The Massachusetts Chapter of The Federal Bar Association

Matthew C. Baltay - Editor

NEWSLETTER • MAY 2012

President's Column

by Mary Jo Harris

Wow! For all of the members of the Massachusetts Chapter of the Federal Bar Association, **thank you** for making our annual Judicial Reception so successful this year! So many of our friends and colleagues from large and small firms, solo practices, and public agencies throughout the Commonwealth came together on April 3, 2012 as we honored Judge Michael A. Ponsor for his outstanding service as a member of our federal judiciary. Retired Chief Justice Margaret Marshall shared with us her funny and eloquent reminiscences of her law school classmate and colleague, and Judge Ponsor gave a thought-provoking speech detailing his observations from the bench. We share those observations with you in this edition of the newsletter, and I urge you to take a moment to reflect on Judge Ponsor's powerful critique of our system of justice.

One of our Chapter's missions is to bring practitioners and judges together, outside of the courtroom, to allow for informal, collegial exchanges of thoughts and ideas. The April 3, 2012 event was an excellent such opportunity.

The Chapter has more events planned, and although not so grand as this one, I encourage you to take note of our ongoing breakfast with the bench series, and our upcoming program with the BBA on First Circuit Practice.

Sincerely,

Mary Jo Harris
President, FBA-Massachusetts
Assistant General Counsel,
TravelCenters of America

Inside This Issue:

Federal Bar Association Massachusetts Chapter Annual Judicial Reception

April 3, 2012 • Boston Harbor Hotel

Proudly Recognizing The Honorable Michael A. Ponsor

The Honorable Michael A. Ponsor

The Honorable Michael A. Ponsor and Mary Jo Harris


Miriam Conrad and Judge Patti B. Saris


Chief Judge Mark L. Wolf and Ethan Torrey


Mary Jo Harris and Christopher Sullivan


Chief Justice Margaret Marshall


Sandy Dibble, Chris Kenney, and Michelle Schaffer


Lisa Tittemore and Jack Schecter

Judge Michael Ponsor has graciously agreed to share a lightly-edited text of his remarks, delivered at the April 3, 2012 Annual Judicial Reception.

FEDERAL BAR ASSOCIATION REMARKS: BOSTON April 3, 2012

By Judge Michael Ponsor

I want to thank the Federal Bar Association. This moment means a lot to me, and to all of us in the federal judiciary. A strong legal system depends, of course, on the character and competence of the judges, but it depends just as much on the firm support of the community, working through organizations like the FBA. Do not suppose that those of us who put on the robes ever forget this, or ever stop being grateful for what you do.

I am proud to have been a federal judge -- proud of a number of the cases I have worked on and a handful of decisions I have written. We judges toil along, doing our important work, as crucial to the life of our nation as the bees are to the spring. I say it without embarrassment, and without concern that I exaggerate: an independent judiciary marks the difference between a free people and a tyranny.

On the whole, I believe -- I certainly hope -- that in my life on the bench I've done more good than harm. There is one aspect of the work that I have done, however, that I do not feel good about. Let me take a few moments now to tell you about that and make some suggestions about what we can all do about it.

In 1984, when I began my judicial career as a Magistrate Judge, the incarceration rate for state and federal prisons in our country was about 188 prisoners per 100,000 U.S. residents. This rate was roughly comparable to the rates of other industrialized nations. As I move to senior status, the rate of incarceration in the U.S. is now around 502 sentenced prisoners for every 100,000 residents. That's 188 to 502 in a twenty-eight year period. If we count pretrial detainees the rate jumps to 730 prisoners per 100,000. We have the highest rate of incarceration of any country in the world, and not by a narrow margin, by far. By comparison, the United Kingdom has a rate of 155 per 100,000 and France a rate of 111, despite the fact that their crime levels in many respects -- burglaries and robberies for example -- are actually higher than ours. Our rate of imprisonment skyrockets when we look at incarceration rates for minorities. For example, Black men had in 2010 an incarceration rate of 3,059 per 100,000 Black male residents. We have five percent of the world's population and 25% of its prisoners.

Now, either our fellow Americans are much more dangerous than the residents of any other country in the world, or something has gone haywire in our criminal justice system.

As a recent article by Adam Gopnik in the New Yorker pointed out, we now have more people in our contemporary American gulag of state and federal prisons than Stalin ever imprisoned in his. When did our beloved country, the "land of the free and the home of the brave," turn into a nation that locks up more, many more, of its citizens than any other country in the world?

I'm not sure when the transition took place, but it has happened on my watch, and I have definitely been a part of it. I tell myself various things to try to ease my discomfort at what I've done.

I tell myself, for example that, for some crimes, severe sentences are appropriate. This is certainly true, and I have handed down some long prison terms, including life terms without parole, that have not troubled my sleep. It's part of the job. But too often I impose sentences so totally out of whack, so unmoored from any legitimate penological justification, that they feel almost barbaric.

I tell myself that most of the harsher the sentences I impose are not my fault; they are often driven by minimum mandatory statutes that are beyond my control. This is also true. But this rationale veers too close to the "I was only following orders" moral dodge to work terribly well as any sort of consolation.

Finally, I tell myself that I am just one person, and who am I to say what is just and what is unjust? Deference to Congressional will -- even when it is distorted by irrational fear and demagoguery -- at least avoids individual caprice.

The problem with this position is that some things are wrong, just plain wrong -- after a while, you can sense what they are -- and the fact that Congress requires them does not make them right. Slavery was wrong, even though George Washington and Thomas Jefferson owned slaves, and the Founding Fathers enshrined it in the Constitution. Segregation was wrong, even though, at least in some of his writings, Abraham Lincoln seemed to approve of it. So, let me, at the moment of transition in my professional life say to you what I truly think: just as slavery was wrong, just as segregation was wrong, the imposition of multi-decade sentences, and life sentences without parole, on massive numbers of non-violent drug offenders, even repeat offenders, is wrong. Just plain wrong. Some day, I very much suspect, lawyers of the future will be as embarrassed at what our criminal justice system did between 1984 and 2012 as we are embarrassed today at Dred Scott, the Fugitive Slave laws, and Plessy v. Ferguson. Serious crime deserves serious punishment but we are grossly, grossly overdoing it. Our criminal justice system, whose magnificent procedural safeguards are the wonder of the world, has become, substantively -- that is, in the savage punishments it metes out mainly to poor men of color -- not worthy of us as a free people.

(*Continued on page 12*)

An interview with The Honorable William G. Young on the decline of the American Jury Trial

Over the course of the last fifty years, seasoned litigators have come to harbor a dark secret. Despite years and even decades of avid courtroom experience, one critical aspect of litigation has eluded many—the jury trial. The heroic portrayals of advocacy once immortalized by the likes of Atticus Finch have faded into a practice whose pinnacle is the dispositive motion. Scholars and litigators alike have proffered theories to explain this great shift, yet many still wonder what is at stake for a legal system devoid of juries.

Matthew Baltay and Jamie-Clare Flaherty recently caught up with United States District Court Judge William G. Young to get his perspective on this elusive creature of the American judicial system.

Federal Bar Association (FBA): Alexis de Tocqueville observed two hundred years ago that the American jury trial is one of the greatest expressions of democracy. Do you agree?

Hon. William G. Young (WGY): Indeed, it is the greatest expression of direct democracy. It's part of our cultural DNA. Ninety percent of jury trials in the world take place in the U.S. The jury experience is, by its very nature, a local institution because it is limited by the distance that jurors can travel. As a result, the law may be national, but it is applied by local people and it is utterly ungovernable by special interests. Interestingly, studies show that jury participants are more likely to participate in communitarian events—because the jury experience is a communitarian effort. At the time of the founding, it was unthinkable in a criminal case that a judge could do virtually anything without a jury. The jury was the judge's partner.

FBA: One often hears about the decline of the American jury trial. Is there empirical evidence?

WGY: By way of experience, I can say that during my thirteen-year tenure on the Budget Committee of the Judicial Conference of the United States, one line item decreased in absolute numbers—the expenses for jurors. This phenomenon occurred despite the steady increase in the number of cases, both civil and criminal. Marc Galanter of the University of Wisconsin, a leading scholar on the topic, has documented this decline.[1]

FBA: Is the American jury trial dead or dying or is it simply used less than it once was?

WGY: The U.S. Constitution preserves trial by jury, so the jury trial will never die. But, the percentage of jury trials is diminishing because, culturally, we no longer think of it as central. Judges don't defend jury trials as they should.

FBA: Some say one reason for the decline in the jury trial is a shift in the role and mission of the trial judge from one of readying cases for trial to one of docket manager where clearing cases off dockets is the laudable goal. Is there anything to that?

WGY: Yes, it's the central insight into the deconstruction of the judicial role. It's false to say that certain judges are trial judges while others are managers. You can't be just a "trial judge." It's impossible to stay constantly on trial. Instead, every judge has to be a manager—especially those who want to try cases back-to-back. The question is how judges manage their cases. Generally speaking, there are two models: (1) the Trial Model; and (2) the Administrative Model. From the moment the complaint is filed, the Trial Model asks "How am I going to try this case? What will the verdict slip look like?" The Administrative Model asks "How am I to get rid of this case?" Neither model is superior to the other—they both seek to find resolution. That said, the Trial Model is today in the minority; yet, the District of Massachusetts has been called an "island of resistance" to this shift away from trials.

FBA: Does the increase in the scope of discovery affect the number of cases going to trial?

WGY: The percentage of settlements in civil cases has remained constant through the years. Discovery has increased the expense of litigation, which can prompt settlement for the wrong reasons. The most efficient trial tool is a fixed trial date because it reins in the attorneys' focus.

FBA: Is there anything to the suggestion that jury trials are unnecessarily expensive and lengthy such that clients rightfully shy away from trial?

(*Continued on page 13*)

[1] *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 JOURNAL OF EMPIRICAL LEGAL STUDIES, 459 (2004).

Criminal and Civil Practice Before the Federal Magistrate Judges

By Scott P. Lopez, Lawson & Weitzen, LLP

On March 14, 2012, the Massachusetts chapter of the FBA and the Litigation and Criminal Law Sections of the Boston Bar Association co-sponsored a program featuring the Magistrate Judges of the United States District Court for the District of Massachusetts. Chief Magistrate Judge Leo T. Sorokin, Magistrate Judge Robert B. Collings, Magistrate Judge Judith G. Dien, Magistrate Judge Timothy S. Hillman, Magistrate Judge Jennifer C. Boal, and Magistrate Judge Kenneth P. Neiman participated in the program. The purpose of the program was to have a frank and lively discussion concerning current and recurring practice issues in cases pending before the Magistrate Judges. The first hour was focused on criminal practice issues and the second hour was focused on civil practice issues. The program was designed to benefit both new and experienced practitioners who appear in the United States District Court.

During the first hour the criminal issues discussed included the recent amendments to the Local Rules, trials in criminal misdemeanor cases, the types of criminal discovery issues that are being raised and the impact that recent speedy trial case law is having on the Court. The current status and success of the CARE Program and RESTART Program were also discussed.

During the second hour the civil issues discussed included the manner in which each of the Magistrate Judges conduct mediations, their perspective on what works and does not work in mediation, the Judges' perspective on discovery disputes and the types of discovery disputes that typically are brought to their attention, and other practice tips. Each of the Magistrate Judges was also asked to highlight the most important thing for a lawyer to know when appearing before them. The answers given were quite interesting.

The program lived up to its billing. The Magistrate Judges were engaging and responsive to the questions asked and the answers they provided were helpful to both new and experienced attorneys. After the formal program ended, the Magistrate Judges also stayed for the reception that followed and continued to discuss various issues of interest to the attendees.

Presentation on the Jury Evidence Recording System (JERS)

By Michelle I. Schaffer, Campbell Trial Lawyers

On February 16, 2012, the FBA sponsored with the Clerk's Office a presentation by Judge George A. O'Toole and Training and Outreach Coordinator Ginny Hurley on the Jury Evidence Recording System (JERS) now being used within the District of Massachusetts. Attendees had the opportunity to observe how jurors can access electronic evidence during deliberations.

The JERS permits evidence admitted during a trial to be viewed by jurors in an electronic format in the jury deliberation room at the conclusion of the trial using a touch screen monitor similar to a large iPad. Using the touch screen, the jury can locate exhibits quickly by exhibit number and navigate through particular exhibits, for example, by scrolling down a document or skipping to a particular page. The JERS accepts documents, photographs and video and audio files.

The panelists explained that the attorneys will submit proposed exhibits on a DVD or CD prior to the trial; thumb drives will not be permitted. The JERS will accept electronic evidence in standard electronic formats: for documents and photographs: .bmp, .gif, .jpg, .pdf, .tif and for video and audio recordings: .avi, .mpg, .mp3, .wav, .wma, and .wmf. PDF files may not be larger than 12MB. The clerk will then have these materials loaded on to the system. The courtroom clerk oversees the marking of exhibits and all exhibits admitted into evidence that will be released to the jury at the conclusion of the trial along with an exhibit list. The jury will also receive paper copies of the exhibits.

The system permits exhibits to be modified during the trial (as an example, when a witness marks a photograph or a document or when portions of a document have been ordered to be redacted); and in such cases, the clerk will work with counsel to substitute original evidence with the modified document.

Notably, for cases on appeal, the First Circuit Court of Appeals requires that hard copies of all trial exhibits be submitted.

The system has been used successfully in a few trials to date.

Breakfast with Judge Woodlock

By Michelle I. Schaffer, Campbell Trial Lawyers

On January 12, 2012, the FBA Massachusetts Chapter and FBA Intellectual Property Section along with the BBA Patent Law Section hosted a well-attended breakfast with Judge Douglas P. Woodlock who shared insights on the judicial management of patent law matters, and specifically about claim construction and the handling of Markman hearings. Judge Woodlock noted that patent law cases are becoming more prevalent in the District of Massachusetts. Given the complexity of the cases, they often require significantly more judicial involvement than most other types of matters.

Judge Woodlock welcomed an interactive discussion with the attendees particularly regarding issues concerning the timing of a Markman hearing and suggested that there is no best time. Judge Woodlock finds it important to set the hearing for a time sufficiently deep into the case when he can be provided with a contextual understanding of the claim and a tutorial providing the texture of the technology involved.

Judge Woodlock offered insights generally about experts, cautioning that juries find them tiresome and that the key in all cases is to ensure their reliability. There are many approaches for the presentation of expert opinions and Judge Woodlock noted that often in non-jury circumstances he will encourage the parties to submit direct examinations of experts by affidavit and will provide an opportunity for cross-examination. Another technique discussed is to have each expert make brief initial presentations and then to allow the experts to ask each other questions in open court in an effort to draw out the strengths and weaknesses of their respective positions. See Lisa C. Wood, Experts in the Tub, ANTITRUST, Summer 2007.

FBA-Sponsored Presentation on Federal Courts Jurisdiction and Venue Clarification Act of 2011"

By Susan Weise, City of Boston Law Dept.

The Massachusetts Chapter of the Federal Bar Association in conjunction with Suffolk University Law School held a seminar on January 25, 2012 on the "Federal Courts Jurisdiction and Venue Clarification Act of 2011" which went into effect on January 6, 2012.

The panelists were Chief Magistrate Judge Leo T. Sorokin, Professor Karen Blum of Suffolk University Law School and Professor Karen Simard of Suffolk University Law School.

The program, held at Suffolk University Law School was a very comprehensive point by point comparison of the old and new rules. The Massachusetts Chapter of the Federal Bar Association thanks Chief Magistrate Judge Sorokin, Professors Blum and Simard and Suffolk University Law School for presenting this seminar.

The details of the Act are described in the article that follows.

Understanding the Federal Courts Jurisdiction and Venue Clarification Act of 2011: What Every Litigator Should Know

By Andrew Palid, Foley Hoag LLP

JURISDICTIONAL IMPROVEMENTS

Removal and Remand (28 U.S.C. §§ 1441, 1446, 1454)

The Federal Courts Jurisdiction and Venue Clarification Act of 2011 substantially amended a number of federal jurisdictional and venue-related statutes. The Act is divided into two parts, titled "Jurisdictional Improvements" and "Venue and Transfer Improvements," respectively. While the former part revises the rules for removing cases to federal court and limits the availability of diversity jurisdiction in cases involving resident aliens or certain corporations and insurers with foreign operations, the latter part modifies various venue rules and permits the transfer of a case to any district to which all parties consent, even if the case could not have been brought in that district originally.

For many litigators, the most significant changes effected by the Act are those which modify the procedures for removing cases to federal court. In addition to creating a separate section to address removal in criminal cases (28 U.S.C. § 1454), the Act alters removal procedures in five principal ways.

First, in cases involving multiple defendants, the Act codifies the well-established "rule of unanimity" requiring all defendants who have been properly joined and served to join in and consent to the removal. *See* 28 U.S.C. § 1446(b)(2)(A).

Second, the Act provides that each defendant has thirty days from his or her own date of service to seek removal. See 28 U.S.C. § 1446(b)(2)(B). Previously, federal courts had been split as to when the thirty-day removal period expired in multi-defendant cases. While some courts had held that a case could be removed up to thirty days after service on the *last-served* defendant, *see Bailey v. Janssen Pharmaceutica, Inc.*, 536 F.3d 1202, 1209 (11th Cir. 2008), other courts had held that the time for removal ended thirty days after the first defendant was served. *See Getty Oil Corp., Div. of Texaco, Inc. v. Insurance Co. of North America*, 841 F.2d 1254, 1262-1263 (5th Cir. 1988). In resolving the circuit split, Congress decided

that "[f]airness to later-served defendants, whether they are brought in by the initial complaint or an amended complaint, necessitates that they be given their own opportunity to remove, even if the earlier-served defendants chose not to remove initially." Report of House Judiciary Committee on the Act, No. 112-10 ("House Report") at 14.

Third, the Act creates a limited exception to the rule prohibiting the removal of diversity cases more than one year after their commencement. Although the one-year limitation on removal was intended to avoid the disruption of state court proceedings when late developments in a case made it subject to removal, some plaintiffs' attorneys had developed removal-defeating strategies designed to keep their cases in state court until the one-year period had expired. See House Report at 15. In response to such gamesmanship, the Act gives courts discretion to allow removal more than one year after suit is filed if "the plaintiff has acted in bad faith in order to prevent a defendant from removing the action." 28 U.S.C. § 1446(c)(1).

Fourth, the Act permits a defendant to assert an amount in controversy in the notice of removal if the initial pleading seeks (i) nonmonetary relief or (ii) a money judgment, but state practice either does not permit demand for a specific sum or does not limit recovery to the amount demanded. *See* 28 U.S.C. § 1446(c)(2)(A). Removal is allowed in such circumstances if the district court finds by a preponderance of the evidence that the amount in controversy exceeds the amount specified in 28 U.S.C. § 1332(a), currently $75,000. *See* 28 U.S.C. § 1446(c)(2)(B). Further, the Act expressly permits defendants to utilize state court discovery to establish the amount in controversy when the case stated in the initial pleading is not removable. Under 28 U.S.C. § 1446(c)(3)(A), when information relating to the amount in controversy appears in the record of the state proceeding or in response to discovery requests, this information qualifies as an "other paper" under § 1446(b)(3), triggering a new thirty-day period in which to remove the action.

Finally, the Act eliminates a federal court's discretion to hear unrelated state-law claims when an action is removed on the basis of federal question jurisdiction. Upon removal of a case under 28 U.S.C. § 1441(c), the district court must now sever from the action all claims that are not within its original or supplemental jurisdiction and remand the severed claims to the state court from which the action was removed. *See* 28 U.S.C. § 1441(c)(2). According to the House Report, "[t]his sever-and-remand approach is intended to cure any constitutional problems while preserving the defendant's right to remove claims under Federal law." House Report at 12.

Citizenship of Resident Aliens, Corporations, and Insurance Companies for Diversity Jurisdiction Purposes (28 U.S.C. § 1332)

The Act also attempts to modestly restrict the scope of diversity jurisdiction by modifying the citizenship determination for resident aliens as well as corporations and insurance companies with significant foreign operations. The Act changes the citizenship determination for resident aliens by repealing the so-called "resident alien proviso" of 28 U.S.C. § 1332(a), which had provided that "an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled." While the intent of this proviso was to reduce the federal caseload by eliminating diversity jurisdiction in suits between citizens of a state and aliens permanently residing in the same state, it had the unintended effect of creating diversity jurisdiction in cases between resident aliens domiciled in different states. *See* House Report at 7. To correct this anomaly, the Act eliminates the proviso altogether and replaces it with a provision stating that "the district courts shall not have original jurisdiction under [§ 1332(a)] of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State." 28 U.S.C. § 1332(a)(2).

As for corporations with foreign operations, the Act clarifies that such entities should be regarded as citizens of both their place of incorporation and their principal place of business, whether foreign or domestic. *See* 28 U.S.C. § 1332(c)(1). The same holds true for insurance companies with foreign operations, though they are also deemed to be citizens of every state, foreign or domestic, of which their insured is a citizen. *Id.* Practically speaking, these changes result in the denial of diversity jurisdiction in two principal scenarios: "(1) where a foreign corporation with its principal place of business in a state sues or is sued by a citizen of that same state, and (2) where a citizen of a foreign country (alien) sues a U.S. corporation with its principal place of business abroad." House Report at 9.

VENUE AND TRANSFER IMPROVEMENTS

Clarification and Modification of Venue Rules (28 U.S.C. §§ 1390, 1391, 1392)

The Act also clarifies and modifies the rules governing venue. It begins by adding § 1390 to Title 28. This new section defines venue, distinguishes it from subject-matter jurisdiction, and makes clear that the general venue provisions of § 1391 do not apply to either proceedings in admiralty or cases removed from state court. *See* House Report at 17-18.

While § 1390 is little more than a codification of existing law, the Act's amendments to § 1391 are more substantive. For instance, the Act abolishes the "local action" rule, which had

required certain actions pertaining to real property to be brought in the district where the property was located. *Id.* at 18. This rule had caused problems in trespass actions where the district court could not exercise personal jurisdiction over the defendant in the place where the property was located, thereby leaving plaintiffs unable to pursue their cases. *Id.* at 18.

Moreover, the Act unifies the venue rules governing actions filed in federal court based on diversity or federal question jurisdiction. Previously, the "fallback" provisions, which come into play when there is no district in which an action may otherwise be brought, had differed for diversity and federal question cases; in diversity cases, such actions could only be brought in "a judicial district in which any defendant is *subject to personal jurisdiction*," while in federal question cases, such actions could only be brought in a "judicial district in which any defendant *may be found*." The Act does away with this disparity and provides that when there is no other district in which an action may be brought, venue is appropriate in "any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action." 28 U.S.C. § 1391(b)(3).

The Act also closes a loophole in § 1391(b)(1), which previously made venue proper in "a judicial district where any defendant resides, if all defendants reside in the same State." The trouble with this language is that corporations may be residents of multiple districts, including districts in other states where no other defendants reside. Thus, for example, if all defendants in a case were residents of Illinois, but one of the defendants was a corporation that was also a resident of the Southern District of New York, venue would be appropriate in the Southern District of New York. *See* House Report at 19. To remedy this problem, the Act revises § 1391(b)(1) to make venue appropriate in "a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located." 28 U.S.C. § 1391(b)(1).

Finally, the Act rewrites § 1391(c), which had been limited to defining a corporation's residence for venue purposes, transforming it into a more fulsome provision defining the residency of (1) natural persons, (2) entities with the capacity to be sued, whether or not incorporated, and (3) defendants residing abroad. Starting with natural persons, the Act provides that a natural person is deemed to reside in the district where that person is domiciled. *See* 28 U.S.C. § 1391(c)(1). As for incorporated and unincorporated entities, the Act provides that, when such an entity is a defendant, it is deemed to reside in any judicial district in which it is subject to the court's personal jurisdiction and, when such an entity is a plaintiff, it is deemed to reside only in the judicial district in which it maintains its principal place of business. *See* 28 U.S.C. § 1391(c)(2). Last of all, with respect to defendants residing outside the United States, whether citizens or aliens, the Act states that they "may be sued in any judicial district, and the joinder of such a defendant shall be disregarded in determining where the action may be brought with respect to other defendants." 28 U.S.C. § 1391(c)(3).

Expanding Options for Transfer (28 U.S.C. § 1404(a))

The final significant change effected by the Act is the revision of 28 U.S.C. § 1404(a) concerning transfers. While the old provision limited transfer to districts or divisions where the case could have been originally brought, the new § 1404(a) allows a district court to transfer a civil action "to any district or division to which all parties have consented," regardless of whether the action could have been filed there. Of course, the usual requirements -- i.e., that the transfer be in the interests of justice and for the convenience of the parties and witnesses -- continue to apply. *See* 28 U.S.C. §1404(a).

In the end, despite its title, the Act does much more than clarify the federal jurisdictional and venue-related statutes to which it applies. Indeed, the Act significantly revises the law regarding removal and remand, venue and transfer, and citizenship of certain persons and entities for purposes of diversity jurisdiction. For the full text of the Act, detailing all of the changes effected, see H.R. 394, P.L. 112-63.

The First Circuit Court of Appeals: Sarbanes-Oxley Whistleblower Protection Restricted to Public Companies (*Lawson v. FMR LLC*, No. 10-2240, 2012 WL 335647 (1st Cir. Feb. 3, 2012))

By Harvey Weiner and Julie A. Brennan, Peabody & Arnold LLP

In a case of first impression, the United States Court of Appeals for the First Circuit issued a seventy-three page decision on February 3, 2012 in *Lawson v. FMR LLC*, holding that the whistleblower protection provision of Section 806 of the Sarbanes-Oxley Act of 2002 ("SOX") covers only employees of "public" companies – those with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 ("Exchange Act") or those required to file reports under Section 15(d) of the Exchange Act – and does not extend its coverage to employees of private companies that are contractors or subcontractors to those public companies. The First Circuit reached its conclusion on the basis of statutory interpretation of the whistleblower provision, as well as other relevant sections of SOX. The First Circuit's decision was also informed by an examination of the legislative history.

The *Lawson* case involved two plaintiffs, both of whom initiated lawsuits against their respective former employers,

which were private companies that contract to provide investment management services to the Fidelity family of mutual funds—mutual funds organized under the Investment Company Act of 1940 that file reports under Section 15(d) of the Exchange Act. Although the two lawsuits were filed separately, the District Court addressed both in a single order based on the fact that they shared a common defendant and raised the same question regarding the scope of the whistleblower provision of Section 806 of SOX, codified at 18 U.S.C. §1514A. Defendants filed Rule 12(b)(6) motions to dismiss, arguing that plaintiffs were not covered employees under Section 806. The district court denied the motion.

The First Circuit granted interlocutory review and reversed the District Court's ruling, holding that the employees of public companies only are covered by SOX's whistleblower provision. The First Circuit stressed that Section 806 provides that no public company "or any officer, employee, contractor, subcontractor, or agent of such company" may retaliate against an employee for engaging in protected activity, and that the foregoing language refers to the individuals who are prohibited from retaliating, "not to who is a covered employee."

According to the First Circuit, its interpretation of Section 806's coverage is supported by the text within the subsection, as well as other relevant text in SOX. The Court noted that both the title of SOX Section 806, within which Section 1514A is found, and the caption of Section 1514A(a) shed light on the meaning of the term "employee" in Section 1514A. Section 806 is titled "Protection For Employees of Publicly Traded Companies Who Provide Evidence of Fraud" and subsection (a) contains the caption "Whistleblower protection for employees of publicly traded companies." The Court reasoned that the fact that both the title and the caption contain the phrase "employees of publicly traded companies" indicates that Section 1514A applies only to "employees of publicly traded companies."

Additionally, the Court found that "[o]ther provisions of SOX as of the time of enactment reinforce [its] view of the meaning of Section 1514A(a) in several respects." The Court noted that in other sections of SOX, Congress clearly enacted broader whistleblower protection. For example, the language in Section 1107, "requires neither a public company, nor an employment relationship, nor a securities law violation to trigger coverage. The scope of Section 1514A(a) is, by contrast, conspicuously narrow." The Court also noted that in other portions of SOX where Congress intended separate provisions of the Act to apply to employees of private entities, it said so explicitly. The title of section 806 and the caption of Section 1514A(a), however, plainly refer to publicly traded companies. As a result, the Court reasoned if "Congress intended to extend Section 1514A whistleblower coverage protections to the employees of private companies that have contracts to provide investment advice to funds organized under the Investment Company Act, it would have done so explicitly"; however, the language of Section 1514A, as well as its caption and title, indicate that Congress did not intend its coverage to extend beyond employees of public companies.

The Court pointed out also that Section 806 varies from the language of other whistleblower protection statutes, such as the Nuclear Whistleblower Protection provision of the Energy Reorganization Act and the Whistleblower Protection provision of the Pipeline Safety Improvement Act of 2002, which clearly extend coverage to employees of contractors to entities regulated by those statutes.

The First Circuit further confirmed its interpretation of the text of Section 1514A through an examination of the legislative history. The Court noted that the Senate committee report for a bill containing what became Section 1514A reflects that "Congress's primary concern was the Enron debacle, which involved the stock of a highly visible publicly traded company" and contains several references to "whistleblower protection to employees of publicly traded companies." Likewise, the Congressional record contains statements of Senator Leahy, a sponsor of that bill, that the provision ultimately codified as Section 1514A "would provide whistleblower protection to employees of publicly traded companies who report acts of fraud." In addition, the Court supported its holding by referencing post-enactment legislative activity. Specifically, the Court reasoned that Congress amended Section 1514A in 2010 through the Dodd-Frank Wall Street Reform and Consumer Protection Act "by explicitly extending whistleblower coverage to employees of public companies' subsidiaries and employees of statistical rating organizations."

As the first court of appeals to decide the issue, the First Circuit in *Lawson* found the whistleblower protection afforded by Section 1514A to be limited to employees of public companies referenced in the provision. A range of private employers that contract or sub-contract publicly traded companies can now rely on this decision if and when their employees seek to invoke SOX's whistleblower provisions.

Judge O. Rogeriee Thompson had the only dissenting opinion in this case. On February 17, 2012, both plaintiffs filed petitions for rehearing en banc with the Court. Plaintiffs' motions were both currently pending as of March 5, 2012.

United States v. Jones – What's Next Is Anyone's Guess

by By Scott P. Lopez Partner at Lawson & Weitzen, LLP*

In *United States vs. Jones*, 132 S.Ct. 945 (2012), the Supreme Court of the United States unanimously decided that the attachment of a Global-Positioning-System (GPS) tracking device to an individual's vehicle, and the subsequent use of that device to monitor the vehicle's movement on public streets, constituted a search within the meaning of the Fourth Amendment. Interestingly, even though every Justice agreed that the Fourth Amendment was violated, the Justices split 5-4 over the reasoning for their decision. This article will discuss how the Justices reached the same conclusion using different legal theories, how law enforcement reacted to the Court's decision, and what significance the decision may have in future.

In *Jones*, the police placed a GPS device on the defendant's car. Although the police had time to get a warrant in advance and, in fact, did get a warrant, by the time the police attached the GPS device to Jones' car, the warrant had expired. Rather than obtaining a new warrant, the police decided to attach the GPS device to Jones' car without a warrant. Over the next 28 days, the Government used the GPS device to track Jones' vehicle's movement.

Before trial, Jones filed a motion to suppress the evidence obtained with the GPS device. The District Court granted Jones' motion in part, suppressing the evidence obtained while the vehicle was parked in the garage adjoining his home. However, the District Court held the remaining data admissible because "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." Id. at 948. After a jury trial in which Jones was convicted, the District Court sentenced Jones to life imprisonment. On appeal, the United States Court of Appeals for the District of Columbia reversed the conviction, finding that the admission of evidence obtained by the warrantless use of a GPS device violated the Fourth Amendment. Id. at 949.

Justice Scalia, writing for the majority (and joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Sotomayor) applied a traditional property-based analysis to find that the Government's "trespass" violated the Fourth Amendment. Noting that "it is beyond dispute that a vehicle is an 'effect' as that term is used in the Amendment," the majority held that "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" Id. (Emphasis added).

> Justice Scalia's opinion pointedly noted:
>
> It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted. Id.

In doing so, the majority rejected the Government's argument that, under the standard first enunciated by Justice Harlan in his concurrence in *Katz v. United States*, 389 U.S. 347, 351 (1967), Jones had no "reasonable expectation of privacy" in the area accessed by the Government (the car's undercarriage). Rather, the majority reasoned that Jones' Fourth Amendment rights did not rise or fall with the *Katz* formulation. Indeed, the majority concluded that the *Katz* analysis was unnecessary because "At bottom, we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." Id. at 950.

In a concurring opinion written by Justice Alito (and joined by Justices Ginsburg, Breyer and Kagan), the Justices arrived at precisely the same conclusion - that the placement of the GPS device to monitor a vehicle's movement was an unreasonable search - but criticized the majority's narrow "trespass" analysis as "unwise" and "highly artificial". Framing the question posed in the case as "whether respondent's reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove", Justice Alito asserted that the *Katz* Court "did away with the old approach, holding that a trespass was not required for a Fourth Amendment violation." Id. at 949. For Justice Alito, the reasonable-expectation-of-privacy test is better suited for analyzing cases in the digital age. In circumstances involving dramatic technological change, Justice Alito noted that the best solution to privacy concerns is likely legislative. However, in the absence of legislation, Justice Alito reasoned that the best a court can do is to apply existing Fourth Amendment doctrine and ask whether the use of a GPS device in a particular case involved the degree of intrusion that a reasonable person would not have anticipated. Id. at 964.

According to Justice Alito, relatively short-term monitoring of a person's movements on public streets may accord with expectations of privacy that our society finds reasonable and, thus, not require a warrant. Conversely, the use of longer-term GPS monitoring in investigations of most offenses will likely impinge on reasonable expectations of privacy and, therefore, require a warrant. Interestingly, Justice Alito's opinion leaves the door open on the question of whether prolonged GPS monitoring in investigations involving certain undefined "extraordinary offenses" will similarly impinge on the "constitutionally protected sphere of privacy."

Observing that the precise point at which GPS tracking becomes a search is difficult to pinpoint, Justice Alito had no difficulty concluding that "the line was surely crossed before the 4-week mark." Id. (Emphasis added). Justice Alito further commented

that where uncertainty exists concerning the duration of the monitoring, the police can always seek a warrant. Thus, for Justice Alito, it is the length of the monitoring and the type of offense being investigated that will inform his judgment on the "constitutionally protected sphere of privacy."

Justice Sotomayor, who joined the majority's narrow holding, also filed a concurring opinion. Justice Sotomayor clearly disagreed with Justice Alito's contention that short-term monitoring does not violate an individual's expectation of privacy. Indeed, for Justice Sotomayor, the unique attributes of GPS surveillance require particular attention under the Katz reasonable-expectation-of-privacy test. Because "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about familial, political, professional, religious and sexual associations", and because "GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously", Justice Sotomayor posited that it "evades the ordinary checks that constrain abusive law enforcement practices: 'limited police resources and community hostility.'" Id. at 956.

Also, it is clear that Justice Sotomayor wanted the Court to go further than any of the other Justices were willing to go. In fact, it appears that Justice Sotomayor was the only Justice willing to accept Mr. Jones' primary argument that monitoring for any amount of time was itself a search or, as stated by Justice Sotomayor: "When the Government physically invades personal property to gather information, a search occurs." Id. at 955.

More importantly, Justice Sotomayor's opinion suggested that "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties" and highlighted the fact that the third-party doctrine is "ill-suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."[2] Id. at 957. Observing that:

> People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers,

Justice Sotomayor declared: "I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year." Id. Also, Justice Sotomayor pointed out that whatever society's reasonable expectations of privacy may be, they can only attain constitutionally protected status if our Fourth Amendment jurisprudence ceases to treat "secrecy" as a prerequisite for "privacy." Id.

When the Court's decision in *Jones* was released at the end of January, 2012, agents in the Federal Bureau of Investigations (FBI) apparently were ordered to stop using GPS devices immediately and were told to await guidelines on retrieving the devices. According to various news reports, the ruling caused a "sea change" inside the United States Justice Department. Indeed, more than one news source reported that the *Jones* decision caused the FBI to turn off nearly 3,000 GPS devices being used to track suspects domestically.

Interestingly, it was not the majority opinion that caused the FBI's "sea change." Rather, it was Justice Alito's focus on the fact that law enforcement monitored Jones for about a month. Specifically, it was Justice Alito's statement that "the use of longer-term GPS monitoring in investigations of most offenses impinges on expectations of privacy" that apparently caused the FBI to question whether other members of the Court are also concerned with long-term surveillance using technologies other than GPS devices.

In addition, because Justice Alito's opinion suggests that 2 days of GPS surveillance might be okay but 28 days is too long, the Court's lack of clarity may force the Department of Justice to modify its guidelines for federal law enforcement operations. For example, the unclassified version of The Attorney General's Guidelines for Domestic FBI Operations provides that the use of closed-circuit television, direction finders and other monitoring devices "usually do not require court orders or warrants unless they involve physical trespass or non-consensual monitoring of communications." See Page 31. Given the Court's holding in *Jones*, the FBI may seek a warrant in every case involving GPS monitoring in the future. However, whether the FBI will continue to use warrantless short-term GPS monitoring will likely depend on the circumstances of the case.

Clearly, the three opinions in *Jones* offer a glimpse into how each of the Justices will address the privacy cases percolating through the courts. Moreover, although Mr. Jones won this battle, it is still difficult to predict whether the Government or individuals are better positioned for victories in the future.[3]

Indeed, notwithstanding the fact that various newspaper articles erroneously proclaimed that the Court held that GPS

[2]The third-party doctrine referenced by Justice Sotomayor is the principle arising out of two Supreme Court cases involving banking information and telephone call information. In *Miller vs. United States*, 425 U.S. 435, 443 (1976), and *Smith v. Maryland*, 442 U.S. 735, 740 (1979), the Supreme Court held that individuals have no reasonable expectation of privacy in records created and stored by private companies in the ordinary course of business due to the fact that they are maintained and accessible to a third party. Indeed, the Court found that people waive their "reasonable expectation of privacy" when they provide information to a third party, and consequently, under the third-party doctrine, law enforcement's access to these records is not a violation of the Fourth Amendment's warrant requirement.

[3] Unfortunately for Mr. Jones, the Government has announced that it intends to retry him without using the evidence obtained from the GPS device.

tracking requires a warrant, it is significant that the majority did not hold that installing a GPS device was a search that always required probable cause or a warrant. Rather, the majority held that it was the combination of "installing the device" and "using it to monitor the car" that constituted a "search" under the Fourth Amendment. However, it was the long period of monitoring (28 days) that was found to be "unreasonable" when done without a warrant. Which raises some obvious questions: What about electronic monitoring without a trespass? If monitoring the vehicle for 28 days is too long, is monitoring the vehicle for 2 days or 2 weeks allowed? Presumably, these questions will be analyzed under the *Katz* formula, but the majority opinion in *Jones* seems to suggest that some other formulation may also be appropriate.

Justice Alito's criticism of the majority's trespass approach also highlighted the "vexing problems" it will create in electronic surveillance cases without physical contact to the item to be tracked. As an example, Justice Alito posed the following hypothetical: "[S]uppose that the officers in the present case had followed respondent by surreptitiously activating a stolen vehicle detection system that came with the car when it was purchased. Would the sending of a radio signal to activate this system constitute a trespass to chattels?" Id. at 962. Perhaps such third-party information will be available to the Government without reasonable suspicion or probable cause.

Judge Alito even questioned whether new technologies like "smart phones" and other wireless devices, which permit wireless carriers to track and record the location of users,have changed the expectations of privacy of the users of such devices. Id. at 963.

Finally, it may turn out that Justice Sotomayor's suggestion to the Court to reevaluate the third-party doctrine will have the greatest impact on the development of Fourth Amendment law in the digital age. Indeed, if Justice Sotomayor is able to persuade four of her colleagues to reconsider the third-party doctrine's principle of "secrecy" as a prerequisite for "privacy," it is likely that the *Jones* case, like the *Katz* case before it, will be remembered for a concurring opinion. However, whether a reevaluation of the third-party doctrine will actually happen is anyone's guess.[4]

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[4] Interestingly, less than a month after the *Jones* decision, the National Association of Criminal Defense Lawyers (NACDL) published a White Paper on Electronic Surveillance & Government Access to Third Party Records available at http://www.nacdl.org/reports/. In this paper the NACDL called for the adoption of the principle that law enforcement access to content of private electronic communications and geolocation information (including cell-phone and GPS surveillance) should require a warrant supported by probable cause. Also, given the quantity and type of information gathered by third party companies today, NACDL notes that the third-party doctrine is no longer consistent with reasonable expectations of privacy.

(Continued from page 3)

FEDERAL BAR ASSOCIATION REMARKS: BOSTON April 3, 2012

By Judge Michael Ponsor

The only real consolation in this environment is that things are beginning, slowly, to change. We are realizing that the material and moral costs of mass imprisonment are becoming unbearable. The recent crack cocaine sentencing guideline amendments, which were supported across the political spectrum, were very encouraging. The trickle of articles attacking the cost, in money and souls, of our huge prison population is turning into a steady stream. Post-release programs, like the CARE and Restart programs in Massachusetts, are springing up around the country like monsoon frogs. We are a great and resilient nation, and some day, some day relatively soon, we will correct the worst aspects of what we have been doing over the past thirty years.

We, meaning you who are listening to me at this moment, and I can do something to hasten progress. Let me make three suggestions that are very simple and cost nothing but your time. First, every lawyer ought to take time to visit a prison. I don't care if you only write wills; it's an incredibly moving experience. Just walk around, see what it's like, and imagine how it would feel to spend a year there, five years, ten years, or the rest of your life. Second, I'd ask you to take a little time to make yourself knowledgeable about the issue of imprisonment in our country. We all need to know what's going on. If you're looking for the facts in short form, take a look at Adam Gopnik's article in the January 30 New Yorker. You can read it in half an hour. If you want a really powerful, well researched examination of the issue, take the time to read William Stunz's brilliant book, The Collapse of American Criminal Justice. Get to know the basic facts; it won't take long. Third, and finally, speak out. Speak out at dinner parties, and lunches, and elevator rides. Speak out every chance you get. There has to be a better path for our country in dealing with crime than getting the gold medal year after year for locking the most people up. We will some day move past this epoch of darkness in our criminal justice system. Let's us all, as attorneys and judges, work together to move our dear land and erase this blemish on our democracy with as little further damage as possible.

Thank you for having me here tonight and for your patience in listening to me.

(Continued from page 4)

An interview with the Honorable William G. Young on the decline of the American Jury Trial

WGY: We should never obscure the fact that our system is vastly too expensive and too slow. Delay increases the expense of litigation. Judges should take the lead in decreasing delay and decreasing litigant expense.

FBA: Are there any distinctions between criminal practice and civil practice trials that are relevant to the discussion?

WGY: There is no "trial" in criminal practice anymore. Criminal practice revolves mainly around plea bargaining.

FBA: Is there any suggestion that the quality of jury verdicts or the inability to predict jury behavior is to blame for the decline?

WGY: The quality of jury verdicts is as good as it ever was. The largest takeaway for judges is that the juries get it right. As to predictability of verdicts affecting trial rate—yes, lawyers and clients are more risk-averse because both are typically less experienced with trial.

FBA: Are there more mediations and settlements today than ever?

WGY: Settlements—no, they have remained constant. Mediation—yes, because it's a vehicle to settlement.

FBA: Is there anything to the myth that generations of lawyers who have no jury trial experience are unable to think on their feet, unequipped for trial, petrified of trial and will do what they can to avoid trial?

WGY: Yes. The barristers of today are your defenders and your Assistant U.S. Attorneys. To be fair, there are magnificent civil trial lawyers, but there are few. These days most attorneys seek to avoid trials. You see it in the unnecessary motions for summary judgment. Rather than go for the capillaries, attorneys should have an instinct for the jugular. Attorneys think they have to delay, run up costs, turn over every stone. They should instead focus on what the verdict slip will look like. The judicial antidote to this epidemic is speed—it forces swift, clear judgment calls on the part of attorneys. We'd be better off if all cases turned over in one year.

FBA: Some have said that the U.S. Supreme Court is hostile to jury trials as evidenced by its rulings relating to pleading standards, summary judgment, arbitration and the like.

WGY: The Burger Court bought into the myth of the litigation explosion. In recent years, the Court has had its fair share of trial judges: Justices Souter and Sotomayor. The issue is that, to the Justices, the trial courts are only one of the dispute resolution mechanisms, not the gold standard. You saw this play out most recently in Justice Souter's comments in Bell Atlantic [v. Twombly, 550 U.S. 544 (2007)], where he made clear that trial courts have difficulty managing cases.

FBA: Modernity has brought about the demise of the quill pen. Paper newsprint is on its way out. So what if the jury trial joins the Edsel in the dustbin of history?

WGY: People don't like trials. But, people still need trial experts. Judges too often retreat to ivory towers, where they can contemplate trends on summary judgment or motions to dismiss. The goal should be increasing the judge's time on the bench. Judge [Francis] Ford once said "you have to listen to the bastards, they might just have something." As a judge, you've got to get out there and look someone in the eye who's arguing their heart out for a client and then have the guts to make a decision. If you don't have the guts to do that, the system loses. In cases where a litigant has a right to trial by jury, only a jury can find facts. I'm not permitted to do that. I often say that the eclipse of fact-finding foreshadows the twilight of judicial independence. That is one of the largest unanticipated consequences of marginalizing the jury.

FBA: What can lawyers do to stem the tide?

WGY: There is no good answer. But, the FBA could and should host a national conference on the vanishing trial.

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