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# Federal Bar Association Idaho Chapter

VOLUME II ISSUE III

OCTOBER 2007

## A Message from FBA President James Richardson



**James S. Richardson, Sr.**  
**National President**  
**Federal Bar Association**

I want to take this opportunity, as the new President of the Federal Bar Association, to announce to the members of the Idaho Chapter my delight in appointing Paul L. (Larry) Westberg, a partner in the firm of Westberg, McCabe & Collins in Boise, and a highly respected charter member of the Idaho Chapter, as the chairman of the FBA's Government Relations Committee.

The Government Relations Committee plays a significant role in the affairs of the Federal Bar Association. It assists the Association in addressing public policy issues that affect the life and vitality of the federal courts and federal practice. The Committee coordinates the advocacy and positions that FBA takes on legislation under consideration by the Congress and advises the Association's Board of Directors on crafting the Association's annual issues agenda. The Committee assures that FBA remains non-partisan while serving as a credible voice before decision makers in the nation's capital. The Government Relations panel is broadly based and is comprised of fifteen members from across the country.

I'm especially pleased for several reasons that Larry has accepted my appointment. He will be the first chair of the Government Relations Committee to hail from west of the Mississippi. He brings a fresh perspective from outside Washington's beltway, based upon a forty-year career in public service and private practice, including experience as an Assistant United States Attorney in Idaho. His leadership in organizing the Idaho Chapter of the Federal Bar Association and his service as the first president of the chapter attests to his leadership and the respect he enjoys throughout the legal profession.

I am grateful for Larry's commitment to lead the Government Relations Committee of the FBA during the next year, as we continue our advocacy efforts in a host of areas, including the restoration of adequate compensation for federal judges, the improvement of federal courthouse security and the establishment of new judgeships in Idaho and elsewhere. Larry's professionalism and willingness to serve our national body, and the accomplishments of the Idaho Chapter in its relatively brief three years, embody the spirit of the West and the pride in federal practice that thrives in Idaho.

Note: see page two for information on Larry Westberg.

## A Message from James S. Richardson

Larry was a member of the organizational committee of the Idaho Chapter of the Federal Bar. Additionally, he was elected President our first year.

### **PAUL L. (LARRY) WESTBERG** Chair, Government Relations Committee, FBA



Larry Westberg grew up in north Idaho. He attended the University of Idaho, graduating from the College of Law in 1968; and was admitted to the Idaho State Bar and the U.S. District Court that same year. He was later admitted to practice before the Ninth Circuit Court of Appeals, as well as the United State Supreme Court.

After law school, Larry was a law clerk for the Honorable Fred M. Taylor, U.S. District Court for the District of Idaho, and later was district counsel for the U.S. Small Business Administration in Boise, and was an Assistant United States Attorney for four years. In 1977 he entered private practice.

Larry is currently a partner in Westberg, McCabe & Collins.

**Practice Areas:** Civil Litigation, White Collar Crime, Criminal Defense

**Professional Memberships:**

American Inns of Court, Charter Member, President and Emeritus  
 Idaho Chapter of the Federal Bar Association, founding member and  
 first President and current National delegate  
 National Federal Bar Association, member of Government Relations Committee  
 Board of Directors, Idaho Legal History Society  
 Idaho Law Foundation, Fund Development Chair  
 Board of Directors, Federal Defenders of Eastern Washington and Idaho  
 Incorporator, Director and first President, Federal Defender Services of Idaho  
 U.S. District Court Bar Association, Ninth Circuit Lawyer Representative  
 U.S. District Court for the District of Idaho, Procedural Order Committee  
 Criminal Justice Act Panel Attorney  
 Criminal Justice Act National Representative  
 American Bar Association  
 National Association of Criminal Defense Attorneys  
 Idaho Association of Criminal Defense Attorneys, original member and officer

# UPCOMING CLE: NOVEMBER 7, 2007



## The Idaho Chapter of the Federal Bar Association

presents

### A Roundtable Discussion: Pro Se Litigation

#### a Brown-Bag CLE Program

1.5 CLE credits (.5 ethics credit ) pending

- Date:** Wednesday, November 7, 2007
- Time:** 12:00 to 1:30 p.m.
- Place:** James A. McClure Federal Building and U.S. Courthouse, Boise  
Fifth Floor, Jury Assembly Room
- Bring:** Brown bag lunch (please bring your own)
- Cost:** ~ No Charge to Idaho Chapter, FBA members, OR  
~ Attorneys who have accepted a Pro Se Pro Bono Panel assignment  
~ \$15 for non Idaho Chapter, FBA members  
(make checks payable to Idaho Chapter, FBA)
- Moderator:** Chief Magistrate Judge Mikel H. Williams, U.S. District Court
- Presenters:** Kirtlan G. Naylor, Naylor & Hales, PC  
Paul R. Panther, Idaho Attorney General  
Sheryl L. Musgrove, former Pro Se Pro Bono Panel Attorney,  
now Staff Attorney for Ninth Circuit Judge Thomas G. Nelson  
Richard C. Fields, Moffatt, Thomas, Barrett, Rock & Fields, Chtd.  
Tyler J. Anderson, Moffatt, Thomas, Barrett, Rock & Fields, Chtd.  
John J. Burke, Hall, Farley, Oberrecht Blanton, PA  
Janis T. Dotson, Pro Se Staff Attorney, U.S. District Court
- Registration:** Email [Susie Boring-Headlee@id.uscourts.gov](mailto:Susie_Boring-Headlee@id.uscourts.gov) or call (208) 334-9373.

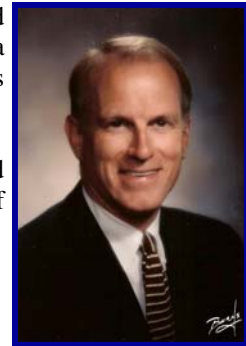
## NEW LAWYER REPRESENTATIVE FOR DISTRICT OF IDAHO

The Board of Judges of the District of Idaho announced last week the selection of Steven Andersen as the new lawyer representative.

### STEVEN B. ANDERSEN

Mr. Andersen has been in private practice since 1982 and a partner with Holland & Hart LLP since 1987, and was managing partner from 1995-2003. Mr. Andersen is a trial lawyer whose practice emphasis is tort and business litigation including products liability, professional negligence, personal injury, and all types of commercial litigation.

He is admitted to practice before all state and federal courts for Idaho. He has argued numerous appeals before the Idaho appellate courts and the Ninth Circuit Court of Appeals, and the Federal Circuit.



#### Professional Activities

Past-President of the Idaho Trial Lawyers Association

Member, American Bar Association, Litigation and Business Sections

Member, Idaho State Bar, Continuing Legal Education Committee and Professional Conduct Board

Secretary/Treasurer American Inn of Court No. 130

Mr. Andersen has lectured statewide on topics of trial preparation and advocacy and has published materials and articles on legal ethics, discovery techniques, and trials, including the book *How to Prepare For, Take and Use a Deposition* (James Publishing).

Member, Idaho Chapter, Federal Bar Association

#### Education

Brigham Young University (J.D., with Honors, 1980)

Brigham Young University (B.A., Summa Cum Laude, 1977)

# By Celeste K. Miller, Regional Fraud Coordinator

## United States Trustee Program

### INTRODUCTION

Fraudulent intent is defined simply as an intent to deceive or cheat. Ninth Circuit Model Criminal Jury Instructions 3.17. Discerning a bankruptcy debtor's intent when concealed assets are uncovered is critical to determining procedures and tactics to employ upon discovery of the assets. Depending on the timing of discovery remedial procedures may be available within the bankruptcy process itself, and others may be simultaneously or successively available under Title 18 of the United States Code for crimes against the United States. A review of Parallel Proceedings issues and of applicable rules is helpful for interested parties seeking redress in either or both arenas.



Parallel proceedings result from simultaneous or successive investigations of separate criminal, civil or administrative actions by different agencies, branches of government or private litigants, involving the same or related individuals and/or entities and some of the same facts.

They arise in numerous types of matters including for example, securities, tax and bankruptcy cases. In a bankruptcy context parallel proceedings arise when conduct discovered in the civil proceeding results in a criminal investigation. Debtor asset concealment allegations provide examples of how parallel proceedings issues arise in the bankruptcy context.

### DISCERNING CRIMINAL INTENT

The *Bankruptcy Code* anticipates that debtors and/or their counsel may neglect to include information on initially filed Schedules and Statements of Financial Affairs, declared to be true under penalty of perjury. First Meetings of Creditors provide a follow-up opportunity for clarifications or amendments to be stated by the debtors, who testify at the meetings under oath. Certainly debtors belatedly recall assets or debts mistakenly omitted from initial filings, and amended schedules are tools available to correct such oversights.

The bankruptcy process affords opportunities for debtors to continue to provide information required on documents filed with the court. The *Bankruptcy Rules* liberally allow parties to amend schedules at any time until the case is closed. Fed. R. Bank. P. 1009 (a). Such practical events, which occur daily in bankruptcy cases, demonstrate a degree of tolerance in the bankruptcy process for ordinary forgetfulness by debtors or their lawyers.

## Celeste K. Miller, Regional Fraud Coordinator (continued)

In practice bankruptcy proceedings may also suggest a systemic tolerance for conduct more provocative than forgetfulness. Questions on Schedules about asset values and lien amounts require debtors to give estimates or to state subjective opinions. Bankruptcy procedures then govern the civil processes for challenges to such assertions.

Asset valuations, exemption claims, debt amounts, lien priorities and estimates of secured values are all common areas of dispute among parties with competing interests, and they are adjudicated free of underlying implications that criminal intent determined subjective opinions or civil litigation strategies. While a debtor's estimate of an asset's value may cause concern to a trustee or a creditor about the debtor's veracity, a low value estimate alone may not indicate a debtor's knowing and fraudulent intent to deceive or cheat creditors or to deprive the trustee of reliable information upon which to base a course of action. Trustees and creditors have many options to address such conduct civilly, including motions for stay relief, motions to determine secured values and objections to discharge.

Occasionally evidence suggests, however, that a debtor's conduct exceeds the reach of the *Bankruptcy Code* processes designed to clarify oversights or to adjudicate civil disputes over subjective opinions. When evidence suggests knowing and fraudulent intent to deceive or cheat, the parallel criminal process is available to address it. Myriad issues can arise in that circumstance including questions about document sharing, grand jury secrecy rules, Fourth Amendment and Fifth Amendment concerns, subpoena powers and issues about trustees' roles and duties.

### CRIMINAL REFERRAL OBLIGATIONS

Trustees and bankruptcy judges have long been required under Title 18, United States Code, § 3057(a) to report conduct they suspect is criminal when it arises in a bankruptcy proceeding. The statute directs them to report to the United States Attorney, who is then required to investigate the referral. 18 U.S.C. § 3057 (b). The United States Trustee is also required to refer matters to the United States Attorney that "relate to the occurrence of any action which may constitute a crime." 28 U.S.C. § 586 (a)(3)(F). In fiscal year 2006 the U.S. Trustee Program made 925 criminal referrals to United States Attorney Offices around the country.

To fulfill its statutory obligation the United States Attorney then refers the matter to the federal criminal investigative agency most likely to address the issues raised by the facts in the referral. The Federal Bureau of Investigation has primary jurisdiction to investigate bankruptcy fraud, but many factual scenarios in referrals contain potential criminal conduct better addressed by agencies such as the Internal Revenue Service, the United States Secret Service

## Celeste K. Miller, Regional Fraud Coordinator (continued)

or the United State Postal Inspection Service. Parallel proceedings concerns then arise whether the civil bankruptcy case proceeds successively or at the same time as a criminal investigation.

### PARALLEL PROCEEDINGS PRINCIPALS

The overarching rule to guide parties to the civil process who encounter potential criminal conduct is that the civil process cannot be used strictly for criminal purposes. Prosecutors “may use evidence obtained in a civil proceeding in a subsequent criminal action unless the defendant shows that to do so would violate constitutional rights or depart from the proper administration of justice.” *United States v. Kordel*, 397 US 1 (1970); *United States v. Unruh*, 855 F. 2d 1363, 1374 (9th Cir. 1988). A criminal investigator or a prosecutor can obtain transcripts generated by the civil process from a hearing or from a deposition without incurring any sanction. A transcript that is generated, however, after an investigator has suggested questions for a civil litigant to ask in advance of taking the deposition would likely be considered improper and could be suppressed from use as evidence in a subsequent criminal case.

Under fact-specific findings, district courts have, in rare instances, found constitutional violations and the improper administration of justice in parallel proceedings cases. *United States v. Scrushy*, 366 F. Supp 2d 1134 (NDAL 2005); *United States v. Stringer, et al.*, 408 F. Supp 2d 1083 (D. OR 2006). In each of these cases the district court perceived that the criminal investigators and prosecutors improperly controlled aspects of the civil process to bolster criminal investigations, and criminal charges were dismissed in both the *Scrushy* and *Stringer* cases. *Id.*

Other courts have declined to reach the same conclusions in the absence of facts strongly suggesting that actions by the criminal investigators and prosecutors wrongfully influenced the civil proceeding. *United States v. Mahaffy*, 446 F. Supp. 2d 115 (E.D. N.Y. 2006) (movant conceded there is “sparse precedent” for the relief he sought), *S.E.C. v. Sandifur*, 2006 WL 1719920 (W.D. Wash. 2006). The *Stringer* case is on appeal to the Ninth Circuit. Litigants involved in parallel proceedings who are mindful of the *Stringer* court’s interpretation of facts, however, will likely conduct their respective matters cautiously and independently. While SEC civil proceedings vary from the bankruptcy process, the securities cases demonstrate the parameters of the “proper administration of justice,” which district courts may be asked to apply as the civil enforcement of rights and obligations under the *Bankruptcy Code* also result in criminal referrals, investigators and prosecutions.

## Celeste K. Miller, Regional Fraud Coordinator (continued)

### INFORMATION SHARING

All information generated in a bankruptcy case is or becomes available to the criminal investigation. An investigator can interview any and all participants in the bankruptcy case; review any documents contained in the court file, the U.S. Trustee's or the panel trustee's files; and subpoena bank records from accounts identified in the bankruptcy case. The information developed for the civil proceeding is invaluable to a criminal investigator. Civil proceedings typically generate enough evidence to determine whether to pursue a criminal case, and they often generate enough evidence to charge one.

There are limitations, however, on the ability of civil parties to use information generated in a parallel criminal investigation. Rule 6(e) of the Federal Rules of Criminal Procedure prohibits specified parties from disclosing information obtained through the grand jury process. Thus if a criminal investigator obtains the name or number of a bank or loan account from documents filed in the bankruptcy case, the grand jury can subpoena any and all bank records concerning the debtor or subject at that financial institution. Rule (6)(e) prevents government disclosure of items obtained by the subpoena so the grand jury documents and evidence will not be made available to any party to the civil bankruptcy case. The subpoenaed financial institution is not required to disclose to its customer (the debtor, for example) that it has received a grand jury subpoena. Thus the criminal investigation can proceed unbeknownst to the debtor or other parties, including whomever may have originally referred the matter for criminal investigation.

Rule 6 (e) secrecy protects the target of an investigation. The value of secrecy is exemplified especially by cases in which the evidence compels a conclusion that the person has not committed a federal crime or a determination is made that evidence is too weak to meet the government's burden of proof at trial. Such instances highlight the importance of grand jury secrecy and the presumption of innocence. Parties to the civil proceeding who made or knew of a criminal referral that does not result in a prosecution will likely not learn of the ultimate outcome unless they are informed by someone who is not prohibited by Rule 6(e) from discussing the matter.

Documents and information generated in the criminal investigation by means other than grand jury subpoena can be shared with parties to the civil case. Search warrant materials are often the most useful, but other sources such as witness interview write-ups, phone numbers and names of creditors discovered by criminal investigators can be shared if they come to light outside the grand jury process. Such information sharing is discretionary. The prosecutor decides whether providing information to civil parties will disrupt the criminal investigation or case, given logistical and strategic developments in the criminal case.

## Celeste K. Miller, Regional Fraud Coordinator (continued)

### THE FIFTH AMENDMENT

Since anything a debtor says in the bankruptcy proceeding can and would be used against him or her in a parallel criminal case, a possibility always exists that a debtor whose conduct has generated any degree of civil enforcement will assert the Fifth Amendment protection against being forced to make incriminating statements. An individual can assert the Fifth Amendment in any civil, criminal, administrative or judicial proceeding, whether investigatory or adjudicatory. *Kastigar v. United States*, 406 U.S. 441 (1972). The Fifth Amendment privilege extends to documents or “any evidence that could furnish a link in a chain of incriminating factors.” *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

An immediate concern of an individual asserting the Fifth Amendment privilege in a bankruptcy proceeding, however, is that adverse inferences can be drawn from its use in a civil context, *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976), including use of the assertion in a civil proceeding as circumstantial evidence. *Federal Trade Commission v. Kitco*, 612 F. Supp. 1282, 1290 (D. Minn. 1985). Asserting the Fifth Amendment at the 341 meeting raises a strong inference of wrongdoing such as international concealment or under-stated asset value and would surely trigger further investigation into assets. In the criminal context, however, no adverse inference can be drawn when a witness invokes the Fifth Amendment. *Mitchell v. United States*, 119 S. Ct. 1307, 1316 (1999).

Practical concerns arise when a debtor makes a blanket assertion of the Fifth Amendment as to document production or in advance of giving sworn testimony. A party asserting the Fifth Amendment must do so specifically, *Davis v. Fendler*, 650 F. 2d 1154, 1160 (9th Cir. 1981), and the privilege cannot be asserted in advance of a specific question. *In Re French*, 127 BR 434 (Bkrcty. D. Minn. 1991). Once a Rule 2004 exam is underway, the debtor can assert the Fifth Amendment as to specific questions, but questioning can proceed to discover matters to which the privilege does not apply.

A debtor cannot be denied a discharge for asserting the Fifth Amendment, 11 U.S.C. §§ 344, 727 (a)(6), *In Re Martin-Trigona*, 732 F. 2d 170, 173 (2d Cir. 1983), but the bankruptcy case could be dismissed. Asserting the Fifth Amendment as a sword rather than using it as a shield brought that result in *In Re Connelly*, 59 BR 421, 448 (Bkrcty. N.D. Ill. 1986) (Debtor’s schedules disclosing only name, address and Social Security number led to dismissal). The Court in *In re French, Id.*, dealt with a similar blanket invocation of the Fifth Amendment and ordered the debtor there to assert it question-by-question. The debtor then asserted the privilege as to only six specific questions. The *French* decision criticizes *Connelly* for not having provided the debtor an opportunity to assert the Fifth Amendment selectively before dismissing the case.

## Celeste K. Miller, Regional Fraud Coordinator (continued)

### WAIVERS AND PROTECTIVE ORDERS

Witnesses can either waive the Fifth Amendment privilege during civil proceedings or choose a point at which to assert it. A person who passes up an opportunity to invoke the Fifth Amendment and testifies loses its protection as to statements then made and against providing further details of incriminating facts to which the witness earlier testified. *In Re Gi Yeong Nam*, 245 B.R. 216, 227 (Bankr. E.D. Pa. 2000). The same person can, however, invoke the privilege later either in the same context (in the same deposition) or in response to questions asked in later stages of the same proceeding. *United States v. Licavoli*, 604 F. 2d 613, 623 (9th Cir. 1979)(witness who testified at grand jury validly asserted the Fifth Amendment at a later trial). *See also: In Re Master Key Litigation*, 507 F. 2d 292, 294 (9th Cir. 1974) (within the same proceeding the witness can pick a point beyond which he or she will not go so long as responses to new questions would tend to incriminate). *But see A & L Oil Co., Inc.*, 2000 B.R. 21, 24 (Bankr. D. New Jersey 1996) (witness compelled to testify with no immunity at continued Rule 2004 exam after waiver on first day of exam).

Debtor-targets may seek protective orders to seal deposition transcripts as an alternative to asserting the Fifth Amendment privilege, but a federal grand jury subpoena for the transcripts may “trump” an order sealing them. Circuits are split on this issue, but a majority has held in favor of a grand jury subpoena. The Ninth, Fourth and Eleventh Circuits apply a *per se* rule allowing subpoenas to obtain transcripts. *In Re Grand Jury Subpoena*, 63 F. 3d 1222, 1226 (9th Cir. 1995); *In Re Grand Jury Subpoena*, 836 F. 2d 1468, 1471 (4th Cir.); *In Re Grand Jury (Williams)*, 995 F. 2d 1013 (11th Cir. 1993). *But See, Martindell v. ITT*, 594 F. 2d 291 (2d Cir. 1979). The First Circuit has held in favor of grand jury subpoenas but declined to adopt a *per se* rule. *In Re Grand Jury Subpoena*, 138 F. 3d 442, 444 (1st Cir. 1998).

### THE FOURTH AMENDMENT AND TRUSTEE SEARCHES FOR ASSETS

Trustees occasionally seek bankruptcy court orders to assist them in the recovery of bankruptcy estate assets either from debtors’ premises or from the homes or business premises of third parties. Questions arise about bankruptcy court powers to issue search and/or asset seizure orders sought by trustees and whether Fourth Amendment protections against warrantless search and seizure apply in these circumstances.

In a case concerning a request to search a debtor’s residence, one court noted that, except in certain rare circumstances, the governing principle that has consistently emerged in the context of private residence searches is that a search of private property without proper consent is “unreasonable” unless it has been authorized by a valid search warrant. *In re Truck-A-Way*,

## Celeste K. Miller, Regional Fraud Coordinator (continued)

300 B.R. 31, 39 (E.D.Cal.2003). The *Truck-A-Way* decision further pointed out that Federal Rule of Criminal Procedure 41 requires an exacting procedure for obtaining a search warrant. A warrant may issue only upon the affidavit of a federal law enforcement officer or an attorney for the government establishing probable cause for the search, and the rule authorizes only a federal magistrate judge with authority in the district or a state judge in the district to issue a search warrant. Fed. R. Crim. P. 41(b); *In re Truck-A-Way*, *Id.*

A bankruptcy court that recently addressed these issues denied the trustee's motion for authority to enter and search for approximately \$100,000 in cash the debtor said he had hidden at his former marital residence. The debtor's ex-spouse had sold the house to new buyers, but the debtor was certain his hidden cash would still be there. *In re Vincent & Bonnie Skinner*, 336 B.R. 316 (N.D. Ohio 2005). The Ohio bankruptcy court declined to authorize the trustee to search the home of the non-debtor third party owners because Rule 41 provides for search warrants to issue only upon the request of a federal law enforcement officer or an attorney for the government. The court held that a trustee is neither a federal law enforcement officer nor an attorney for the government. Fed. R. Crim. P. 41(a), *In re Application of Trustee in Bankruptcy*, 173 B.R. 341, 342 (N.D. Ohio 1994). *Fuentes v. Shevin*, 407 U.S. 67, 94 n. 30 (1972) ("the Fourth Amendment guarantees that the State will not issue search warrants merely upon the conclusory application of a private party").

In the case of *Taunt v. Barman (In re Barman)*, 252 B.R. 403 (Bankr. E.D. Mich. 2000), the trustee obtained an ex parte order that authorized the trustee to enter the debtor's residence to inventory, inspect, and appraise personal property. The *Barman* court analyzed the debtor's subsequent claims of unlawful search under the Fourth Amendment. The court determined that the debtor's privacy rights were reduced by having filed bankruptcy, and it held that the trustee was a government agent because "the status and function of a trustee in a chapter 7 case all suggest a sufficient nexus to the government and its power that it is necessary and appropriate to apply to the trustee the Fourth Amendment limits on government power." *Id.* at 412-13.

After concluding that the trustee was acting as an agent of the government for Fourth Amendment purposes, the court balanced the interests of the trustee and the public against those of the debtor and concluded that the actions there did not violate the Fourth Amendment. *Id.* at 419-20. The fact that the trustee entered the premises to inspect and take inventory rather than to search and seize property was important.

## Celeste K. Miller, Regional Fraud Coordinator (continued)

A California bankruptcy court in *In re Kerlo*, 311 B.R. 256 (Bankr. C.D. Cal 2004), held that the trustee who entered a debtor's residence with U.S. Marshal assistance and seized estate property while enforcing a second turnover and eviction order was not acting as an agent of the government. The *Kerlo* court also analyzed the debtor's claim that the entry violated a constitutionally protected expectation of privacy. By drawing an analogy of the debtor's interest to that of a lessee or a hotel guest (after the check-out hour), the court found that the debtor did not have a such a heightened expectation of privacy after entry of the second turnover order as to invalidate the seizure of assets from the premises. *Id.* at 267.

With respect to personal property the trustee seized, the *Kerlo* court found that the trustee had sought the Marshal's assistance (rather than being asked to assist and become an agent of the Marshal) and was acting pursuant to statutory obligations to the estate, which gave the trustee a legitimate, independent purpose for the intrusion. The court found no constitutional violation and validated the exercise of trustee powers over property of the estate. *Id.*

There is a "good faith" exception to the exclusionary rule in traditional Fourth Amendment analysis. The Supreme Court carved this exception in a search and seizure case in which police officers were found not to have exceeded authority granted them under a search warrant that was duly issued by a United States Magistrate Judge under Federal Rule of Criminal Procedure 41 but was later found to be defective. *United States v. Leon*, 468 U.S. 897, 920 (1984). The *Leon* decision established that neither those who mislead a magistrate into issuing a warrant nor those who exceed the scope of a warrant would be entitled to the good faith exception for such conduct, but officers who act pursuant to a duly issued search warrant later found to be defective will not be held to have violated the Fourth Amendment.

### CONCLUSION

Parties with interests in bankruptcy estate assets have numerous civil processes through which to assert them, and even to seize them in limited circumstances. Asset concealment that successfully avoids all such tools and strategies and evidences an intent to defraud or cheat creditors warrants investigation by criminal authorities. Simultaneous or successive bankruptcy and criminal processes concerning the same individuals or some of the same facts will occasionally present obstacles or cause delay in one proceeding or the other. Ultimately, however, both processes facilitate the goal of providing an orderly distribution of proceeds from bankruptcy estate assets to creditors entitled to payment. These parallel processes also protect the integrity of the bankruptcy system, which provides relief to the honest debtor in need of a fresh start.

## Celeste K. Miller, Regional Fraud Coordinator (continued)

# # #

- Note: The expressions in this article are solely those of the author, and not of the United States Trustee Program or the Department of Justice.

### About the author—

Celeste Miller is a 1980 graduate of the University of Idaho Law School, and she has been with the Department of Justice for 20 years. After a clerkship and six years in private practice at Givens Pursley in Boise, Ms. Miller joined the Idaho office of the United States Attorney. There she handled a varied civil litigation caseload before moving to the criminal division to prosecute white collar cases, including numerous bankruptcy fraud prosecutions.

Four years ago Ms. Miller joined the United States Trustee Program as a founding member of its Criminal Enforcement Unit. She serves as a Bankruptcy Fraud Coordinator in the Pacific Northwest where she works with U.S. Trustee and U.S. Attorney offices as well as federal investigative agencies to address bankruptcy fraud crimes in the region. Ms. Miller is designated as a Special Assistant United States Attorney in four districts. Ms. Miller has written and spoken extensively on white collar crime topics, including bankruptcy fraud, for well over a decade.

# Kim Toryanski, newly-appointed Director, Commission on Aging

## KIM TORYANSKI HAS BEEN APPOINTED DIRECTOR OF THE COMMISSION ON AGING



(BOISE) – Governor C.L. “Butch” Otter recently announced that Kim Toryanski, a Boise lawyer who specialized most recently in pension and employment benefits under the federal Employee Retirement Income Security Act, is the new administrator of the state Commission on Aging, succeeding Lois Bauer, who retired.

In making the announcement, Governor Otter stated, “With Kim, Idaho seniors have another strong and able advocate. Her record of working on behalf of vulnerable clients and navigating some of government’s toughest bureaucracies makes her uniquely qualified for this new challenge.”

Before her last nine years in private legal practice, Ms. Toryanski served as a federal and state prosecutor handling complex criminal and civil litigation, including health care fraud and telemarketing fraud cases in which the elderly or aged often were victimized. She served in Washington, D.C. as an attorney with the U. S. Department of Justice, Criminal Division, and as Majority Staff Counsel to the U.S. Senate Permanent Subcommittee on Investigations.

In her new role, Ms. Toryanski works with a seven-member Idaho Commission on Aging Board that also is appointed by the Governor. The commission is an advocacy body in state government and the community for older Idahoans.

Ms. Toryanski is a member of the Idaho Chapter of the Federal Bar, and serves as the Special Events coordinator. She is married to Deputy Attorney General Mitch Toryanski. They live in Boise with their two sons and daughter.

# # #



Judge Edward J. Lodge  
District of Idaho

# Jury Verdicts, District of Idaho

**Kotewa v. Living Independence  
Network Corporation**

**CV-05-426-S-EJL  
Judge Lodge, March 2007**

**Case settled on second day**

**Plaintiff: Breck Seiniger  
Seiniger Law Offices**

**Defendant:  
Bill Mauk  
Mauk & Burgoyne**

**United States v. Steven Howard**  
**CR-06-97-N-EJL**

**Judge Lodge, April 2007**

**Guilty as charged in one-count  
Indictment (Bank Robbery)**

**For the Government:  
Josh Taylor, Asst. U.S. Attorney**

**For the Defendant:  
Tina Hunt, Federal Defenders  
Spokane, WA**

**Sentenced July 30, 2007  
to 52 months, 3 years supervised  
release, \$2,323 restitution,  
\$100 special assessment**

**United States v. Marquez-Sanchez**  
**CR-07-07-S-EJL**

**Judge Lodge, September 2007**

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

**For the Government:  
Lynn Lamprecht,  
Asst. U.S. Attorney**

**For the Defendant:  
VanNoy G. Bishop**

**United States v. Robert Lippert**  
**CR-05-118-N-EJL**

**Judge Lodge, September 2007**

**Guilty on all Counts —  
mail fraud case**

**For the Government:  
Nancy Cook, Asst. U.S. Attorney**

**For the Defendant:  
Kathleen Moran,  
Federal Defenders, Spokane, WA**

# JURY VERDICTS, District of Idaho

**Martin v. Inclusion, Inc.**  
**CV-05-156-S-BLW**  
**Judge Winmill, April 2007**

**Judgment in Favor of Defendant**

**For Plaintiff: Dean A. Martin, Esq.**  
**Boise, ID**

**For Defendant: Jacob Deaton, Esq.**  
**Charney Law Office**  
**Eagle, ID**

**LaFay v. Micron Technology, Inc.**  
**CV-05-287-S-BLW**  
**Judge Winmill, May 2007**

**Judgment in Favor of Defendant**  
**Micron Technology, Inc.**  
**and David Korn**

**For the Plaintiff :**  
**Sam Johnson and Jason Monteleone**  
**Johnson & Monteleone**  
**Boise, ID**

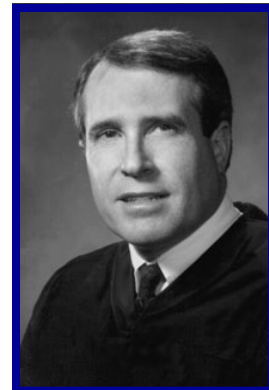
**For the Defendant:**  
**Patricia Olsson and Jason Murray**  
**Moffatt Thomas Barrett Rock &**  
**Fields**  
**Boise, ID**

**Weerheim v. J.R. Simplot**  
**CV-05-20-E-RJB**  
**Judge Bryan, March 2007**

**Court declared a mistrial on Plaintiff's Claim #1. Judgment in Favor of Defendant on Claims #2 and #3 pursuant to the verdict. Court ordered Claims #2 and #3 to be dismissed.**

**Plaintiff:**  
**DeAnne Casperson and**  
**William D. Faler**  
**Holden Kidwell Hahn & Crapo**  
**Idaho Falls, ID**

**Defendant:**  
**Brian K. Julian**  
**David F. VanderVelde**  
**Anderson, Julian & Hull**  
**Boise, ID**



**B. Lynn Winmill**  
**Chief Judge**  
**U.S. District Court**  
**District of Idaho**



Judge Edward J. Lodge  
District of Idaho



Judge N. Randy Smith  
United States Court of  
Appeals for the  
Ninth Circuit

# Jury Verdicts, District of Idaho

## United States v. Dustin Quagigant

CR-07-37-E-EJL

Judge Lodge, June 2007

Guilty as charged in two-count  
Indictment (Assault Resulting in  
Serious Bodily Injury,  
Assault with a Dangerous Weapon)

**For the Government:**  
Jack Haycock  
Assistant United States Attorney

**For the Defendant:**  
Paul EchoHawk  
EchoHawk Law Offices  
Pocatello, ID

Sentenced August 20, 2007 to 42  
months on each of Counts 1 and 2  
to run concurrently, 3 years  
supervised release on each of  
Counts 1 and 2 to run concur-  
rently, \$200 special assessment

## United States v. Thomas Fanning

CR-06-130-N-EJL

Judge Lodge, July/August 2007

Not Guilty as charged in Count  
One: Assault with a Deadly  
Weapon; Guilty as charged in the  
Lesser Included Count: Assault

**For the Government:**  
Nancy Cook  
Assistant United States Attorney

**For the Defendant:**  
Robert Fischer  
Federal Defenders, Spokane, WA

Sentencing set October 22, 2007

## Weerheim v J.R. Simplot Company

CV-05-20-E-NRS

Judge Smith, July/August 2007

Judgment in Favor of Defendant

**For the Plaintiff**  
DeAnne Casperson  
William D. Faler  
Holden Kidwell Hahn & Crapo  
Idaho Falls, ID

**For the Defendant:**  
Brian K. Julian  
and Davis F. VanderVelde  
Anderson Julian & Hull  
Boise, ID

Trial Held in Pocatello, Idaho

Costs Taxed Against Plaintiff  
in the Amount of \$3,467.15

# JURY VERDICTS, District of Idaho

**Afshari v. Cobra Manufacturing**  
**CV-04-271-E-BLW**  
**Judge Winmill, May 2007**

**Judgment in Favor of Plaintiff,  
 \$65,000 with interest and costs**

**For the Plaintiff:**  
**David Alexander**  
**Racine Olson Nye Budge & Bailey**  
**Pocatello, ID**

**For the Defendant:**  
**Steven Adams**  
**Fellers Snider**  
**Blankenship Bailey & Tippens**  
**Tulsa, OK**

**and James Ruchti**  
**Cooper & Larsen**  
**Pocatello, ID**

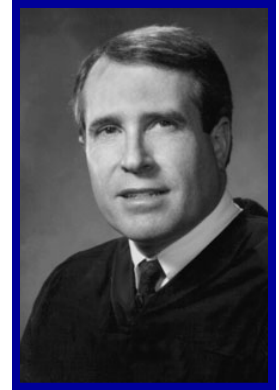
**United States v. Jesse James**  
**Wadsworth**  
**CR-06-163-E-BLW**  
**Judge Winmill, May 2007**

**Not Guilty (Abusive Sexual  
 Contact)**

**For the Government:**  
**Joshua S. Van De Wetering**  
**Special Attorney to the**  
**U.S. Attorney General**

**For the Defendant:**  
**Tera Harden**  
**Criminal Defense Associates**  
**Woodland Hills, CA**

**and Aaron Thompson**  
**Dial May & Rammell**  
**Pocatello, ID**



**B. Lynn Winmill**  
**Chief Judge**  
**U.S. District Court**  
**District of Idaho**

**United States v. Krister Evertson**  
**CR-06-206-E-BLW**  
**Judge Winmill, June 2007**

**Guilty: Counts 1, 2 and 3 (Willful  
 Violation of Laws and Regulations  
 Related to Transportation of  
 Hazardous Materials, Knowing  
 Violation of Laws and Regulations  
 Related to Storage and Disposal of  
 Hazardous Waste)**

**For the Government:**  
**J. Ronald Sutcliffe**  
**Trial Attorney**  
**Environment and Natural  
 Resources Division**

**Evertson continued**  
**and Michelle Mallard**  
**Assistant United States Attorney**

**For the Defendant:**  
**Nicholas Vieth and Steve Richert**  
**Federal Defenders Office**  
**Pocatello, ID**

**Sentencing set October 22  
 in Pocatello**

# Complaints Filed in Federal Court

Kestler v. Smith, et al. CV-07-109-S-BLW

Abuse of Process; Diversity Jurisdiction

- Michael P. Stefanic, II, Anderson Jullian & Hull, Boise, ID and  
Lloyd William Walker, Peachtree City, GA for Plaintiff
- David V. Nielsen, Esq. Boise, ID for Defendant

Plaintiff, Pastor Kestler is the pastor of the Calvary Chapel of Twin Falls. Defendant Pastor Smith is the founder of the Calvary Chapel Movement. The Calvary Chapel of Twin Falls owns two radio stations and combines its broadcasting assets with an organization called CSN. In exchange for broadcasting time, Pastor Smith agreed to provide financing for the broadcasting network through the Calvary Chapel Movement. Pastor Smith later alleged that due to this financing the Calvary Chapel Movement had gained ownership in the broadcasting network. The network refused to give the Calvary Chapel Movement ownership, and Pastor Smith ceased funding for the network.

In 2003 Lori Pollitt filed a claim of sexual harassment with the Idaho Human Rights Commission against Pastor Kestler. The Idaho Human Rights Commission issued a decision that no probable cause existed to believe her allegations and dismissed the complaint, giving her 90 days to file suit. Pollitt could not find an attorney to take her case on a contingency basis, but three days before the statute of limitations was to expire, Pollitt was contacted by Pastor Smith's representative who explained that Pastor Smith was willing to pay for her lawyer on an hourly basis. Before Pastor Kestler was served with the Pollitt litigation, it was publicized to the Calvary Chapel of Twin falls radio stations. Pastor Kestler alleges that Pastor Smith's motivation for funding the Pollitt litigation was to embarrass, harass, and cause emotional distress for Pastor Kestler and his family.

Pastor Kestler is suing for abuse of process and intentional infliction of emotional distress. The case was filed in federal court based upon diversity jurisdiction.

# Complaints Filed in Federal Court

Dodge v. Renke, et al., CV-07-124-E-ELJ Civil Rights; Federal Question Jurisdiction

- Rachelle Dodge, Pro Se Prisoner
- As of July 2007, no Appearance has been filed on behalf of Defendants

Rachelle Dodge is a citizen of the State of Idaho presently residing at Pocatello Women's Correctional Center. Dodge alleges that she has been denied access to the courts. She was denied the opportunity to research her case as well as access to a paralegal and notary in order to file an appeal. By the time Dodge gained access to research materials and the correct forms, her time to appeal had expired.

Dodge has sued in federal court alleging violations of the First, Sixth, Eighth and Fourteenth Amendments. Dodge is requesting injunctive relief to ensure other inmates have access to the courts. Dodge is also requesting compensatory and punitive damages for her inability to appeal her sentence.

Ortega v. Idaho State Police, et al., CV-07-152-S-BLW Civil Rights; Jurisdictional

- Cynthia Jane Woolley and Mary Katherine Patton, Law Offices of Cynthia J. Woolley, Ketchum, ID for Plaintiff
- As of July 2007, no Appearance has been filed on behalf of Defendants

Albino Ortega is the owner of the Jerome Events Center and of Mexican origin. The Jerome Events Center is a venue for individuals and multi-generational families to celebrate their Hispanic heritage. People of all ages visit the Jerome Events Center. A partition runs through the building to separate underage clients from those who can legally consume alcohol. In March of 2007, Defendants removed all minors from the Center, although Defendants found no alcohol violations, cited no one for underage drinking, and did not issue any written warning or citation to Ortega. Defendants threatened to close the facility if minors continued to frequent the Center.

In June 2006, Ortega applied for a renewal of his alcoholic beverage license and requested a change in license to include a restaurant endorsement. Defendant refused to grant a restaurant endorsement to Ortega or the Jerome Event Center. The Defendant, however, provided a restaurant endorsement to a similar establishment, whose owners were not of Mexican origin.

Ortega alleges he has been denied substantive and procedural due process under the state and federal constitutions. He alleges he has been denied equal protection under the state and federal constitutions. He also alleges Defendants have violated 42 U.S.C. §§ 1983 and 1985.

# Complaints Filed in Federal Court

## Ortega (continued)

Ortega seeks a declaratory judgment that Ortega is entitled to a restaurant endorsement and that minors are permitted on the premises. He also seeks an injunction to prevent Defendants from engaging in harassment, discrimination, and interference of Ortega's statutory and Constitutional rights.

## Klimes et al. v. Menu Foods, CV-07-160-S-MHW

Personal Injury Product Liability; Diversity Jurisdiction

- Bruce S. Bistline and Phillip Howard Gordon, Gordon Law Offices, Boise, ID and Mick Hodges, Peterson, Hodges & Harper, Twin Falls, ID for Plaintiff
- Stephen R. Thomas, Moffatt, Thomas, Barrett, Rock & Fields, Boise, ID for Defendant

The Plaintiffs are a Class of all persons who purchased any dog or cat food produced by Defendant and has had a dog or cat become ill or die as a result of eating the food. Defendant Menu Foods is a Canada corporation that produces dog and cat food sold under brand names such as Iams, Eukanuba, and Science Diet. In March 2007 Menu Foods recalled 50 brands of dog food and 40 brands of cat food.

Plaintiffs allege that products of Menu Foods caused their pets to become ill or die. Plaintiffs were caused to pay substantial veterinary expenses. Plaintiffs allege breach of contract, breach of warranties, unjust enrichment, and unlawful, deceptive, and unfair business practices. The suit was filed in federal court based upon diversity jurisdiction.

# Complaints Filed in Federal Court

Citadel Broadcasting Company et al. v. Peak Broadcasting, LLC et al., CV-07-203-S-LMB

Trade Secret; Federal Question Jurisdiction

- Charina Anne Neville and Kelly Alfred Cameron, Perkins Coie, Boise, ID for Plaintiff
- David J. Reis and Long X. Do, Howard, Rice, Nemerovski, Canady, Falk & Rabkin, San Francisco, CA, and Karen Overly Sheehan and Candy W. Dale, Hall, Farley, Oberrecht & Blanton, Boise, ID for Defendants

Plaintiff Citadel Broadcasting operates a radio broadcasting company that owns many stations across the country, including six radio stations serving the Treasure Valley area. Defendant Peak Broadcasting recently acquired six radio stations in the Boise area. Citadel and Peak are direct competitors in the Boise radio market.

Citadel has developed competitively sensitive, confidential, proprietary, and trade secret information relating to its strategic business plans, marketing plans, rate arrangements, station financial and operational information, play lists, music rotations, customer lists, and programming information. Citadel strictly maintains the secrecy of this information.

Defendant Lawley worked for Citadel until 2006 as Regional Vice President, when he resigned to become the CEO of Peak. Defendant Lawley was privy to nearly all of Citadel's confidential, proprietary and trade secret information. Since leaving Citadel Lawley has attempted to recruit Citadel's employees and has disclosed Citadel's trade secret information to Peak. Defendant Godwin, a Regional Manager at Citadel, also left Citadel to join Peak and likewise disclosed proprietary information. Defendant Owens resigned as Citadel's General Manager. Upon leaving the company, he took with him a disk containing Citadel's confidential, proprietary, and trade secret information. Owens shared this information with Peak, where he is now employed.

Among other things, Plaintiff alleges civil conspiracy, violation of the Idaho Trade Secrets Act, unfair competition, and breach of fiduciary duties of confidentiality and loyalty. The suit has been removed to federal court based upon diversity jurisdiction.

# Complaints Filed in Federal Court

## Keim v. United Heritage Life Insurance Co., CV-07-298-BLW

Family Medical Leave Act; Federal Question Jurisdiction

- Patrick E. Mahoney of Mahoney Law Office, PLLC in Boise, Idaho, for Plaintiff.
- Candy W. Dale, and Karen Overly Sheehan; of Hall, Farley, Oberrecht, & Blanton, in Boise, Idaho, for Defendant.

Ida Keim was employed by United Heritage from March 2001 through August 2005. On July 11, 2005 United approved Keim's FMLA leave in connection with her physician's certification. Keim contends that the leave was back-dated to June 30, 2005 and included a return to work date on July 18, 2005. Keim did not return to work by July 18, 2005, and alleges she gave United sufficient notice to extend her leave. On August 1, 2005 Keim was told she needed further medical certification to extend. The next day, August 2, 2005, Keim allegedly advised her employer she was going to see her doctor to obtain the needed certifications. United Heritage contends it was her husband that called in. On August 5, 2005 United Heritage allegedly terminated Keim's employment because she had not yet provided the requested medical certifications. Keim's full 12 weeks under the FMLA of leave would have ended in late September 2005, if taken in full.

The Family Medical Leave Act recognizes the needs of balancing health, work, and families. The Act allows for 12 weeks of leave per 12 months for various medical reasons, individually or within the immediate family. The Act is meant to allow restoration of a person's employment after the leave to the same or equivalent position upon their return.

## Doolittle v. Structured Investments, CV-07-356-S-MHW

Breach of Contract; Diversity Jurisdiction

- John Robert Kormanik of Kormanik, Hallam, & Sneed LLP, Meridian, Idaho, for Plaintiff.
- Defendant Structured Investments Co., LLC has not yet filed a response.

In November 2005, Doolittle was hired by U.S. Pension Funding and named Marketing Director. The compensation package included \$75,000.00 a year and an expense account to reimburse Doolittle for all his business-related expenses. Doolittle discontinued working for U.S. Pension Funding in July 2007. Shortly after his employment ceased, Doolittle made a demand for wages owed under an Idaho Code allowing "Treble Damages for Withholding Wages" in the amount \$146,064.00 dollars. Additionally, Doolittle alleges breach of contract, unjust enrichment, breach of covenant of good faith and dealings, and intentional or negligent infliction of emotional distress.

# Complaints Filed in Federal Court

Fenwick v. Humana Maketpoint Inc., CV-07-373-S-EJL

Contract Dispute; Diversity Jurisdiction

- William L. Smith of Bill Smith & Associates, PA in Boise, Idaho, for Plaintiff.
- Bradley J. Dixon and James C. Dale, of Stoel Rives LLP, in Boise, Idaho, for Defendant.

Julia Fenwick was employed by Humana as the Idaho State Market Manager from August 2005 until March of 2007. While interviewing for Humana, Fenwick claims she had disclosed a current ownership interest in another insurance company. After she was hired to market for Humana, Fenwick again contends that she disclosed her ownership interests with the other insurance company. Several months later Humana and their agent DeVincentis believed her interests in the other company violated ethics employed by Humana. Humana and DeVincentis allegedly directed Fenwick to sell her interests because it constituted a conflict of interest between Fenwick and her employment with Humana. Fenwick sold the alleged competing interests in August 2006 for less than its Fair Market value. In March 2007 Humana terminated Fenwick for the same previously alleged ethics violations in April 2006.

Fenwick seeks specific unpaid wages to be increased by statutory penalty or three times the unpaid amounts, which ever is greater, and all attorney's fees. Additionally Fenwick seeks damages alleging her reputation was defamed and for the losses incurred for the forced sale of her other ownership interest.

This case was removed from Idaho State court under diversity jurisdiction. Plaintiff is from Idaho. Defendant DeVincentis resides in Utah, and Defendant Humana Marketpoint is incorporated in Kentucky.

# Complaints Filed in Federal Court

Ingham v. US Bank National Association, N.A., et al, CV-07-363-S-EJL      Federal Question

- Kelly I. Beeman, Beeman Law Offices for Plaintiff
- Aaron C. Charrier, Jones Hess Fuhrman & Eiden for Defendant

The Inghams and their corporate entity, Emission Condition, Inc., maintained several commercial loans with US Bank totaling \$19,000.00. The loans entered collections status, which the Inghams allege was the result of clerical errors by US Bank. The Inghams seek relief under the Fair Debt Collection Practices Act, alleging that US Bank employed prohibited practices in pursuit of repayment of the loans. Among these are wrongful garnishment of wages, harassment, and failure to communicate through the debtor's attorney. US Bank has removed the case on the basis of federal jurisdiction under the FDCPA.

Rollins v. Blaine County Board of Commissioners, CV-07-275-S-EJL      Federal Question

- Cynthia Jane Woolley for Plaintiff
- Bruce J. Castleton, Naylor and Hales for Defendant

The Blaine County Commissioners granted and then revoked a building permit allowing the Rollins to develop their property. The Blaines eventually obtained a reversal of the revocation in Blaine County court, but they allege damages attributable to the delay. They advance various state and federal due process claims, including a temporary taking of their property under the Fifth and Fourteenth Amendments. They also seek an injunction preventing any further restraint on the development of their property.

Van Diest v. Williams, CV-07-312-S-BLW      Federal Question

- Dennis M. Charney, Charney and Associates for Plaintiff
- Michael J. Kane, Kane & Tobiason, LLP for Defendants

Van Diest was charged with and acquitted of several felony counts in Valley County, Idaho. He alleges that after the acquittal, the Defendants, who are Prosecuting Attorneys for Valley County, brought new charges and made a misrepresentation to the court that he had failed to timely register in a sex offender database. The Valley County court issued a bench warrant for Van Diest's arrest and set bail at \$30,000, effecting what he claims was a false imprisonment. He advances a claim based on the Fourteenth Amendment, as well as Abuse of Process, Intentional Infliction of Emotional Distress, and Negligence claims.

# Complaints Filed in Federal Court

Plaster v. Syngenta Seeds Inc., CV-07-226-S-LMB

Family Medical Leave Act; Federal Question Jurisdiction

- William H. Thomas, Huntley Park, Boise, Idaho, for Plaintiff
- Bradley J. Dixon, Stoel Rives, LLP, in Boise, Idaho, for Defendants

Ms. Plaster was employed full-time by Syngenta Seeds from 1986 until July 2006. Plaster claims she worked more than 1250 hours each year of her employment including the 12 month prior to her termination. Plaster suffers from persistent reoccurring sinus infections and migraine headaches. Because of Plaster's unscheduled illness-related absences, Defendants Ballensky and Schindler allegedly created an "Employee Action Plan" in an effort to terminate Plaster. According to Plaster, no other Syngenta employees were required to agree to any such "Employee Action Plans." The alleged plans were a type of micro-management tool to limit Ms. Plaster's excessive absences due to her condition.

Plaster claims her health declined under the stress of the plan. Defendants Ballensky and Williams placed Plaster on another "Action Plan" demanding "significant improvement in the reduction of unscheduled illness-related absences." Plaster's health allegedly suffered further under the stress of this second action plan.

Plaster contends that her doctor recommend nasal surgery to possibly remedy the reoccurring health issues. Plaster further contends that Defendants Ballensky and Williams demanded Plaster use up her vacation time for the scheduled procedure. On or about the same time, Defendants placed Plaster on probation for her medical time off. Further, Defendant Ballensky gave Plaster a "Confidential Separation Agreement and General Release" to sign. On June 28, 2006, Plaster had the medical procedure on her sinus.

Plaster was terminated on July 5, 2006 from her employment with Syngenta.

Plaster brings her action under the Federal Family Medical Leave Act granting Federal Jurisdiction as Federal Question. Additionally, under Federal Rule of Civil Procedure § 1367(a) Supplemental jurisdiction, Plaster alleges negligence, and intentional or negligent infliction of emotional distress.

# Complaints Filed in Federal Court

Kress, et al. v. Copple-Trout, et al., CV-07-261-S-BLW

Denial of Due Process; Federal Question Jurisdiction

- Robert C. Huntley, Huntley Park, Boise, ID for Plaintiffs
- Merlyn W. Clark, Hawley, Troxell, Ennis & Hawley, Boise, ID for Defendants

Plaintiffs Stan Kress and Dave Neumann are School District Superintendents. Plaintiff Idaho Schools for Equal Opportunity is an association of Idaho school district superintendents. The Defendants, Justice Linda Copple-Trout, Justice James Jones, Justice Roger Burdick, Justice Pro Tem Wayne Kidwell, and Justice Pro Tem Daniel J. Hurlbutt, are the Idaho Supreme Court Justices who presided in *ISEEO v. State of Idaho*.

Plaintiffs in *ISEEO* filed action against the Idaho State Legislature, seeking to require the legislature to comply with the Idaho Constitution by providing a “uniform, and thorough system of public, free common schools.” In *ISEEO*, the Supreme Court found that the system of funding Idaho’s schools is unconstitutional. The Idaho legislature has not changed the funding system to comply with the finding of the Supreme Court. Plaintiffs have attempted at both the trial court and supreme court level to receive a remedy phase of the trial. They have been denied the opportunity to seek a remedy.

Given the current status of the litigation, Plaintiffs have no remedy at law because they cannot reach the remedy phase of the trial. The Plaintiffs thus seek a Writ of Mandamus or other Injunction, requiring the Defendants to provide the Plaintiffs with the remedy phase of their trial. The Plaintiffs allege that failure to provide the remedy stage of the trial violates their rights of due process under the United States and Idaho Constitutions.

# Complaints Filed in Federal Court

Make-A-Friend, Inc. et al. v. The Bear Mill, Inc. et al., CV-07-276-N-EJL

Breach of Contract; Federal Question

- Matthew T. Christensen and Paul J. Stark, Marshall & Stark, Meridian, ID for Plaintiffs
- Shawn C. Nunley, Walker Law Firm, Coeur d'Alene, ID for Defendants

The Plaintiff Make-A-Friend is a federal corporation of Canada. The Defendant The Bear Mill is an Idaho corporation. Plaintiff had the exclusive right to any and all retail or store operations using The Bear Mill trademark and brand name. The Defendant agreed to be the exclusive wholesale supplier for all sales to Plaintiff's franchises. The franchisees placed orders directly with the Defendant. The Defendant failed to comply with the agreement because it did not adequately support the franchisees using consistent, high quality standards. The Defendant was frequently unable to fill orders and filled many orders late. This caused a substantial loss to Plaintiff, especially during holiday seasons. Pursuant to the agreement, Plaintiff is entitled to terminate the contract.

Among other things Plaintiff alleges a violation of the United Nation Convention on Contracts for the International Sale of Goods and breach of contract. Because the claim arises under a treaty of the United States, the suit was filed in federal court under federal question jurisdiction.

Beck et al. v. Ysursa, CV-07-299-S-MHW

Civil Rights; Federal Question Jurisdiction

- Chris T. Troupis, Troupis Law Office, Eagle, ID for Plaintiffs
- Karen D. Jones, Office of the Attorney General, Boise, ID for Defendant

Plaintiffs are members of the Idaho Republican Party and are registered voters in the State of Idaho. Defendant is the Idaho Secretary of State. In June 2006 at the Idaho Republican Party State Convention a rule was passed, limiting participation in Republican Primary Elections, to those individuals registered as Republicans prior to the Primary Elections. The Idaho Republican Party state Central Committee adopted a similar rule in June 2007. This rule directly conflicts with Idaho election laws that require an Open Primary Election.

Plaintiffs allege that the open primary law violates the First and Fourteenth Amendments because the law restricts their freedom of association. Plaintiffs seek a declaratory judgment that the Idaho Open Primary Election law is unconstitutional as applied to the Idaho Republican Primary. Additionally, Plaintiffs seek an injunction against the State of Idaho and the Idaho Secretary of State, mandating the implementation of the Closed Republican Party Primary Rule.

# Complaints Filed in Federal Court

AT&T Communications of the Mountain States, Inc. v. Qwest Corporation, CV-07-272-S-MHW  
Breach of Contract; Federal Question Jurisdiction

- Molly M. O’Leary, Richardson and O’Leary, Boise, ID, for Plaintiff
- Cynthia A. Mitchell, Peter S. Spivack, and Thomas J. Widor, Hogan & Hartson, Boulder, CO, and Mary S. Hobson, Boise, ID for Defendant

In 2001 and 2002 AT&T and Qwest entered into a contract in which Qwest agreed to provide various products and services to AT&T in Idaho. The agreement also required Qwest to make available to AT&T the rates, terms and conditions of any other similar agreements to which Qwest was a party in Idaho.

Qwest entered into agreements with Eschelon Telecom and McLeod USA Telecommunications Services, Inc. These agreements established rates, terms and conditions for telecommunications provided by Qwest. These rates included a 10% discount. Neither the terms of these agreements nor the discount were made available to AT&T. AT&T alleges breach of contract.

Leach v. Idaho Nephrology Associates, PLLC et al., CV-07-278-S-LMB  
Breach of Contract; Diversity Jurisdiction

- Bryon J. Benevento and Kimberly A. Neville, Snell & Wilmer, Salt Lake City, UT, and Jed W. Manwaring, Evans Keane, Boise, ID for Plaintiff
- Patrick J. Miller and Robert Blaine White, Givens Pursley, Boise, ID for Defendants

Plaintiff Robert Leach is a medical doctor who specializes in the diagnosis and treatment of patients with kidney disorders and disease. Dr. Leach is a Utah resident. Defendants Idaho Nephrology Associates and Kidney Physicians of Idaho are Idaho limited liability companies.

In 2005 Dr. Leach entered into a one year employment agreement with Idaho Nephrology Associates. Under the agreement Dr. Leach agreed to provide medical services to patients. Following the end of the initial term, employment continued on an at-will basis. The employment agreement contained a non-competition clause, preventing Dr. Leach from practicing medicine or participating in the operation of a dialysis clinic for five years within a 125 mile radius of Pocatello. Defendant’s granted Dr. Leach the right to buy an ownership interest in Idaho Nephrology Associates and Kidney Physicians of Idaho. Defendant’s refused to honor the provision.

Dr. Leach has complied with the agreement, but has recently moved to Ogden, Utah and intends to practice medicine there. He seeks a declaratory judgment that the covenant not to compete is void for reasons of public policy, or void due to Defendants’ breach of the contract. The suit was filed in federal court based on diversity jurisdiction.

# MAGISTRATE JUDGE MERIT SELECTION PANEL

Chief Judge B. Lynn Winmill and Judge Edward J. Lodge, District of Idaho, recently announced the members of the Magistrate Judge Merit Selection Panel. They are as follows:

Robert G. Hamlin, Chair  
Naylor & Hales, PC, Boise

John A. Bailey, Esq.  
Racine Olson Nye Budge & Bailey, Chtd., Pocatello

William F. Boyd, Esq.  
Law Firm of William F. Boyd, Coeur d'Alene

Trudy Hanson Fouser, Esq.  
Gjording & Fouser, PLLC, Boise

Rafael M. Gonzalez, Esq.  
Criminal Chief, U.S. Attorneys Office, Boise

Cathy Holland-Smith, Lay Member  
Legislative Services Office, Division Manager  
Budget & Policy Analysis, Boise

John R. Kormanik, Esq.  
Kormanik Hallam & Sneed, Meridian

Michael E. McNichols, Esq.  
Clements Brown & McNichols, PA, Lewiston

Katherine Moriarty, Esq.  
Batelle Energy Alliance, LLC, Idaho Falls

Erin Nuxoll, Lay Member  
Vice-President, Human Resources  
J.R. Simplot Company, Boise

S. Richard Rubin, Esq.  
Executive Director  
Federal Defenders Services of Idaho, Inc., Boise

# IDAHO CHAPTER MEMBERSHIP

J. Robert Alexander, Benoit Alexander Harwood High & Valdez, Twin Falls  
Steven B. Andersen, Holland & Hart, Boise  
Tyler J. Anderson, Moffatt Thomas Barrett Rock & Fields, Boise  
C. Tom Arkoosh, Arkoosh Law Offices, Gooding  
Dean B. Arnold, Holland & Hart, Boise  
William F. Bacon, Shoshone Bannock Tribes, Fort Hall  
Katherine C. Ball, Career Law Clerk, Chambers of Judge Larry M. Boyle, U.S. District Court, Boise  
David G. Ballard, Bosch Daw & Ballard, Boise  
Thomas A. Banducci, Banducci Woodard & Schwartzman, Boise  
Breck H. Barton, Breck H. Barton & Associates, Rexburg  
Steven W. Berenter, Hawley Troxell Ennis & Hawley, Boise  
Ron T. Blewett, Clark & Feeney, Lewiston  
Joseph W. Borton, Foley Freeman & Borton, Meridian  
Amanda K. Brailsford, Holland & Hart, Boise  
John J. Burke, Hall Farley Oberrecht & Blanton, Boise  
Bruce J. Castleton, Naylor & Hales, Boise  
Phu H. Chau, Moscow  
Merlyn W. Clark, Hawley Troxell Ennis & Hawley, Boise  
Brian J. Coffey, Law Office of Brian J. Coffey, Boise  
Gary L. Cooper, Cooper & Larsen, Pocatello  
Theodore O. Creason, Creason Moore & Dokken, Lewiston  
Candy W. Dale, Hall Farley Oberrecht & Blanton, Boise  
Gary T. Dance, Moffatt Thomas Barrett Rock & Fields, Pocatello  
Karl R. Decker, Holden Kidwell Hahn & Crapo, Idaho Falls  
M. Allyn A. Dingel, Law Office of M. Allyn Dingel, Jr., Boise  
Kevin E. Dinius, White Peterson, Nampa  
Bradley J. Dixon, Stoel Rives, Boise  
William G. Dryden, Elam Burke, Boise  
Mark A. EchoHawk, EchoHawk Law Offices, Pocatello  
Ford Elsaesser, Elsaesser Zarzabek Anderson Marks Elliott & McHugh, Sandpoint  
Joshua S. Evett, Elam Burke, Boise  
Debra A. Ferguson, Assistant U.S. Attorney, District of Idaho, Boise  
Richard C. Fields, Moffatt Thomas Barrett Rock & Fields, Boise  
Julie Fischer, White Peterson, Nampa  
Trudy Hanson Fouser, Gjording & Fouser, Boise  
William A. Fuhrman, Trout Jones Gledhill & Fuhrman, Boise  
Michael D. Gaffney, Beard St. Clair Gaffney & McNamara, Idaho Falls  
David P. Gardner, Moffatt Thomas Barrett Rock & Fields, Pocatello  
Mark S. Geston, Stoel Rives, Boise

# MEMBERS, IDAHO CHAPTER, FBA

Daniel C. Green, Racine Olson Nye Budge & Bailey, Pocatello  
K. Heidi Gudgell, Nez Perce Tribe, Office of Legal Counsel, Lapwai  
Nicole C. Hancock, Syngenta Seeds, Inc., Boise  
Syrena Case Hargrove, City Attorneys Office, Boise  
Donald L. Harris, Holden Kidwell Hahn & Crapo, Idaho Falls  
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## PUBLIC SERVICE PROJECT BY THE IDAHO CHAPTER

Dear Members:

As you know, the Idaho Chapter of the Federal Bar Association (“FBA”) has been dedicated to expanding its membership and as it does so, expand the field of benefits and incentives membership in this organization provides. In addition to expanding benefits for the members, the Executive Committee of the FBA decided to do something positive for the communities in which we practice, by creating a service project for needy schools. This project was spearheaded by Katie Ball, Maggie Morris of Moffatt Thomas, and myself.

The Executive Committee decided this year, rather than attempting to blanket the state, to focus on one city, Idaho Falls. We identified five of the neediest elementary schools in that city, and asked our members to provide a contribution for those schools. Owing to the generosity of many of our Idaho Chapter members of the FBA, we were able to gather enough money to send checks to those needy schools, along with a very large box of school supplies.

We have received heartfelt thanks and gratitude from these schools and each of their principals. We did not place specific limitations on how the funds were to be used, apart from stating it was to benefit the children, and one school used the funds to help purchase new desks and chairs, because owing to a misunderstanding, the old chairs were disposed of before the new chairs and desks arrived. Some of the teachers had been attempting to teach class without chairs or desks.

The FBA intends to continue this program and will select a different city next year and different schools. The Executive Committee wishes to thank all of those members for their kindness and generosity in contributing, and we will be announcing next years school project in the very near future.

Very truly yours,

Bradley J. Williams  
Secretary, Idaho Chapter, Federal Bar Association

## RECENT SUPREME COURT DECISIONS



Chief Justice  
Roberts  
United States  
Supreme Court

Parents Involved in Community Schools v. Seattle School District No. 1, 127 S. Ct. 2738 (2007).

Plurality opinion by Chief Justice Roberts, joined by Justices Scalia, Thomas, Alito, and, in part by Justice Kennedy.

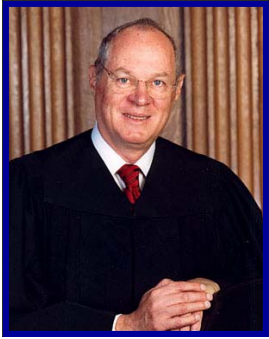
In an effort to achieve a racial balance in their public schools, school districts in Seattle and Louisville assigned students to certain schools based on racial classifications. The Supreme Court concluded that these programs violated the Equal Protection Clause of the Fourteenth Amendment. The Court noted that its precedents recognized a compelling state interest in the use of racial classifications in the school context in two circumstances, neither of which was presented here. The first is in remedying the effects of past intentional discrimination. The second is in diversity in higher education. The Court concluded that the racial classification employed by the districts were not narrowly tailored to the goal of achieving educational and social benefits asserted to flow from racial diversity.

Justice Kennedy wrote a concurring opinion in which he agreed that neither of the school plans in the case before the Court were narrowly tailored, so they did not survive strict scrutiny. Justice Kennedy noted, however, that “the plurality opinion is too dismissive of government's legitimate interest in ensuring that all people have equal opportunity regardless of their race.” In his view, it may be permissible for state and local authorities to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition.

Justices Stevens dissented with the opinion. Justice Breyer dissented with the opinion, joined by Justices Stevens, Ginsburg, and Souter.

Leegin Creative Leather Products, Inc., v. PSKS, Inc., 127 S. Ct. 2705 (2007).

Nearly a century ago, in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) (*Dr. Miles*), the Supreme Court held that it is per se illegal under Section 1 of the Sherman Antitrust Act for a manufacturer and a retailer to agree on resale prices that the retailer would charge for the manufacturer's goods.



**Justice Anthony  
Kennedy  
U.S. Supreme Court**

Leegin is a manufacturer, designer, and distributor of leather goods and accessories. PSKS, Inc., doing business as Kay's Kloset ("Kay's"), operates a women's apparel store that sold belts manufactured by Leegin. When Leegin discovered Kay's was offering its belts to the public at 20% below its suggested retail price, it discontinued its association with PSKS. PSKS sued in federal court, alleging that Leegin had violated Section 1 of the Sherman Act because it had entered into agreements with retailers to charge fixed prices. PSKS won a jury verdict, which was upheld on appeal.

The Supreme Court, per Justice Kennedy (author), Chief Justice Roberts, and Justices Scalia, Thomas, and Alito, reversed. The Court concluded that the per se rule from Dr. Miles as to vertical price agreements to fix minimum resale prices was no longer warranted. The Court overruled Dr. Miles and replaced it with the "rule of reason," which requires the factfinder to determine the legality of pricing restraints on a case-by-case basis under the totality of the circumstances. Justice Breyer dissented, joined by Justices Stevens, Souter, and Ginsburg.

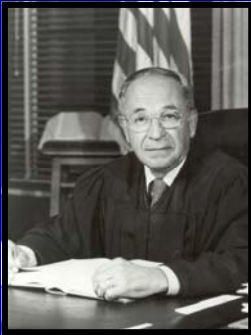
Panetti v. Quarterman, 127 S. Ct. 2842 (2007).

In 1986, the Supreme Court held that the Eighth Amendment prohibits execution of an inmate who is presently insane. Ford v. Wainwright, 477 U.S. 399 (1986). As the date for Scott Panetti's execution neared, the state court turned aside his claim that he was not competent to be executed. Though Panetti understood that state officials claimed that the execution was punishment for his crime, he apparently held a delusional belief that the real reason was related to "spiritual warfare" designed to stop him from "preaching."

The district court denied habeas relief, and the U.S. Court of Appeals for the Fifth Circuit affirmed. The Fifth Circuit determined that Panetti was competent because he understood that he would be executed and that the state claimed it was based on his crime. His rational understanding of the reason for the execution was irrelevant.

The Supreme Court, per Justice Kennedy (author), Stevens, Breyer, Ginsburg, and Souter, concluded that Panetti deserved a rehearing in federal district court. Although the Court did not set down a rule governing all competency determinations, it held that "[g]ross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose. It is therefore error to derive . . . a strict test for competency that treats delusional beliefs as irrelevant once the prisoner is aware the State has identified the link between his crime and the punishment to be inflicted." Justice Thomas dissented, joined by the Chief Justice and Justices Scalia and Alito.

## RECENT DECISIONS—NINTH CIRCUIT



Judge Warren  
Ferguson  
Ninth Circuit  
Court of Appeals

Hadera v. Gonzales, 05-70496

Petition for Review from: BIA

Argued and Submitted: 6/5/07

Panel: Pregerson, Ferguson (author), Ikuta

Subject Matter: Immigration

**Holding:** The panel granted a petition for review challenging the Board of Immigration Appeals' final order designating Ethiopia as the country of removal and denying petitioner's applications for withholding of removal and protection under the Convention Against Torture. Petitioner was born in Italy to parents who were born in Ethiopia. Petitioner's father obtained asylum in the United States and is a naturalized United States citizen and his mother is a lawful permanent resident. Petitioner also obtained lawful permanent resident status, but was found removable as an aggravated felon because he had been convicted of a drug trafficking crime. The panel held that the agency erred in designating Ethiopia as the country of removal and remanded for a redetermination of the country of removal pursuant to 8 U.S.C. § 1231(b)(2)(E)(i)-(vi) and *Jama v. ICE*, 543 U.S. 335 (2005). Because the panel held that the agency erred in its country of removal designation, it did not reach the remaining issues, each of which presumes petitioner's removal to Ethiopia.

Petitioner asserted that he was stateless and declined to designate a country of removal, and thus the statutory framework of 8 U.S.C. § 1231(b)(2)(e)(i)-(vi) applied. The Supreme Court in *Jama* organized this statutory framework into a four-stage inquiry: (1) an alien shall be removed to his country of choice . . . ; (2) otherwise he shall be removed to the country of which he is a citizen . . . ; (3) otherwise he shall be removed to one of the countries with which he has a lesser connection; or (4) if that is impracticable, inadvisable or impossible, he shall be removed to another country whose government will accept the alien into that country. The panel held that the agency erred in ordering petitioner removed to Ethiopia at step two of the inquiry after making the factual determination that it was not likely that Ethiopia would recognize petitioner as an Ethiopian citizen. The panel rejected the government's contention that under *Pelich v. INS*, 329 F.3d 1057 (9th Cir. 2003) only the Ethiopian government could determine whether petitioner was a citizen. The panel recognized that there are circumstances under which the agency might on remand re-designate Ethiopia as the country of removal, and noted that under such circumstances petitioner's withholding of removal and CAT claims would again be applicable and subject to judicial review.

United States v. Diaz-Castaneda, 06-30047  
 Appeal from: D. Or. [Marsh, J.]  
 Argued & Submitted: 11/17/06  
 Submission Withdrawn: 2/20/07  
 Resubmitted: 7/9/07  
 Panel: Goodwin, Fisher (author), M. Smith, Jr.

Subject Matter: Criminal Law

Holding: The panel affirmed the district court’s denial of a motion to suppress evidence obtained as a result of the stop of a vehicle in which the defendant was a passenger. The panel held that when a police officer sees a license plate in plain view, and then uses that plate to conduct a check that reveals non-private information about a person’s car ownership, driver status, and criminal record, the officer does not conduct a Fourth Amendment search. The panel also held that none of an officer’s actions after the license plate check – stopping the driver’s truck, requesting the defendant’s identification, and checking the defendant’s driver’s license or Oregon ID card with radio dispatch – violated the Fourth Amendment.



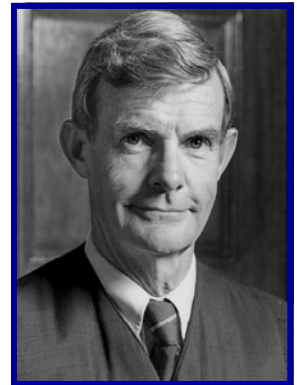
**Judge Raymond Fisher**  
 United States Court of  
 Appeals for the  
 Ninth Circuit

United States v. Jenkins, 06-50049  
 Appeal from: S.D. Cal. [Benitez, J.]  
 Argued & Submitted: 2/15/07  
 Panel: Canby (author), Thomas, District Judge Conlon (dissenting in part)

Subject Matter: Criminal Law

Holding: The panel affirmed the district court’s dismissal of an indictment charging alien smuggling. The district court dismissed the indictment on the ground that the prosecutor’s conduct created the appearance of vindictive prosecution because the charges were brought only after the defendant exercised her right to testify in her own defense at her separate marijuana smuggling trial. The panel held that because the government could have prosecuted the defendant for alien smuggling well before she presented her theory of defense at the separate marijuana smuggling trial, the timing of the charges created the appearance of vindictiveness. The panel wrote that the government’s assertion that its case against the defendant was much stronger after her in-court admission does not suffice to dispel the appearance of vindictiveness.

Dissenting in part, District Judge Conlon wrote that the prosecutor’s conclusion that the in-court confession greatly strengthened the alien smuggling case and his decision to file a criminal complaint on these charges fell within the bounds of prosecutorial discretion.



**Judge Canby**  
 United States Court of  
 Appeals for the  
 Ninth Circuit

## NINTH CIRCUIT DECISIONS



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

Ball v. Rodgers, 04-16963

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

Argued: 9/12/06

Submitted: 7/12/07

Panel: B. Fletcher, Berzon (author), and District Judge Trager

Subject Matter: Medicaid Act/Civil Rights

**Holding:** The panel reversed in part and affirmed in part the district court's bench trial judgment and permanent injunction in an action brought by a certified class of elderly, physically disabled, and developmentally disabled Medicaid beneficiaries who alleged that Arizona is failing to provide them with adequate home and community based health care services in violation of several provisions of the federal Medicaid Act, 42 U.S.C. §§ 1396 *et seq.* Citing *Sanchez v. Johnson*, 416 F.3d 1051 (9th Cir. 2005), the panel held that the Medicaid Act's "equal access" provision, 1396a(a)(3)(A), does not accord Medicaid recipients individual rights enforceable under 42 U.S.C. § 1983.

The panel held, however, that the Act's "free choice" provisions, §§ 1396n(c)(2)(C) and (d)(2)(C), did afford Medicaid recipients rights that could be enforced in a § 1983 cause of action. The panel remanded to the district court for further fact-finding and, and if merited, the entry of a new injunction tailored to the scope of the surviving claims. The panel also instructed the district court to consider whether Arizona violated the Americans with Disabilities Act ("ADA"), §§ 12131-12134, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 – two claims that survived the summary judgment phase of the proceedings below but which the district court did not address in its post-trial decision.

**United States v. Aukai, 04-10226**

Appeal from: D. Hi. [Gillmor, J.]

Argued &amp; Submitted En Banc: 3/21/07

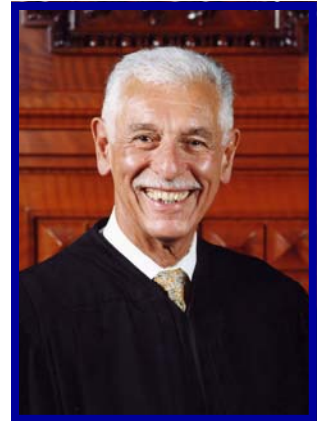
En Banc Panel: Schroeder, Kozinski, Kleinfeld, Silverman, McKeown, W. Fletcher, Gould, Rawlinson, Bybee, Callahan, Bea (author), and Ikuta

Specially Concurring: Graber, joined by Hawkins, Wardlaw

Subject Matter: Criminal Law

**Holding:** Affirming the district court's denial of a suppression motion, the en banc court clarified that the reasonableness of airport screening searches does not depend, in whole or in part, upon the consent of the passenger being searched. The en banc court wrote that where such a search is otherwise reasonable and conducted pursuant to statutory authority, 49 U.S.C. § 44901, all that is required is the passenger's election to attempt entry into the secured area of an airport, and that to the extent this court's cases have predicated the reasonableness of an airport screening search upon either ongoing consent or irrevocable implied consent, those cases are overruled. The en banc court concluded that the search procedures used in this case were neither more extensive nor more intrusive than necessary under the circumstances to rule out the presence of weapons or explosives, and that the duration of the search was reasonable.

Specially concurring, Judge Graber (joined by Judges Hawkins and Wardlaw) concurred in the result and nearly all of the reasoning of the majority opinion, but wrote separately because she cannot join the majority's irrelevant and distracting references to 9/11 and terrorists.

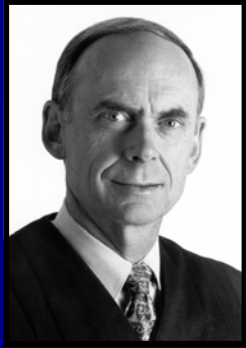


**Judge Carlos Bea  
United State Court  
of Appeals for the  
Ninth Circuit**



**Special Concurrence by  
Judge Susan Graber  
United States Court of  
Appeals for the  
Ninth Circuit**

## NINTH CIRCUIT DECISIONS



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

United States v. Garcia, 05-30596

United States v. Smith, 06-30214

Appeal from: D. Mont. [Cebull, J.]

Argued & Submitted: 4/10/07

Panel: Kozinski, Fisher (author), Tallman

Subject Matter: Criminal Law; Holding: The panel affirmed in part and reversed in part criminal judgments imposed by the district court, and remanded.

Vacating defendant Smith's sentence and remanding for resentencing, the panel held that district courts are not prohibited in all circumstances from considering a defendant's drug addiction in choosing a reasonable sentence; and that the district court adopted too narrow a view of its post-*Booker* discretionary authority when it concluded that because voluntary drug addiction is precluded as a basis for a downward departure under the Sentencing Guidelines, it did not have discretion to consider as a mitigating factor under 18 U.S.C. § 3553(a)(1) Smith's alleged diminished mental capacity due to drug addiction. The panel wrote that just because a consideration was improper under the mandatory Guidelines regime does not mean that it is necessarily improper under the advisory Guidelines regime.

The panel reversed defendant Garcia's convictions on three counts charging him with liability for the substantive offenses committed by a co-conspirator in July 2003, where there was insufficient evidence that Garcia entered the conspiracy to distribute methamphetamine before August 2003. The panel remanded for reconsideration the denial of Garcia's Rule 29 motion for acquittal with respect to counts based on the conduct of another co-conspirator, where the district court later granted another defendant's identical Rule 29 motion based on a finding that there was insufficient evidence regarding the co-conspirator's continued involvement.

(Continued on next page)

United States v. Garcia, 05-30596 and United States v. Smith, 06-30214 (continued)

Recognizing an intra-circuit split regarding the standard for reviewing application of the Guidelines to the facts, the panel held that under either de-novo or abuse-of-discretion review, there was sufficient evidence to support the four-level enhancement of Garcia’s sentence under U.S.S.G. § 3B1.1(a) for being an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, where there is evidence that Garcia set the price and quantity for the methamphetamine he supplied to two participants and that he exercised control over at least one of them by fronting her methamphetamine while threatening to harm her if she did not repay him. Because there is sufficient evidence that Garcia engaged in conduct that qualifies as “training,” “intimidating” or “encouraging” a 17-year-old in the commission of the crime, the panel affirmed Garcia’s enhancement under U.S.S.G. § 3B1.4 for use of a person less than 18 years of age to commit the offense.

Cedars-Sinai Medical Center v. National League of Postmasters of the U.S., 05-55710

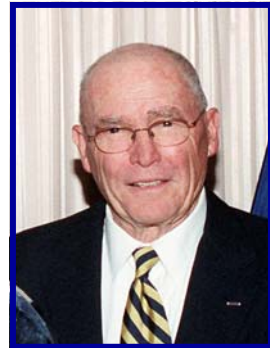
Appeal from: C.D. Cal. [Klausner, J.]

Argued & Submitted: 4/11/07

Panel: Pregerson (author), Feranandez, Sixth Circuit Judge Siler

Subject Matter: Federal Employee Health Benefits Act/Preemption

Holding: The panel reversed the district court’s dismissal for lack of subject matter jurisdiction of an action by a hospital alleging that a federal health benefit plan breached the parties’ contract and committed torts when it failed fully to reimburse the hospital for services provided to a patient insured by the plan. The panel held that the hospital’s claims were not preempted by the Federal Employee Health Benefits Act because the hospital was not acting on behalf of a covered individual, and its claims did not relate to a benefit. Therefore, the hospital was not required to exhaust the FEHBA’s administrative remedies for claims regarding denial of benefits.



**Judge Harry  
Pregerson  
U.S. Court of  
Appeals for the  
Ninth Circuit**

## NINTH CIRCUIT DECISIONS



**Judge W. Fletcher**  
U.S. Court of  
Appeals for the  
Ninth Circuit

Giles v. General Motors Acceptance Corp., 05-15189 & 05-17251

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

Argued & Submitted: 1/9/07

Panel: Goodwin, Tashima, and W. Fletcher (author)

Subject Matter: Nevada Law

**Holding:** The panel affirmed in part and reversed the district court’s summary judgments in two consolidated diversity cases concerning two car dealerships’ “floorplan financing” agreements under which defendant GMAC financed the dealerships’ wholesale purchase of vehicles and the dealerships repaid GMAC the portion of the loan attributable to an individual vehicle when that vehicle was sold or leased. The dealerships and their owners claimed that by placing holds on the dealerships’ “open account funds” after discovering violations of the floorplan financing agreements, GMAC committed various torts and breach of contract.

In the first case, the panel held that Nevada’s economic loss doctrine, providing that certain economic losses are remediable only in contract, did not prevent the plaintiffs from recovering on their claims for fraud and conversion because the doctrine does not bar recovery in tort where the defendant had a duty imposed by law rather than by contract and where the defendant’s intentional breach of that duty caused purely monetary harm to the plaintiff. Affirming summary judgment in favor of GMAC on claims for breach of fiduciary duty arising from a confidential or special relationship, as well as related claims, the panel held that GMAC owed no fiduciary duty to the plaintiffs, who did not produce evidence sufficient to support a finding that a confidential or special relationship arose because they placed a special trust or confidence in GMAC.

In the second case, the panel held that Nevada claim preclusion law did not bar the plaintiffs’ contract claims because these claims were not the same “cause of action” as the contract claims in the first action.

*A Note to our Practitioners:*

**Wi-Fi ACCESS IN FEDERAL COURTHOUSES  
IN POCA TELLO, BOISE AND COEUR d'ALENE**

The Board of Judges and Lawyer Representatives recently approved the installation of a Wi-Fi network in the Boise, Coeur d'Alene and Pocatello courthouses. This will allow litigants and those who work with litigants, access to the Internet for business purposes. The Wi-Fi is accessible in all courtrooms and witness rooms.

This wireless service is now available in Boise, Pocatello and Coeur d'Alene. This service is operated as an open Wi-Fi Hot Spot, just like many coffee shops and bookstores offer, so no special code or password is required for use.

The following document explains the Wi-Fi program and any restrictions, in addition to instructions for connecting to the system.

**<http://id.uscourts.gov/docs/wifi-secure.pdf>**

**Submitted by Jason Murray, Associate Attorney**

**Moffatt, Thomas, Barrett, Rock & Fields, Chtd.**

*"Your lawyer in practice spends a considerable part of his life in doing distasteful things for disagreeable people who must be satisfied against an impossible time limit in which are hourly interruptions from other disagreeable people who want to derail the train; and for is blood, sweat, and tears, he receives in the end a few unkind words to the effect that it might have been done better, and a protest at the size of the fee."*

--William L. Prossner

*UPCOMING EVENTS*

*Join  
Judge Mikel H. Williams  
U.S. District Court  
Wednesday, November 7  
U.S. Federal Courthouse, Boise  
12:00 to 1:30 p.m.*

*Brown Bag Luncheon  
Ref Pro Se Litigation  
and Procedures*

*NOTE OF APPRECIATION!*

*Special thanks to U.S. District Court Externs*

*Dan Callaway  
and Ian Service*

*for preparing the case evaluations  
for this edition of the Idaho Chapter, FBA newsletter—*

*Thank you very much!*