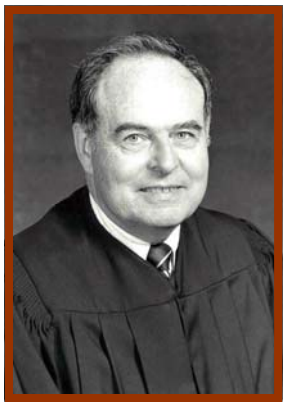
Lowden v. T-Mobile USA, Inc., 06-35395

Appeal from: W.D. Wash. [Pechman, J.]

Panel: Canby, Graber, Gould (author)

Subject Matter: Arbitration

Holding: The panel affirmed the district court's denial of a cellular telephone service provider's motion to compel individual arbitration of claims for breach of contract and violation of the Washington Consumer Protection Act per arbitration provisions in the provider's service agreements with customers. The panel held that the Washington State Supreme Court's decision in *Scott v. Cingular Wireless*, 161 P.3d 1000 (Wash. 2007), established that the service provider's arbitration provision was substantively unconscionable and unenforceable under Washington state law, and that there was no federal preemption in light of *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir. 2007).



Judge Robert R. Beezer
U.S. Court of Appeals
for the Ninth Circuit

Harris v. Carter, 06-35313

Appeal from: W.D. Wash. [Robart, J.]

Panel: Beezer (author), Tashima, and Tallman

Subject Matter: Habeas Corpus

Holding: Reversing the district court's dismissal of a habeas corpus petition as untimely, the panel, following the Tenth Circuit, held that the petitioner was entitled to equitable tolling of the statute of limitations because he relied on this court's precedent, which subsequently was overruled by the Supreme Court's holding in *Pace v. DiGuglielmo* that untimely state court habeas petitions do not toll the federal statute of limitations. The panel did not address the issue whether *Pace v. DiGuglielmo* changed the standard for equitable tolling.

RECENT NINTH CIRCUIT DECISIONS

Judge M. Margaret McKeown
U.S. Court of Appeals
for the Ninth Circuit

Suazo Perez v. Mukasey, 06-73523

Petition for Review from: BIA

Panel: McKeown (author), Clifton, and Schwarzer, District Judge

Subject Matter: Immigration

Holding: The panel granted a petition for review from the Board of Immigration Appeals' summary affirmance of an Immigration Judge's decision ordering petitioner removed on the basis that his fourth degree misdemeanor domestic violence assault, in violation of RCW §§ 9A.36.041, 10.99.020, qualified as a conviction for a "crime of violence," and thus an aggravated felony.

The panel held that fourth degree assault under Washington law is not categorically a crime of violence under 18 U.S.C. § 16(a) because the "full range of conduct" covered by the Washington fourth degree assault statute does not fall within the meaning of a "crime of violence." The panel also held that the modified categorical approach did not establish, on this record, that petitioner was convicted of a "crime of violence."

RECENT NINTH CIRCUIT DECISIONS

Judge A. Wallace Tashima
U.S. Court of Appeals
for the Ninth Circuit

United States v. Jennings, 06-30190

Appeal from: W.D. Wash. [Robart, J.]

Panel: O'Scannlain (dissent), Tashima (author), and Berzon

Subject Matter: Criminal Law

Holding: The panel affirmed a conviction, vacated a sentence imposed by the district court, and remanded for resentencing.

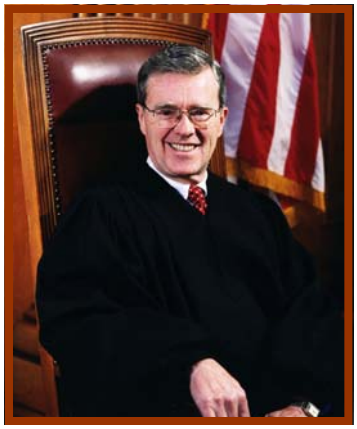
Affirming the denial of the defendant's motion to suppress the fruits of a search incident to his arrest, the panel did not need to address the validity of the search warrant because Washington law authorized the defendant's arrest even without a warrant on two grounds: (1) Wash. Rev. Code §§ 9.94A.631, 9.94A.740(1) (authorizing a community corrections officer to arrest or cause the arrest without a warrant of their supervisees for violations of their conditions of supervision); and (2) Wash. Rev. Code § 10.31.100 (authorizing police officers to make warrantless public arrests for felonies). Affirming the district court's refusal to suppress statements the defendant made to ATF agents, the panel held that the defendant's Fifth Amendment rights were not violated where it was the defendant who initiated communication about the investigation of this case and where the defendant validly waived his Fifth Amendment rights.

The panel rejected as foreclosed by precedent the defendant's contention that there is constitutional doubt as to whether a district court may determine, without formal pleading and proof, that prior convictions qualify as violent felonies under the Armed Career Criminal Act (ACCA).

The panel held that first degree theft from a person under Wash. Rev. Code § 9A.56.030(1)(b) is categorically a violent felony under the ACCA, and that under *United States v. Kelly*, 422 F.3d 889, 895

(Continued on next page)

RECENT NINTH CIRCUIT DECISIONS

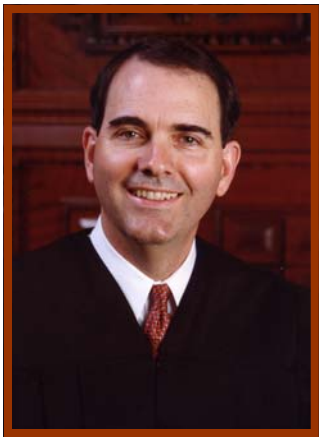


Judge O'Scannlain, dissenting
U.S. Court of Appeals
for the Ninth Circuit

(9th Cir. 2005), a conviction for attempting to elude a pursuing police vehicle under Wash. Rev. Code § 46.61.024 is not categorically a violent felony under the ACCA. The panel held that generally the modified categorical approach may be applied in determining whether a conviction qualifies as a violent felony under 18 U.S.C. § 924(e)(2)(B)(ii)'s "otherwise" (catchall) clause, but that the modified categorical approach cannot be applied to § 46.61.024 because that statute does not require proof of any actual or potential risk of harm to others, which is an element of the generic definition of a "violent felony" under § 924(e). Because the defendant's § 46.61.204 is not a qualifying violent felony, the panel concluded that the district court erred in holding that the defendant had suffered the requisite three prior convictions for violent felonies to be subject to the fifteen-year mandatory minimum sentence under the ACCA.

Dissenting, Judge O'Scannlain wrote that the opinion is premised on the mistaken assumption that *United States v. Kelly* remains good law after the Supreme Court effectively overruled it in *Gonzales v. Duenas-Alvarez*, 127 S. Ct. 815 (2007), and *James v. United States*, 127 S. Ct. 1586 (2007); and that he would join sister circuits in holding that attempting to elude a pursuing police officer is categorically a crime of violence. He wrote that even if *Kelly* were still good law, he would not agree with the majority's blanket rejecting of application of the modified categorical approach to § 46.61.024.

RECENT NINTH CIRCUIT DECISIONS



Judge Jay S. Bybee
U.S. Court of Appeals
for the Ninth Circuit

United States v. Banks, 05-10053

Appeal from: D. Nev. [Dawson, J.]

Order Amending Opinion to be Filed: 1/29/08

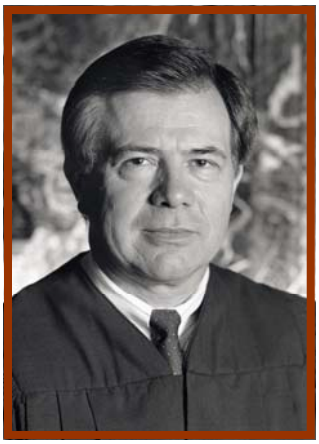
Panel: Wallace, Kleinfeld, and Bybee (author)

Subject Matter: Criminal Law

Holding: The panel amended an opinion, filed on October 25, 2007, in which the panel had reversed convictions on two counts of violence in aid of a racketeering enterprise (VICAR), and affirmed convictions for use of a firearm in a crime of violence and possession of a firearm by a convicted felon, following a jury trial before the district court.

The panel amended the opinion to reverse, rather than affirm, the convictions and sentence for use of a firearm in furtherance of a crime of violence because the defendant's VICAR convictions were essential elements of those crimes. The panel affirmed the district court in all other respects.

RECENT NINTH CIRCUIT DECISIONS



Judge Stephen S. Trott
U.S. Court of Appeals
for the Ninth Circuit

Silvas v. E*Trade Mortgage, 06-55556

Appeal from: S.D. Cal. [Whelan, J.]

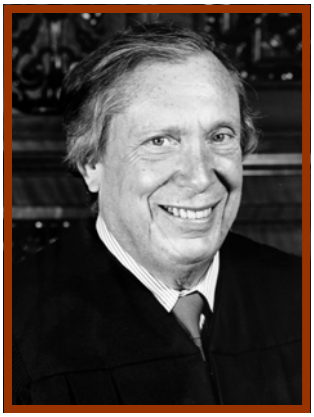
Panel: Pregerson, Noonan, and Trott (author)

Subject Matter: Federal Preemption

Holding: The panel affirmed the district court's Federal Rule of Civil Procedure 12(b)(6) dismissal, based on federal preemption, of a class action against E*TRADE Mortgage.

Appellants, alleging a violation of California's Unfair Competition Law, sought disgorgement of all lock-in mortgage interest rate fees E*TRADE collected from class members. The panel held that field preemption applies because appellants' state law claims provide state remedies for violations of federal law in a field preempted entirely by federal law. Specifically, the panel held that the Home Owners Loan Act, through the Office of Thrift Supervision, preempts the entire field of lending regulation; and the provisions of the Unfair Competition Law at issue are listed as types of laws that the Office of Thrift Supervision intended to preempt. The panel also held that the general presumption against preemption is not applicable, and the relevant regulation, 12 C.F.R. § 560.2, is clear that the field of lending regulation of federal savings associations is preempted.

RECENT NINTH CIRCUIT DECISIONS



Judge Stephen Reinhardt
U.S. Court of Appeals
for the Ninth Circuit

Solis v. Bell, 05-56637

Appeal from: C.D. Cal. [Klausner, J.]

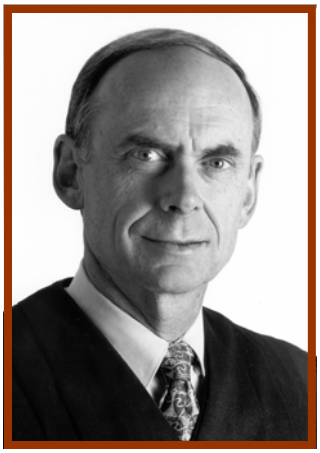
Panel: D.W. Nelson, Reinhardt (author), and Rymer

Subject Matter: Prisoner Civil Rights

Holding: The panel reversed the district court's summary judgment and verdict following a bench trial in a 42 U.S.C. § 1983 action brought by a former inmate at the Los Angeles County jail who alleged constitutional violations stemming from his transfer into the jail's "gang module," where he was attacked and injured by three other inmates.

The panel reversed the district court's grant of summary judgment in favor of defendants on the ground that plaintiff, who was proceeding pro se before the district court, was not given fair notice of the requirements and consequences of a summary judgment motion, as required by *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998) (en banc). The panel also reversed the bench trial verdict in favor of the jail officer, holding that the district court erred in denying plaintiff a jury trial, and the error was not harmless. The panel stated that plaintiff properly demanded such a trial; his failure to submit specified pretrial documents could not constitute a waiver of the jury right; and his "participation" in the bench trial did not amount to consent to a waiver of his prior jury demand. Finally, the panel reversed the district court's denial of plaintiff's request for appointment of counsel and remanded on that issue as well.

RECENT NINTH CIRCUIT DECISIONS



Judge Raymond C. Fisher
U.S. Court of Appeals
for the Ninth Circuit

Hess v. Board of Parole and Post-Prison Supervision, 06-35963

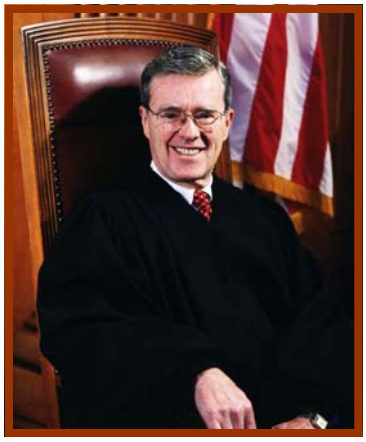
Appeal from: D. Or. [Jones, J.]

Panel: Fisher (author) , Berzon, and
Court of Int'l Trade Judge Barzilay

Subject Matter: Habeas Corpus

Holding: Affirming the district court's denial of a habeas corpus petition, the panel held that Or. Rev. Stat. § 144.125(3) (1991), which allows the Parole Board to postpone a prisoner's parole date if it finds he has "a psychiatric or psychological diagnosis of a present severe emotional disturbance such as to constitute a danger to the health or safety of the community," is not unconstitutionally vague because the statute and narrowing constructions by the state court allow the Board to make a "principled distinction" between those whose parole should be postponed and those whose parole should not. The panel held that the statute also was not unconstitutionally vague as applied to the petitioner.

RECENT NINTH CIRCUIT DECISIONS



Judge Diarmuid O'Scannlain
U.S. Court of Appeals
for the Ninth Circuit

United States v. Comprehensive Drug Testing, 05-10067

Major League Baseball Association v. United States, 05-15006

In re: Search Warrants Executed on April 8, 2004 at CDT, Inc., 05-55354

Appeal from: N.D. Cal. [Illston, Mahan, JJ.]; C.D. Cal. [Cooper, J.]

Panel: O'Scannlain (author) , Thomas (concurring in part, dissenting in part), and Tallman

Subject Matter: Criminal Law/Fed. R. Crim. P. 41(g) Return of Property

Holding: The panel granted petitions for panel rehearing, withdrew an opinion and dissent filed December 27, 2006, filed a superseding opinion and dissenting opinion, and wrote that a petition for rehearing en banc was denied as moot, in consolidated appeals from orders issued by the district court in cases arising from the federal investigation into illegal steroid use by professional baseball athletes. In the superseding opinion, the panel dismissed in part, affirmed in part, and reversed in part.

The panel held that the Major League Baseball (MLB) Players' Association has standing to assert the Fourth Amendment rights of its members and to file Federal Rule of Criminal Procedure 41(g) motions seeking return of seized property in which their members hold privacy interests.

The panel held that the government's notice of appeal was untimely as to Judge Cooper's order granting a Rule 41(g) motion for return of specimens and records seized, and that the appeal from that order must be dismissed for lack of jurisdiction, where the government's motion for reconsideration was not filed within ten days of the order, as required to be eligible for tolling, and where the government didn't request an extension of time to

United States v. Comprehensive Drug Testing, (continued) 05-10067

file an appeal under Fed. R. App. P. 4(a)(6) or 4(a)(5). The panel held that District Judge Cooper did not abuse her discretion in denying the motion for reconsideration based upon her review of the record and the factual arguments raised in the motion.

The panel held that District Judge Mahan did not abuse his discretion in exercising equitable jurisdiction to hear the Players' Association's Rule 41(g) motion. The panel held that District Judge Mahan misinterpreted *United States v. Tamura*, 694 F.2d 591 (9th Cir. 1982), in concluding (a) that the government unlawfully seized from a third-party drug-testing administrator intermingled data (i.e., evidence that relates both to the players specifically named in a warrant and to players not specifically named) and (b) that the government could not use that data to support an expanded search warrant in the District of Nevada. The panel held that because the search of the third-party administrator's office was lawful, the information seized in that search provided a legitimate basis for expanded warrants in the District of Nevada, and that District Judge Mahan abused its discretion by requiring the return of property seized in the District of Nevada that did not relate solely to the ten players named in the search warrants.

The panel held that District Judge Illston, who failed to recognize the different purposes and requirements of subpoenas and contemporaneously-executed search warrants, abused her discretion in quashing, as harassment and unreasonable, subpoenas seeking from a laboratory and the third-party administrator drug-testing records and specimens for all MLB players who tested positive for steroids.

The panel referred to the district courts for consideration a non-party journalist's motion to unseal the dockets, opinions, orders, and briefs for these cases.

Concurring in part and dissenting in part, Judge Thomas wrote that the majority opinion will allow the government unprecedented easy access to confidential medical and other private information about citizens who are under no suspicion of having been involved in criminal activity, will significantly and adversely impact the viability of voluntary workplace drug testing, conflicts with *Tamura*, and improperly rejects the district judges' factual findings. He concurred in the remand of the motion to unseal records.

RECENT NINTH CIRCUIT DECISIONS

Judge Richard C. Tallman
U.S. Court of Appeals
for the Ninth Circuit

Bank of New York v. Fremont General Corp., 05-56653

Appeal from: C.D. Cal. [Snyder, J.]

Panel: Kozinski, Kleinfeld, and Tallman (author)

Subject Matter: California Tort Law

Holding: The panel reversed the district court's grant of partial summary judgment as to a claim for intentional interference with contract and affirmed his judgment after bench trial as to a conversion claim by a bank against a workers' compensation insurance company's corporate parent, which withdrew funds from the insurance company's custodial accounts in violation of New York insurance law. As to the intentional interference claim, the panel held that irrespective of the bank's conduct, the corporate parent's conduct was a substantial factor in causing the transfer of funds.

The panel held that there was no dispute that a custodian agreement was a valid contract between the bank and the insurance company, that the parent was aware of the contract, and that the transfer of funds breached the contract. The panel remanded for further proceedings as to issues of material fact regarding the corporate parent's intention in causing the transfer of funds. As to the element of damages on both the intentional interference claim and the conversion claim, the panel held that California rather than New York law applied to the question whether the New York Insurance Department, and derivatively the bank, was damaged by the transfer of funds. The panel held that under California law the Department was entitled to the full amount of the transferred funds. Finally, the panel held that the corporate parent was not liable for conversion because the bank consented to the transfer of the funds.

RECENT NINTH CIRCUIT DECISIONS

Judge Marsha S. Berzon
U.S. Court of Appeals
for the Ninth Circuit

Frantz v. Hazey, 05-16024

Appeal from: D. Ariz. [Bronwing, J.]

En Banc Court: Berzon (author), joined by Kozinski, Schroeder, Pregerson, Thomas, Graber, Wardlaw, Paez, and Bea; Gould (concurring in Part II and in the result), joined by O'Scannlain, Rymer, Silverman, Callahan, and Ikuta; Kozinski (concurring), joined by Wardlaw, Paez, and Bea

Subject Matter: Habeas Corpus

Holding: The en banc court reversed the district court's denial of a habeas petition challenging under *McKaskle v. Wiggins* the petitioner's exclusion from a chambers conference in which his advisory counsel participated and discussed how the judge should respond to a query from the deliberating jury. The en banc court held that even though the state appellate court never addressed the dispositive constitutional issue, its decision was contrary to clearly established federal law as determined by the Supreme Court under 28 U.S.C. § 2254(d)(1) because it applied an improper rule in determining that any constitutional error was not prejudicial when *McKaskle* error is structural and not subject to harmless error analysis. The en banc court held that after finding a state court error that satisfied § 2254(d)(1), it must resolve the constitutional claim without the deference that the Antiterrorism and Effective Death Penalty Act otherwise requires. Reviewing de novo the petitioner's Sixth Amendment claim regarding his exclusion from the chambers conference, the en banc court held that because a pro se defendant is entitled to preserve actual control over the case he chooses to present to the jury, standby counsel's solo participation in the conference could have violated the petitioner's right to self-representation. The panel remanded to the district court for an evidentiary hearing concerning the circumstances during the course of the trial and after the jury retired that gave rise to the petitioner's exclusion from the conference, including whether he was accurately informed of the purpose of the conference and given the opportunity to appear but declined to do so, and for a determination whether the petitioner's *Faretta/McKaskle* rights to self-representation were violated by that exclusion. (Continued on next page).

RECENT NINTH CIRCUIT DECISIONS

Chief Judge Alex Kozinski
U.S. Court of Appeals
for the Ninth Circuit
(concurring, joined by Judges Wardlaw, Paez, and Bea)

Frantz v. Hazey continued - 05-16024

Concurring in Part II of the majority's opinion, addressing AEDPA error and scope of review, and in the result, Judge Gould, joined by Judges O'Scannlain, Rymer, Silverman, Callahan, and Ikuta, stated that although he agreed that an evidentiary hearing was necessary, he wrote separately because he concluded that the majority's rationale was unduly complicated and intimated conclusions about the scope of the right to self-representation under *Faretta* and *McKaskle* without knowledge of the predicate facts.

Concurring, Chief Judge Kozinski, joined by Judges Wardlaw, Paez, and Bea, wrote that Judge Gould's worry that the majority was hostile to the ability of a pro se defendant to delegate tasks to standby counsel was unfounded, and that this case turned on the different question of whether the petitioner was allowed to appear at the bench conference to speak for himself, as he was entitled to do under *Faretta* and *McKaskle*, or whether he was forced to communicate only through standby counsel.

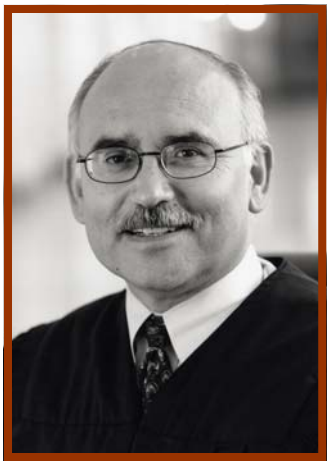
Avis Budget Group v. California State Teachers Retirement System, 06-560

Link: http://www.supremecourtus.gov/opinions/07slipopinion.html

Subject Matter: Securities

Holding: In a summary disposition, the Supreme Court granted a petition for a writ of certiorari; vacated the Ninth Circuit decision, published at 452 F.3d 1040 (9th Cir. 2006); and remanded for further consideration in light of *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. ___ (2008) (holding that the private right of action at § 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5 does not extend to aiders and abettors). The case concerns a "scheme liability" claim involving alleged participation by business partners in an effort to enhance the financial status of Homestore.com, Inc.

RECENT NINTH CIRCUIT DECISIONS



Judge Richard A. Paez
U.S. Court of Appeals
for the Ninth Circuit

Judge John T. Noonan
U.S. Court of Appeals
for the Ninth Circuit
(concurring and dissenting)

Estate of Tucker v. Kenner, 05-56045 and 06-55376

Appeal from: C.D. Cal. [Takasugi, J.]

Panel: Noonan (concurring and dissenting), Paez (author), and Tallman

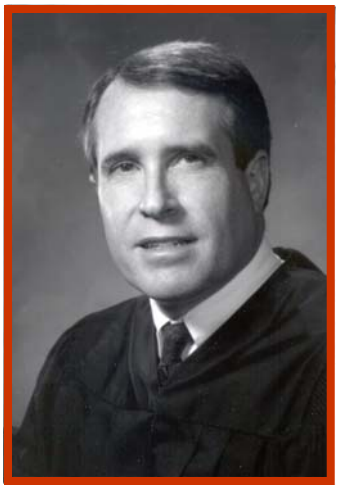
Subject Matter: California Malicious Prosecution

Holding: The panel affirmed the district court's summary judgment in favor of the defendants in a malicious prosecution case, *Tucker v. Interscope*. In another, consolidated malicious prosecution case, *Tucker v. Kenner*, the panel affirmed District Judge Takasugi's summary judgment as to one defendant and affirmed in part and reversed in part as to another defendant.

Plaintiff Cynthia DeLores Tucker, a civil rights activist, sought to limit the defendants' sale of gangsta rap to young people. The panel held that as to all but one claim, the plaintiffs did not present sufficient evidence on the issue of malice in the defendants' filing of underlying federal actions against Tucker, alleging intentional interference with contractual relations and other related claims. The panel stated that a showing of lack of probable cause is a separate element of malicious prosecution and does not establish that the underlying litigation was initiated with malice. Rather, malice is present when proceedings are instituted primarily for an improper purpose. The panel held that the plaintiffs raised a triable issue of fact with respect to their claim against the lawyer who included an abuse of process claim in one of the underlying complaints. The panel reversed in part the grant of summary judgment as to this claim and remanded for trial.

Concurring and dissenting, Judge Noonan wrote that the plaintiffs presented sufficient evidence of malice to defeat the summary judgments.

JURY TRIALS IN THE DISTRICT OF IDAHO



Chief Judge B. Lynn Winmill
United States District Court
for the District of Idaho

United States v. Huitt
CR-07-90-S-BLW

Trial held September 17, 2007
Boise, ID

For the Government:
Wendy Olson and
Anthony Hall
Assistant U.S. Attorneys, Idaho

For the Defendant:
Dennis Charney
Charney and Associates
Eagle, Idaho

Guilty as to Count One of distribution of child pornography; Guilty as to Count Two of receiving child pornography; and Guilty as to Count Three of possession of child pornography.

Sentencing is scheduled on March 7, 2008 at 9:00 a.m. in Boise, Idaho

PMG v. Lockheed Martin
CV-02-539-E-BLW

Trial held September 26, 2007
Pocatello, Idaho

For the Plaintiff:
Richard H. Greener
Jon T. Simmons
Yvonne Andrea Vaughan
Greener Burke Shoemaker, PA

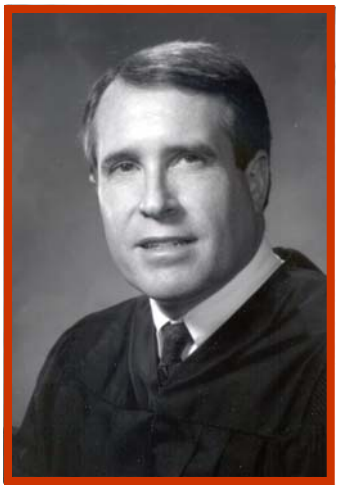
Wade L. Woodard
Banducci, Woodard, and Schwartzman, PLLC
Boise, Idaho

For the Defendant:
Phillip Oberrecht
James S. Thomson, II
Hall Farley Oberrecht Blanton
Boise, Idaho

Edgar Cataxinos
Trask Britt, Salt Lake City, UT

Judgment was awarded in favor of Lockheed Martin Idaho Technologies Company against PMG and Positech International jointly and severally, in the sum of $1,195,178.90 with interest at the rate of 4.14. per cent.

JURY TRIALS IN THE DISTRICT OF IDAHO



Chief Judge B. Lynn Winmill
United States District Court
for the District of Idaho

Mangum v. City of Pocatello

CV-05-507-E-BLW

January 28, 2008 Pocatello, ID

For the Plaintiff:

DeAnne Casperson

and Donald Harris

Holden Kidwell Hahn & Crapo

Idaho Falls, Idaho

For the Defendants:

Blake G. Hall

Anderson Nelson Hall Smith

Idaho Falls, Idaho

Jeffrey Ira Hasson

Davenport & Hasson

Portland, Oregon

Peter Dahl Shearer

Shearer & Bonney, PC

Boise, Idaho

Todd R. Erikson, PA

Idaho Falls, Idaho

Verdict:

Case was dismissed in its entirety during trial.

JURY TRIALS IN THE DISTRICT OF IDAHO

Judge Edward J. Lodge
United States District Court
for the District of Idaho

US v. Rafael Marquez-Sanchez

CR-07-07-S-EJL
Trial held September 4, 2007
in Boise, Idaho

For the Government:
Lynn Lamprecht
Assistant U.S. Attorney
Boise, Idaho

For the Defendant:
VanNoy G. Bishop, Retained
Nampa, Idaho

Guilty as to Count One:
Conspiracy to Possess with Intent to Distribute Marijuana

Defendant was sentenced on November 20, 2007; receiving 60 months followed by 4 years supervised release; and $100 special assessment

US v. Robert Lippert

CR-05-118-N-EJL
Trial held September 18, 2007
in Coeur d'Alene, Idaho

For the Government:
Nancy D. Cook
Assistant U.S. Attorney
Coeur d'Alene, Idaho

For the Defendant:
William Matthew Butler, CJA
Harrison, Idaho

Defendant was found Guilty of three counts of mail fraud, and three counts of knowingly making a false statement to obtain federal employees' compensation.

Sentencing is scheduled on June 23, 2008 at 2:00 p.m. in Coeur d'Alene, Idaho.

JURY TRIALS IN THE DISTRICT OF IDAHO

Judge Edward J. Lodge
United States District Court
for the District of Idaho

US v. Cameron Scott Griffin

CR-06-67-N-EJL
Trial held January 29, 2008
in Coeur d'Alene, Idaho

For the Government:
Anthony G. Hall
Assistant U.S. Attorney
Boise, Idaho

Michael W. Mitchell and
Nancy Cook
Assistant U.S. Attorneys
Coeur d'Alene, Idaho

For the Defendant:
Christopher Alden Bugbee
Retained
Spokane, Washington

Verdict:

Defendant was convicted of five counts alleging conspiracy, possession with the intent to distribute, and distribution of methamphetamine.

Sentencing is scheduled on June 23, 2008 at 4:00 p.m. in Coeur d'Alene, Idaho.

JURY TRIALS IN THE DISTRICT OF IDAHO

Magistrate Judge
Larry M. Boyle
United States District Court
for the District of Idaho

Lang v. Norton

CV-05-324-S-BLW

December 3, 2007 Boise, ID

For the Plaintiff:

Paul J. Augustine

For the Government:

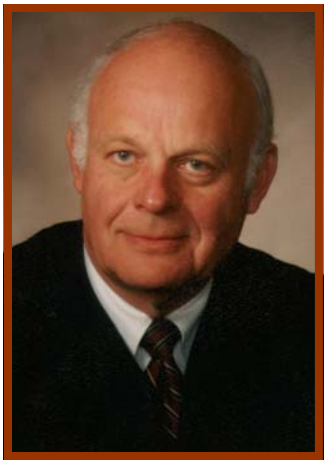
Joanne Rodriguez

Assistant United States Attorney

Boise, Idaho

Verdict: (1) Has the Plaintiff proved, beyond a preponderance of the evidence, that he had a disability? YES; (2) Has the plaintiff proved, by a preponderance of the evidence, that the plaintiff was qualified to perform the essential functions of the security guard position with or without a reasonable accommodation? YES; (3) Has the Plaintiff proved, beyond a preponderance of the evidence, that the defendant failed to provide him a reasonable accommodation? YES; (4) Has the defendant proved, by a preponderance of the evidence, that it had a legitimate nondiscriminatory reason requiring the plaintiff to work forty hours per week? NO; (5) Has the defendant proved, by a preponderance of the evidence, that business necessity, not plaintiff's disability, was the reason it required plaintiff to work forty hours per week? NO; (6) Has the defendant proved, by a preponderance of the evidence, that the plaintiff posed a direct threat to the health and safety of himself and others? NO; and (7) If your answers to Questions 1, 2, and 3 were "yes" and your answers to Questions 4, 5, and 6 were "no," what amount of damages did plaintiff suffer for emotional distress as a result of defendant's discrimination: $ 0.00

VISITING JUDGES IN THE DISTRICT OF IDAHO



Judge Justin L. Quackenbush
Senior U.S. District Judge
Eastern District of Washington
Sitting by Special Designation

U.S. Pedro Rodriguez

CR-07-154-S-BLW(JLQ)
Trial held October, 2007
in Boise, Idaho

For the Government:
Christian Nafzger
Assistant U.S. Attorney, Idaho

For the Defendant:
Thomas B. Dominick, CJA
Dominick Law Offices
Boise, Idaho

Verdict:

Not Guilty of Knowingly possessing an unregistered illegal firearm on or about May 30, 2007

U.S. v. Silva-Puga

CR-07-11-S-BLW(JLQ)
Trial held January 14, 2008
in Boise, Idaho

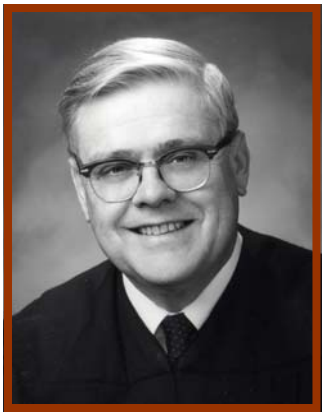
For the Government:
Christian Nafzger
Assistant U.S. Attorney, Idaho

For the Defendant:
S. Richard Rubin
Federal Defenders Services, Inc.
Boise, Idaho

Verdict:

Not Guilty of Knowingly and unlawfully possessing a firearm between June 12, 2006 and July 31, 2006

VISITING JUDGES IN THE DISTRICT OF IDAHO



Judge Robert J. Timlin
Senior, U.S. District Judge
Central District of California
Sitting by Special Designation

United States v. Ruiz-Barosso
CR-07-113-E-EJL
Trial held January 8, 2008
in Pocatello, Idaho

For the Government:
Michelle Mallard
Assistant U.S. Attorney, Idaho

For Defendant Ruiz-Barosso
Steven W. Boyce, CJA
Idaho Falls, Idaho

Defendant Arredondo-Delgado
Mark EchoHawk, CJA
EchoHawk Law Offices
Pocatello, Idaho

Verdict:

Ruiz-Barosso was found guilty of one count of conspiracy and four counts of possession with the intent to distribute. The jury could not reach an agreement on one count, and the court declared a mistrial as to that charge.

Arredondo-Delgado was found guilty of one count of conspiracy to distribute or to possess with the intent to distribute more than 50 grams of methamphetamine and one count of possession of methamphetamine with the intent to distribute.

Sentencing is currently being scheduled in Pocatello, Idaho

VISITING JUDGES IN THE DISTRICT OF IDAHO

Judge Lloyd D. George
Senior U.S. District Judge
District of Nevada
Sitting by Special Designation

Wyatt v. Horkley Self-Serve

CV-03-144-E-BLW

October 29, 2007 Pocatello

For the Plaintiff:

DeAnne Casperson

Frederick J. Hahn, III

William D. Faler

Holden Kidwell Hahn & Crapo

Idaho Falls, Idaho

For the Defendant:

R. James Archibald

Larren Keith Covert

Swafford Law Office

Idaho Falls, Idaho

Ronald L. Swafford

Idaho Falls, Idaho

Verdict:

(1) Jury found that Horkley Self-Serve and Horkley Petroleum were an integrated or single employer of Wyatt

(2) Jury found that Horkley Self-Serve subjected Wyatt to a sexually hostile work environment

(3) The Jury found that Horkley Self-Serve did not retaliate against Wyatt for engaging in a protected activity

(4) The Jury awarded damages against Horkley Self-Serve to Wyatt for back pay and benefits of $59,250.00; $50,000 for emotional pain and suffering; $3,500 in past and future counseling benefits; and $100,000 in punitive damages

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