



SideBAR

Spring 2013 • Published by the Federal Litigation Section of the Federal Bar Association

OPENING STATEMENTS

Message from the Chair William Frank Carroll



Welcome to the spring edition of our Section's award winning publication, SideBAR. I am sure you will find it interesting, informative and educational.

The Federal Bar Association 2013 Annual Meeting will be held in San Juan, Puerto Rico, from September 26-28. As always there will be interesting CLE programs, section and committee meetings, and numerous social events which will provide opportunities to meet with your fellow federal practitioners throughout the country. Please make plans now to join us in what is sure to be a unique meeting.

The Federal Litigation Section has presented outstanding CLE programs at the last two annual meetings. This year our tentative topic will be "Private and Government Related Consumer Litigation—Recent Development and Hot Topics." More information will be forthcoming as plans for the program are finalized. The Section also hosted receptions after the program for all Annual Meeting attendees and we plan to do so again this year.

Also, SideBAR is published on a quarterly basis under the leadership of editor Rob Kohn. I would encourage you to consider writing an article on a topic of interest for SideBAR. The articles average 1,200 words (about five or six pages), and are written in

Chair continued on page 2

Editor's Notes Robert E. Kohn



Your Federal Litigation Section continues to support expanding the membership of the Federal Bar Association. As members of the premier bar association serving federal practitioners and the federal judiciary, each of us benefits when the association grows larger. Growth enhances the visibility and relevance of the association in our communities, in the rule-making process, and on Capitol Hill. So, I am proud to let you know that FBA leaders across the country are actively working to launch chapters in districts that

Editor continued on page 4

About the Editor

Robert E. Kohn litigates entertainment, business, and intellectual property disputes in the Los Angeles area. He also argues appeals in federal and state courts at all levels. A former clerk to Hon. Joel F. Dubina of the Eleventh Circuit, Kohn attended Duke Law School. He is the vice chair of the Federal Litigation Section and co-chairs the committee on Federal Rules of Procedure and Trial Practice. He can be reached at r.kohn@clearspire.com.

Inside this Issue

Briefing the Cause

<i>Fact-Based Advocacy on Appeal</i>	2
<i>Predictive Coding v. Keywords: Rumble in the Jumble</i>	3

Federally Speaking

<i>The Future of Federal Class Actions</i>	5
<i>Federal Courts in Puerto Rico</i>	6
<i>The False Claims Act and "Fraud in the Inducement": A Brief Look at the Government's Damages Calculus in Light of DOJ Intervention in Floyd Landis's FCA Suit</i>	8

Approaching the Bench

<i>Exceeding the Scope of the Matters Listed in a 30(b)(6) Deposition Notice</i>	10
<i>District of Oregon Takes Steps to Control the Cost of Litigation</i>	13

BRIEFING THE CAUSE

Fact-Based Advocacy on Appeal

Paul Georgeson

Every once in a while, it is important to try to take a step back and evaluate your individual routine. For instance, as a litigator for 18 years, I have learned that before mediation, arbitration, or trial, I need to do my best to try to take a look at my case in the light of an objective observer. This can be surprisingly hard to do after advocating your own position for months or years. However, whether that means bouncing ideas off my spouse, discussing the case with colleagues, or going through the more formal process of a mock trial, I have to consciously force myself to recognize that I may have developed a myopic view of my case. The danger of moving forward with that myopic view is the possibility of overlooking potential weaknesses that may be discovered by the mediator, judge, or jury and left unaddressed. I had another similar realization recently when I had the opportunity to speak with three U.S. Court of Appeals judges. It has led me to a renewed focus on the factual aspects of arguing a case on appeal.

I was interviewing the judges for an article about appellate practice tips for lawyers who don't regularly practice before the courts of appeals. I was fortunate to have a remarkably frank conversation with them to obtain their advice and input. In those conversations, I expected much of the usual advice that we regularly get from appellate judges: be brief, be accurate, be candid, follow the rules for organization of your brief, don't use too many acronyms, expect to be interrupted at oral argument, never fail or refuse to answer a judge's question at oral argument, etc. However, what struck me most about my conversations with those three judges was how many times they mentioned the importance of the facts of your case. Many practitioners, myself included, tend to think of the trial court as the place where factual issues are determined and the courts of appeals as the place where legal issues are determined. However, in my conversation with the judges, they emphasized repeatedly how important the facts are to an appeal. As one judge noted, before ever reading your brief, the judges know what the standard is for summary judgment. They know what the rules of evidence are. They know *Daubert*. They know what the law is. However, until they read your brief, they have no knowledge of the facts of your case.

It surprised me that a significant portion of my conversation with the judges were devoted to facts. For instance, the judges discussed how important it is to preserve facts at the trial court level. One of the judges noted the importance of offers of proof, which may be under-utilized as a tool. This made me realize that I am not using that tool as well as I should in my practice. As trial attorneys, we may be reluctant to make an offer of proof to the trial judge when we realize that the trial judge has already made up his or her mind. We may not want to waste time on an issue that we are sure to lose. We also may not want to potentially annoy the judge by pushing an issue that has been decided. However, the appellate judges noted that without an offer of proof on rejected evidence, they can't analyze what the potential consequence of the rejected facts would be. Therefore, they suggested that counsel should use offers of proof more than they do. I know I am going to do so.

The judges also talked about the importance of the fact section of the appellate brief. The judges note that all other portions of a brief should be a logical extension of the facts that support your position on appeal. One judge who had significant experience as an appellate practitioner before taking the bench noted that he always drafted the factual section of his brief first, then went back and filled in all of the other elements.

Knowing the facts is also extremely important at oral argument. No judge wants to hear a response to a question that "I wasn't counsel below so I don't know." Whether you tried the case in the trial court or took over at the appellate stage, it is imperative that you have a complete and thorough knowledge and understanding of the facts in the record.

Taking a step back from the process, the judge's focus on the facts seems obvious. Of course the facts of your case are important on appeal. However, what struck me in my conversations with the judges was their emphasis on that topic. The repeated emphasis on the facts (whether it be preserving the facts at trial, setting forth the facts in your brief, or being prepared to discuss the facts at oral argument), made me realize that many practitioners, myself included, may not be giving the facts of our case the credit that they are due on appeal. Too many of us may be trapped in the mindset—in the routine—that a trial is about the facts and appeal is about the law. This was not a profound or earthshaking revelation.

Advocacy continued on page 11

Chair continued from page 1

a "journalistic" style with minimal footnotes. If you are interested in writing an article or have questions regarding the process, please contact Rob at r.kohn@clearspire.com.

Finally, I invite you to become active in our section. Your ideas, participation and questions are welcomed. Please contact me at (214) 698-7828 or fcarrroll@coxsmith.com at any time. I look forward to meeting and working with you in the coming year. **SB**

About the Chair

William Frank Carroll is a member of the Trial and Appellate Sections in the Dallas, Texas, office of Cox Smith Matthews Inc. He concentrates his trial and appellate practice in the areas of antitrust, class action, securities, white collar criminal, and intellectual property litigation in the federal courts and is Board Certified in both Trial and Civil Appellate Law. He is also an adjunct professor of law at Southern Methodist University, where he has taught Antitrust Law, Federal Courts, Complex Federal Litigation and Trial Advocacy. He can be contacted at fcarrroll@coxsmith.com.

Predictive Coding v. Keywords: Rumble in the Jumble

By J. Mark Coulson and James Shoemaker

The future of e-discovery will be closely tied to technology assisted review (TAR) or so-called “predictive coding.” With recent studies hailing it as a more effective means of searching than the traditional gold standard of human review,¹ consensus on using TAR is building by the month. Although the jury may still technically be out as the Bar awaits the blessing of a broader segment of the Judiciary, the science is undeniable, especially when supported by transparency and cooperation of the litigants. As notions of proportionality finally gain consistent traction, TAR will play an ever-growing role in cases.

By extension, keyword searching—human review’s co-conspirator—is quickly falling from favor. After all, both the courts and the scientists (and vendors) miss no opportunity to point out the lack of precision when e-discovery is premised on lawyer hunches about appropriate search terms in ferreting out the proverbial needles from the haystacks of data accumulated by most enterprises.² Although public, patient nods to keyword searching continue, one gets the impression that privately, thought leaders would prefer that we get with the new program, for all of the right reasons—increased accuracy and decreased cost.

However, despite obvious shortcomings, in certain circumstances, keyword searching may still have its place. In fact, it can even play a crucial role in the proper execution of TAR. Surprisingly, it is in just the sort of “needle in a haystack” case referred to above. More precisely, the more the case concerns activity outside the normal course of the enterprise, the more helpful keyword searching can be. For example, take the case of a rogue employee engaged in wrongful activity where the enterprise provides only the setting or opportunity for the wrongdoing. In such a setting, keywords and human review (by itself or as an adjunct to TAR) may well get to the heart of the matter faster and cheaper than TAR alone.

For purposes of this discussion, a quick definition of search accuracy, or specifically its measurements—precision and recall—is helpful.

Precision: The percentage of relevant results returned by a search (e.g., where 100 records out of 100 returned by a search are relevant, precision is 100%).

Recall: The percentage of relevant records within a population returned by a search (e.g., where there are 100 relevant records within a population of 1 million and the search returns 100 of the relevant documents, recall is 100%).

F Measure: The weighted average of precision and recall. The F_1 score is an important measurement as it balances precision and recall. For example, a search that returns 100% of a record population has 100% recall, but low precision. A search where all 100 results are relevant, but another 100 records are left behind has high precision and low recall. Ultimately, the goal is not to reach perfection, but to reach an acceptable harmony between precision and recall.

The biggest knock against keywords is that they can suffer from either a lack of precision (i.e., when too broad a term is used) or a lack of recall (i.e., when the search terms are too

narrow).³ In other words, keywords have trouble reaching an acceptable F_1 score. By contrast, through the combination of process (sampling and validation) and technology (algorithms), TAR offers a means to solving both bias and completeness, while improving accuracy.

A predominant methodology among today’s TAR systems is one requiring multiple rounds of statistically sound random sampling with users then reviewing and coding records in the sample. This is sometimes referred to as “supervised learning.” Under this approach, an initial random sample is drawn from the full data set. Users then review these records for potential relevance, creating a baseline sample. After the baseline sample, additional rounds of random sampling (the “training rounds”) are then performed with binary coding calls (relevant vs. not relevant) made by human reviewers until an acceptable error or “discrepancy” rate (how often human disagrees with machine) is achieved. The methodology here being that in order to teach the system what constitutes an *apple*, it must also be given some *oranges* in order to differentiate the fruits. The system then ranks or categorizes the remaining records in the data set based on similarity to these exemplars and the team decides on how to structure human review around the results. By crude analogy, just as iTunes makes suggestions based on an analysis of the songs you buy (“If you like *U2* you may like *Coldplay*”), TAR systems analyze the records that reviewers deem relevant, and try to find more like them.

But the very methodology that makes TAR so effective in most situations can hamstring it when it is “data starved” by too few relevant records in the data set. This can occur particularly when looking for records concerning activity outside the normal business of the enterprise, such as the wrongful activity of a rogue employee. TAR’s random sampling/learning model does not work as well in situations of low “richness” (i.e., few relevant records in the data set—our “needles in the haystack”). This is because, despite best efforts to eliminate bias and achieve completeness through random sampling, the system still may not have received enough information about what constitutes relevance (i.e., the seed set may not include a sufficient number of relevant documents—because there aren’t that many to find). Moreover, certain algorithms, such as a Bayesian classification system and Latent Semantic Indexing used for finding similarities and relationships between documents may ultimately wind up confusing relevance where too few relevant records exist, and those that do may have no consistent relationship to each other.

To revert back to our iTunes analogy, should the middle-aged head of household make only an occasional purchase on his fourteen-year-old son’s iTunes account, the ability of the system to suggest an appropriate additional purchase is hamstrung by both the lack of purchases by the head of household and the fact that they are completely unrelated to all of the typical purchases by the fourteen year old account holder (“If you like *Lil’ Wayne* and *Simon and Garfunkle*, you might like???”)

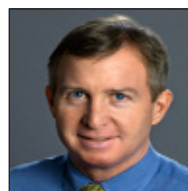
There is the potential for these two methods to work together in these situations. In another variant of TAR, so-called “seeding” or “judgmental sampling” is used to boost the number of relevant records within the seed set beyond the random sampling through a combination of iterative keyword searching and other traditional search techniques. By priming

Predictive continued from page 3

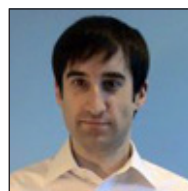
the pump with a population of relevant documents identified with keyword searching, TAR has a better chance to then go out and find similar documents. Some vendors have suggested that where richness is less than five percent, seeding is necessary to optimize their TAR systems.

By way of example, in a recent such situation, out of a universe of over 300,000 documents (largely email), a preliminary keywords search directed at the activity at issue (theft by a co-worker) returned a little over 5000 potential “needles” of which approximately 1000 were deemed to be relevant (using a fairly broad definition). Given the unusual nature of the activity at issue, this relatively low richness was not unexpected. However, the reviewers were left with a large number of un-reviewed documents and wanted to use TAR to validate their search, while also ruling out the likelihood that there were additional relevant documents in the data set. Using the classic TAR approach outlined above, review of an initial baseline sample confirmed extremely low richness (< 1%).⁴ When multiple rounds of TAR review yielded high discrepancy rates (reviewer disagreeing with the computer), the team, recognizing the negative impact of the low richness, decided to “seed” the system with highly relevant records identified from the preliminary keyword search to optimize the system. Ultimately, although TAR accuracy was significantly improved, only a handful of additional relevant records not identified by the keywords were identified (the keyword “false negatives”). At best, these records proved to be only marginally relevant. Finally, a review of a sample of the documents predicted to be not relevant supported the conclusion that it was unlikely that the remaining un-reviewed records contained relevant information.

In summary, TAR is a power tool that in the vast majority of cases will be an important weapon to tame the scope and expense of e-discovery and improve its accuracy over keywords and human review. At the same time, keywords can still play an important role, particularly in use cases where one is seeking records of unusual activity. In such cases, using a holistic approach usually ensures the most efficient and complete end result. **SB**



Coulson is a principal with the Baltimore office Miles & Stockbridge and can be reached at jcoulson@milesstockbridge.com.



Shoemaker is the Manager of Practice Group Support Programs at Miles & Stockbridge and can be reached at jshoemaker@milesstockbridge.com.

Endnotes

¹Maura R. Grossman & Gordon V. Cormack, Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review, XVII RICH. J.L. & TECH. 11 (2011), <http://jolt.richmond.edu/v17i3/article11.pdf>.

²*United States v. O’Keefe*, 537 F. Supp. 2d 14,24 (D.D.C. 2008) (“Whether search terms or ‘keywords’ will yield the information sought is a complicated question involving the interplay, at least, of the sciences of computer technology, statistics and linguistics ... Given this complexity, for lawyers and judges to dare opine that a certain search term or terms would be more likely to produce information than the terms that were used is truly to go where angels fear to tread.”).

³David C. Blair & M.E. Maron, *An Evaluation of Retrieval Effectiveness for a Full-Text Document Retrieval System*, 28 COMMUN. OF THE ACM 289, 295 (1985) (The best keyword searches typically only find 20-40% of relevant records). TREC 2008 study. <http://trec.nist.gov/pubs/trec17/papers/LEGAL.OVERVIEW08.pdf>

⁴Interestingly, statistical sampling during TAR actually confirmed that the keyword search, although imprecise (~30%), had surprisingly high recall (~75%).

Editor continued from page 1

currently have no FBA presence. For instance, on May 2, 2013 the Federal Litigation Section was pleased to help support a gathering aimed at launching a New Hampshire Chapter of the FBA. The gathering included FBA leaders from other chapters within the First Circuit as well as members of the Advisory Panel of the U.S. District Court for the District of New Hampshire and the leadership of the New Hampshire State Bar Federal Practice Section. Please contact Chris Sullivan (CPSullivan@rkmc.com) of the Massachusetts Chapter to get involved.

The Federal Litigation Section also strives to support new and existing chapters in bringing valuable educational and professional programs to our members. On a personal note, when this issue of SideBAR reaches your inbox, I will have just finished addressing the annual FBA Chapter Leadership Conference as part of a discussion led by the Hon. Michelle Burns on April 26, 2013 at our headquarters in Arlington, Va. Under the leader-

ship of Judge Burns, who serves as Chair of the Sections and Divisions Council, we’ll encourage the incoming presidents of each FBA chapter to make full use of the people-power and financial resources that national sections like ours possess.

You are that people power. I hope you will engage with your local chapters to bring the Federal Litigation Section’s resources home to support federal court litigators and the bench where you live and practice. Please call upon Chair Frank Carroll in Dallas, Tex. (fc Carroll@coxsmith.com), or get in touch with me or any other member of the section board, to get the ball rolling.

This issue of SideBAR also benefits, as it always does, from the contributions of you: the federal litigation bar. We need you to write the insightful and diverse articles that Federal Litigation Section members enjoy each time this newsletter is published. Thank you. **SB**

FEDERALLY SPEAKING

The Future of Federal Class Actions

Jason Steed

The Supreme Court has issued several important class-action decisions over the past few years, most notably including *AT&T v. Concepcion*, 131 S. Ct. 1740 (2011), and *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011). In *Dukes* the court decertified a nationwide class of as many as a million female employees, in a 5-4 opinion written by Justice Scalia, who has been called a “dedicated skeptic” of collective litigation.¹ Justice Scalia’s *Dukes* decision stiffened the “commonality” requirement for class certification under Rule 23, making the certification of large employee class actions more difficult. And in *Concepcion*—another 5-4 decision authored by Justice Scalia—the court held that state laws prohibiting class-action waivers in consumer arbitration agreements are preempted by the Federal Arbitration Act, making class-action waivers enforceable and potentially putting an end to class arbitrations altogether.

In the current term, the Supreme Court seemed poised to follow *Dukes* and *Concepcion* with as many as four more class-action decisions that could further reshape class-action practice. But so far the court has refrained from dropping any bombshells.

The first class-action case of the 2012 term, *Comcast v. Behrend*,² was argued last November and set out to address a question that Justice Scalia had raised in *Dukes*. In *Dukes*, while discussing the commonality requirement in the context of employee sex-discrimination claims, the court held that there must be evidence of a general policy of discrimination to show that the class members have common claims—and the court concluded that no such evidence existed. But Justice Scalia went out of his way to note that the parties had disputed whether certain expert testimony on this issue was admissible under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). Acknowledging the *Daubert* question was immaterial to the court’s decision, Justice Scalia nevertheless commented on the district court’s finding that *Daubert* did not apply at the certification stage, saying, “We doubt that this is so.”³

Upon granting certiorari in *Behrend*, the court again went out of its way to reach the *Daubert* question, this time by reformulating the issue presented. (Neither party to the case originally raised the *Daubert* issue.) The court seemed eager to answer this question, and many assumed that Justice Scalia’s dictum in *Dukes* was a hint at where the court was headed. This hint resurfaced at oral argument, where a majority of the justices seemed to support requiring a finding of some form of reliability regarding expert testimony, before certifying a class. Obviously, any new requirement—even if it did not entail satisfying a full-scale *Daubert* inquiry—would mean plaintiffs would face another hurdle to class certification.

But *Behrend* was decided not with a bang, but with a whimper. It was yet another 5-4 decision authored by Justice Scalia, but the opinion decertified the class by focusing on the “fit” between the theory and evidence of damages in the case, instead of on the *Daubert* issue. Justices Breyer and Ginsburg wrote a rare joint dissent, joined by Justices Kagan and Sotomayor, criticizing the majority opinion as unfair to the plaintiffs for failing to answer the question that the court had gone out of its way to raise. But the dissenters also noted, perhaps with some relief, that the majority opinion “breaks no new ground” in class-cer-

tification standards. Some commentators think *Behrend* invites greater consideration of the merits of class claims at the class-certification stage—but most seem to agree that the opinion will have little impact outside the case itself.

The court has also decided *Standard Fire Insurance Co. v. Knowles*,⁴ which was argued in January. In *Knowles*, Standard Fire had established that the amount in controversy exceeded the \$5 million threshold for federal jurisdiction under the Class Action Fairness Act (CAFA), and was therefore seeking to remove the putative class action to federal court; but the named plaintiff had sought to defeat removal by “stipulating” that the class would not seek more than \$5 million in damages. The question facing the Supreme Court, in essence, was whether a plaintiff, as master of the complaint, can tailor class claims to avoid removal under CAFA, even if it limits recovery to less than what absent class members might otherwise be entitled to.

At oral argument the justices’ questions were intense, as they discussed what was at stake for both plaintiffs and defendants. Toward the end of Standard Fire’s rebuttal, Justice Kagan said, “[Y]ou really are asking us to blow up the whole world”—as though to emphasize just how far-reaching the *Knowles* decision could be.

But the outcome was somewhat less than explosive. In an apparently uncontroversial 9-0 decision, the court said class counsel cannot avoid removal by “stipulating” that damages would be limited to less than the federal jurisdictional amount, because the stipulation would not be binding on unnamed class members prior to class certification. Another class member, for example, could intervene without stipulating to the limited damages. Thus, in considering removal, the federal district court must ignore any nonbinding stipulation and simply aggregate the claims of the putative class members.

The *Knowles* decision can be seen as another blow to class plaintiffs, insofar as it restricts their control over their own lawsuit. But the decision also makes sense, and can be seen as protecting absent class members who are not involved—and might not agree—with attempts to limit damages. And its impact on class-action practice will likely be narrow.

So if class-action practitioners on either side of the docket were expecting fireworks from *Behrend* and *Knowles*, they probably were disappointed (or relieved). But of course, the term isn’t over.

In February, the court heard argument in *American Express v. Italian Colors Restaurant*,⁵ which picks up on class-action waivers where *Concepcion* left off. In *Italian Colors*, small business owners brought a class action against the credit card company because AmEx was forcing businesses to accept all AmEx-branded credit cards, thereby forcing them to pay higher fees. Relying on *Concepcion* and its class-action waivers, AmEx sought to force arbitration with each individual plaintiff. But plaintiffs put on evidence showing that litigating their claims individually—whether in court or in arbitration—would be cost prohibitive, because their claims are worth only about \$5,000 each. Now the Supreme Court must decide which policy interest takes priority: the interest in providing a procedure for collectively litigating claims that are too small to warrant the costs of individual action, or the interest in enforcing arbitration agreements as

Federal Courts in Puerto Rico

By Ira Cohen

This year's Federal Bar Association Annual Meeting is scheduled to take place in San Juan, Puerto Rico on September 26-28, 2013. It would, therefore, appear to be appropriate for us to familiarize ourselves with some of the unique background and rich judicial history of the federal district courts in the Commonwealth of Puerto Rico.

Overview

The U.S. District Court for the District of Puerto Rico (U.S.D.C., D.P.R.) was established on Sept. 12, 1966. In the Spanish language, it is referred to as the "Tribunal del Distrito de Puerto Rico," but the official language is, and all court proceedings are, conducted in English. The court's official website address is www.prd.uscourts.gov. As to this federal court, the jurisdiction of which comprises the Commonwealth of Puerto Rico, appeals from this trial level court are to the U.S. Court of Appeals for the First Circuit.

Albeit the main courthouse for that appellate court is situated in Boston, Mass., the court hears appeals during a pair of sessions held each year at the Old San Juan courthouse.¹

The Puerto Rico District Court's home base is in San Juan. The Clemente Ruiz-Nazario U.S. Courthouse is located in the Hato Rey section of the city. The address for this courthouse is 150 Carlos Chardon Avenue, Hato Rey, P.R. 00918, (787) 281-4898. Parenthetically, it should be noted that the U.S. Magistrate Judges for this district hold court in the adjacent Federico Degetau Federal Building. The present panel of Magistrates includes Hon. Marcos E. Lopez, Hon. Bruce J. McGiverin, and Hon. Camille Velez-Rive. That building likewise sits at 150 Carlos Chardon Avenue, Hato Rey, P.R. 00918, Tel. (787) 281-4898. The phone number for the Clerk's Office is (787) 772-3000. In addition, a number of senior district judges are chambered at the Jose V. Toledo Federal Building and U.S. Courthouse in Old San Juan.² The address of the old courthouse is 300 Recinto Sur Street, San Juan, P.R. 00901, Tel. (787) 729-6602. The Clerk of the Court is Frances Rios de Moran. The Clerk's Office telephone number is (787) 977-6138.

Apart from San Juan, since 1900, there have been two other authorized places in which to hold court in this district. The first is in the city of Mayaguez, located at Miguel Angel Garcia Mendez Post Office Bldg, McKinley and Pilar DeFillo Streets, Mayaguez, P.R. The second is in the city of Ponce, located at Luis A. Fere U.S. Courthouse & Post Office Building, Atocha and Guadalupe Streets, Ponce, P.R.

History

In 1898, following the Spanish-American War, sovereignty over Puerto Rico shifted from Spain to the United States. The military commanders appointed Judge Noah Pettingill, to preside over the provisional court in 1899.

A year later, pursuant to the Foraker Act, in 1900, with Judge William Holt at the helm, the U.S. government established a federal court in Puerto Rico.³ The court so created was, however, a

territorial court. As such, the court was established under Article I, rather than Article III, of the United States Constitution.⁴

According to the court's official website, many of those early judges, apart from their integrity, high character, and distinguished legal pedigrees, had stellar accomplishments in their careers. To illustrate, both Judge Roberts and Judge Chavez later became Supreme Court Justices in their home states. Moreover, Judge Cooper had previously been the Governor of South Carolina. Judge Rodey, in his time, founded the University of New Mexico.

During those early days, inasmuch as the federal court in Puerto Rico was a territorial court, as opposed to a full-fledged district court, the pioneering judges quite obviously did not enjoy Article III protections, such as life tenure. Rather, the early 20th century federal jurists in Puerto Rico were appointed by the President of the United States to serve for terms of only four years. This was the state of affairs all the way up through 1938.⁵ Subsequently, and until 1996, the judicial terms were, however, doubled to a period of eight years.

From 1900 through 1961, only one federal judge at a time sat on the bench in this District. Over the decades, of course, more seats on the federal bench in Puerto Rico have been established.⁶

As mentioned above, the very first federal judge to serve in Puerto Rico was Hon. William H. Holt (1900-1904). He was followed by a succession of non-hispanic judges, until Hon. David Chavez ascended the bench in 1947-1950.⁷ Furthermore, as a matter of objective fact, the first dozen jurists to grace the bench of this district all hailed from the Continental United States.

The main courthouse is named after Hon. Clemente Ruiz-Nazario, who presided for two terms, from 1952-1966. Ruiz-Nazario, who also was the first Puerto Rican to sit on this bench, was appointed by President Harry Truman in 1952. Subsequently, all U.S. district judges from Puerto Rico have been native-born Puerto Ricans.

Until as late as the 1950s, sitting judges of the Supreme Court of Puerto Rico also were on the Federal bench, at least from time to time. They were designated to act in the capacity of judges of the federal court. In that manner, they could "pinch hit" in situations where there was a vacancy on the federal bench, while the sitting judge was away, or in cases of severe court-docket congestion.

On Sept. 12, 1966, the federal judgeships were changed to life-tenure positions and the court itself was elevated to a level plane status vis-à-vis other U.S. district courts.⁸ The first Article III judge in Puerto Rico was Judge Hiram Cancio (albeit he had originally been appointed as an Article I judge.)

Press of Business

Case filings, in this district, according to the government's own statistics, actually have decreased over the last several years. For example, back in 2006, there were 1,851 new filings, but by 2010, that number had dwindled down to 1,820. A similar trend may be observed in terms of total cases pending. In 2006, the District boasted a total of 3,938 cases; by 2010, however, that number had shrunken to 3,531. As of 2010, the court's median disposition time for criminal cases was 13.1 months, with a slighter shorter period of 11.3 months for civil cases. Notably, civil cases of a three-year-old, or greater, vintage case only represented 3.2% of the court's caseload as of 2010.

Practicing before this Court

In order to practice before the bar of this court, one must take and pass a separate bar examination. The test consists of 50 multiple choice questions, in eight subject areas, including federal civil procedure, federal criminal procedure, evidence, the local rules, appellate procedure, bankruptcy and, last but not least, ethics.

Official Court Records

For research purposes, or academic projects, the official court records of the U.S. District Court for the District Court of Puerto Rico, for the years 1897-1967, are included among Record Group 21, and warehoused in New York City, at the following location:

National Archives at New York City
201 Varick Street, New York, NY 10014-4811
e-mail: newyork.archives@nara.gov
Note: A guide to the holdings is available at:
www.archives.gov/northeast/nyc/holdings/index.html

Current Complement of Jurists

At the present time, there are seven active judgeships authorized by Congress for the Puerto Rico district. One judgeship is vacant; there are six active judges and four senior judges. The current chief judge is Hon. Aida M. Delgado-Colon (2011-present).⁹

Practice Aid

Puerto Rico Rules of Court- (including the local Federal Court Rules):

Vol. I - Rules of the Federal Courts with Puerto Rican jurisdiction, utilizing English, the official language of the federal courts in Puerto Rico.

Vol. II - Rules of the Commonwealth of Puerto Rico, written in Spanish. (Published by Thomson West, 2013 ed.)

For Further Reading

Baralt, Guillermo A., *History of the Federal Court in Puerto Rico: 1899-1999* (Hato Rey, PR: Publicaciones Puertorriquenas, 2004). **SB**



Ira Cohen, a partner at Henkel & Cohen P.A. in Miami, has been an intellectual property law litigator for 30 years. Cohen formerly served as law clerk to Hon. Harold J. Raby, U.S. Magistrate Judge for the Southern District of New York. He earned an LL.M. from NYU School of Law and now holds a post as an adjunct professor at the University of Phoenix, where he teaches business law and U.S. constitutional law. He is a member of the New York and Florida bars. Cohen can be reached at ic@miamibusinesslitigators.com.

Endnotes

¹In cases of patent claims and claims against the U.S. government, pursuant to the Tucker Act, appeals are to the U.S. Court of Appeals for the Federal Circuit.

²The old courthouse additionally serves as home to the U.S. Bankruptcy Court. The website for the bankruptcy court is www.prd.uscourts.gov. The bankruptcy court judges are as follows: Hon. Enrique S. Lamoutte, Chief Judge, Hon. Brian K. Tester, Hon. Mildred Caban, and Hon. Edward A. Godoy. The clerk of the bankruptcy court is Maria de los Angeles Gonzalez.

³ See 31 Stat. 77.

⁴ See *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

⁵ See 52 Stat. 118.

⁶Although a second judgeship was authorized in 1961 (75 Stat. 80), Congress did not actually fill the vacancy until 1965. In 1970, yet a third judgeship was authorized. (June 2, 1970, 84 Stat. 294) Later, in 1978, the total number of authorized judgeships for this district was increased to its present compliment of seven. (October 20, 1978, 92 Stat. 1629).

⁷The Article I judges who served in the District of Puerto Rico were as follows:

Hon. William H. Holt (1990 – 1904); Hon. Charles F. McKenna (1904 – 1906); Hon. Bernard S. Rodey (1906 – 1910); Hon. John J. Jenkins (1910 – 1911); Hon. Paul Charlton (1911 – 1913); Hon. Peter J. Hamilton (1913 – 1921); Hon. Arthur F. Odin (1921 – 1925); Hon. Ira K. Wells (1925 – 1933); Hon. Robert A. Cooper (1933 – 1947); Hon. David Chavez (1947 – 1950); Hon. Thomas H. Roberts (1950 – 1952); Hon. Clemente Ruiz-Nazario (1952 – 1966); and Hon. Hiram Rafael Cancio (1965 – 1966).

⁸ See 80 Stat. 764.

⁹The current roster of federal district judges in Puerto Rico is as follows: Chief Judge, Hon. Aida Delgado Colon (2006 – Present); District Judge Hon. Carmen Consuelo Cerezo (1980 – Present); Hon. Jose A. Fuste (1985 – Present); Hon. Jay A. Garcia-Gregory (2000 – Present); Hon. Gustavo Antonio Gelpi, Jr. (2006 – Present); Hon. Francisco Besosa (2006 – Present); Hon. Juan Manuel Perez-Gimenez (Active 1979 – 2006; senior district judge 2006 – Present); Hon. Raymond L. Acosta (Active 1982 – 1994; senior district judge 1994 - Present); Hon. Salvador E. Casellas (Active 1995 – 2005; senior district judge 2005 – Present); Hon. Daniel R. Dominguez (Active 1994 – 2011; senior district judge 2011 – Present).

The False Claims Act and “Fraud in the Inducement”: A Brief Look at the Government’s Damages Calculus in Light of DOJ Intervention in Floyd Landis’s FCA Suit

By Chet Rabon and Marshall Walker

On Feb. 22, 2013, the Department of Justice (DOJ) intervened in the False Claims Act (FCA) case filed by Floyd Landis in the D.C. District Court in connection with now-admitted doping fraud by Lance Armstrong when the professional cycling team that Armstrong controlled was sponsored by the U.S. Postal Service.¹ The suit alleges that Lance Armstrong, and other defendants, submitted false claims to the federal government by using banned substances while under a sponsorship agreement with the U.S. Postal Service. Specifically, the complaint alleges, in part, that “the understanding that the USPS team was free of doping and other wrongful conduct was integral to the sponsorship agreements between the USPS and the defendants.”² The complaint then continues: “That understanding perpetuated by the defendants was false and fraudulent, which thus fraudulently induced the USPS to enter into the sponsorship contracts . . . and then extend the same for increasingly large sums of money.”³ The DOJ made clear in its press release announcing intervention that it seeks to recover damages in the entire amount of the sponsorship contracts tainted by the fraud, which amounted to \$31 million between 2001 and 2004 alone.⁴

That the government’s framework for calculating damages in FCA “fraud in the inducement” cases starts with the full value of the tainted contracts does not originate with the U.S. *ex rel. Landis* matter. In 2011, in U.S. *ex rel. Magee v. SAIC*, No. 1:09-cv-324 (S.D. Miss. dismissed Oct. 17, 2011), the government argued in opposition to a motion for partial summary judgment that the FCA damages determination begins with the full value of the contract because, “but for” the fraudulent inducement, the government never would have entered into the contract at all.⁵ The government asserted that any actual “benefit” that the government received from the contract should be deducted as a credit only after the trebling of damages mandated by 31 U.S.C. §3279(a).⁶ The relator in *Magee* alleged fraud in the inducement by the winning bidder for a contract to provide technology goods and services for multiple government agencies.⁷ Pursuant to the award, \$116 million was paid for the goods and services, which the government nevertheless retained after learning of the fraud through the FCA case.⁸ Counsel for one of the defendants has written that the district court in *Magee* “appeared to agree with the government” in an oral decision denying defendant SAIC’s motion to rule upon (and substantially limit) the amount of damages.⁹ SAIC sought to persuade the court that the government suffered no damages, because it received technology goods and services fully worth the \$116 million that had been paid.¹⁰ After SAIC’s motion was denied, and with the defendants potentially facing substantial FCA damages, the case settled.¹¹

The government’s argument in *Magee* was based largely upon the U.S. Fifth Circuit’s decision in *Longhi v. Lithium Power Technologies*, 575 F.3d 458 (5th Cir. 2009). *Longhi*, also an FCA

case, involved misrepresentations in proposals for research grants awarded by the Department of Defense.¹² The government moved for and ultimately was granted summary judgment as to both liability and damages.¹³ Both in the district court and on appeal, the government argued that defendants’ false statements had induced the government to award \$1.6 million in grants to the defendants, which instead should have gone to other deserving small businesses for which the program funding was intended.¹⁴ The Fifth Circuit noted that the contracts at issue did not produce a tangible benefit to the government, but that the “intangible benefit of providing an ‘eligible deserving’ business with the grants was lost as a result of the defendants’ fraud.”¹⁵ Despite the lack of a tangible benefit, the Fifth Circuit opined that if there had been a calculable tangible benefit, it would have been deducted only after the government’s damages had been trebled.¹⁶ The Fifth Circuit affirmed that the damages in *Longhi* were the full amount of the grants paid by the government, which were then trebled.¹⁷

While *Longhi* provides straightforward support for analyzing FCA damages in fraudulent inducement cases by focusing initially on the full value of the contracts obtained by fraud, a recent case decided by the D.C. Circuit Court of Appeals just months after U.S. *ex rel. Landis* was filed provides the government an alternative, though more challenging, theory for using the full value of fraud-tainted contracts as the damages to be trebled. In U.S. *v. Science Applications International Corp.*, 626 F.3d 1257 (D.C. Cir. 2010), an FCA case brought directly by the government, the D.C. Circuit Court of Appeals held that the correct measure of damages when a product or service has no “ascertainable market value” is the amount paid by the government minus the value provided to the government.¹⁸ The D.C. Circuit opinion provided that both the government and the defendants should be allowed to present evidence on the value of the goods or services provided to the government under the contract.¹⁹ Specifically, the court stated that “the government remains free to argue that the value [of the goods or services] was completely compromised . . . , making the full amount paid . . . the proper measure of damages.”²⁰

Both *Longhi* and SAIC, though in very different ways, are major departures from other “benefit of the bargain” cases. For example, in *Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908 (4th Cir. 2003), an FCA fraudulent inducement case involving “organizational conflict of interest” (OCI) certifications, the Fourth Circuit held that the proper measure of damages was “how much more the government paid [the subcontractor] to perform the subcontract than it would have paid another firm absent the false no-OCI certification.”²¹ In looking at two factors, whether the government got what it paid for or whether another firm could have performed the work for less, the Fourth Circuit affirmed the district court’s determination that the government’s damages were zero because the relator presented no evidence showing that another firm could in fact have performed the work for less, or that the government did not get what it paid for.²²

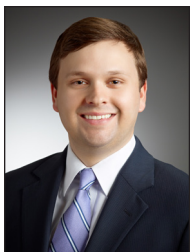
Simplistically applied, the damages approach in *Harrison* can lead to results that are unintended and could eviscerate the punitive and deterrent purposes of the FCA.²³ Consider, for

instance, a scenario wherein a prospective contractor misrepresents its status as a qualified, eligible bidder in proposals for a construction project worth \$100 million, or where false representations are made in connection with the proposal's required Subcontracting Plan.²⁴ The government, ignorant of the fraud, awards the contract to the cheater and does so based in part upon the false representations. The project is completed within 24 months, and the contractor submits its monthly payment requests once each month. The contractor capably performs the contract in all respects, and in fact provides a facility worth the \$100 million price tag. A relator with knowledge of the fraud then brings an FCA action. Under a *Harrison*-based measure of FCA damages, the government would be able to recoup only the statutory civil penalty of \$11,000 for each payment (each "false claim"), since the government received a \$100 million tangible benefit (i.e., the facility). Consequently, the dishonest contractor would greatly have benefited by the \$100 million contract that it should never have been awarded, and yet would have paid only a trifling penalty of \$264,000.00 (24 months X \$11,000 per claim) as the price for its fraud.²⁵ Such a result would amount to an incentive, rather than a deterrent, to fraudulent behavior. As a practical matter, the damages approach in *Harrison* appears particularly inappropriate for fraud in the inducement FCA cases in which "intangible benefits" to the government are significant and are part of the "benefit of the bargain," as in the context of required Subcontracting Plans that are intended to be fulfilled by historically disadvantaged business enterprises.²⁶

In cases such as *U.S. ex rel. Landis*, defendants inevitably will continue to argue that the government received value under the tainted contracts and that the government essentially "got what it paid for," or otherwise suffered no damage. Conversely the government will almost certainly continue to advocate, particularly given the precedents of *Longhi* and its progeny, that it is entitled to three times the full value of the contracts awarded as a result of fraudulent inducement and that to do anything less would reward, rather than punish, fraud. **SB**



Chet Rabon is the founder of the Rabon Law Firm, in Charlotte, N.C., which concentrates in False Claims Act and related cases. Rabon, a graduate of Vanderbilt Law School, clerked for the Hon. Emmett R. Cox of the U.S. 11th Circuit Court of Appeals and has since been in private practice for more than 22 years. He is also the founder of the U.S. National Whitewater Center in Charlotte. Rabon can be reached at CRabon@USFraudAttorneys.com.



Marshall Walker is an associate with the Rabon Law Firm. Walker is an honors graduate of the University of South Carolina School of Law and practices in the area of FCA and whistleblower claims. Walker can be reached at MWalker@USFraudAttorneys.com.

Endnotes

¹See U.S. Dep't of Justice, *United States Joins Lawsuit Alleging Lance Armstrong and Others Caused the Submission of False Claims to the U.S. Postal Service*, JUSTICE.GOV, Feb. 22, 2013, <http://www.justice.gov/opa/pr/2013/February/13-civ-224.html>.

²Complaint for Violations of Federal False Claims Act at 10, *U.S. ex rel. Landis v. Tailwind Sports Corp.*, No. 1:10-cv-00976 (D.D.C. June 10, 2010).

³*Id.*

⁴See U.S. Dep't of Justice, *supra* note 1.

⁵The United States' Opposition to Defendant Science Applications International Corp.'s Motion for Partial Summary Judgment as to Damages at 6–7, *U.S. ex rel. Magee v. SAIC*, No. 1:09-cv-324 (S.D. Miss. Jan. 3, 2011).

⁶*Id.* at 7.

⁷See *id.* at 1–2; Relator's Second Amended Complaint and Jury Demand at 6–7, *U.S. ex rel. Magee v. SAIC*, No. 1:09-cv-324 (S.D. Miss. June 29, 2009).

⁸See The United States' Opposition to Defendant Science Applications International Corp.'s Motion for Partial Summary Judgment as to Damages, *supra* note 5, at 7–8; Julie Carpenter, *DOJ Damages: From \$0 to \$232M With No Evidence Of Harm*, LAW360, http://jenner.com/system/assets/publications/10178/original/DOJ_Damages_From_0_to_232M_With_No_Evidence_Of_Harm.pdf?1340219239.

⁹Carpenter, *supra* note 8.

¹⁰See The United States' Opposition to Defendant Science Applications International Corp.'s Motion for Partial Summary Judgment as to Damages, *supra* note 5, at 7–8.

¹¹See Carpenter, *supra* note 8.

¹²See *Longhi v. Lithium Power Technologies*, 575 F.3d 458, 461, 464 (5th Cir. 2009).

¹³See *id.* at 464. After summary judgments were granted to the Government, the parties stipulated to the dismissal of the Government's remaining claims. See *id.* The defendants then appealed as to the district court's rulings on liability and damages. See *id.* at 464–65.

¹⁴See *id.* at 472.

¹⁵*Id.* at 473.

¹⁶See *id.* at 473 & n. 11 (citing *U.S. v. Bornstein*, 423 U.S. 303, 314 (1976)) (stating that "when deducting the 'bargain' received from a defendant, a court must begin with the already doubled (and now tripled) amount" and rejecting the argument advanced by *amicus curiae*, The Career College Association, "that in calculating damages the court should subtract the value of the benefit that the Defendants conferred on the Government from the amount the Government paid to the Defendants and then treble this 'actual damages' figure").

¹⁷See *id.* at 474.

¹⁸See *U.S. v. Science Applications International Corp.*, 626 F.3d 1257, 1279 (D.C. Cir. 2010).

¹⁹See *id.* at 1279–80.

²⁰*Id.*

²¹*U.S. ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 911–12, 923 (4th Cir. 2003).

APPROACHING THE BENCH

Exceeding the Scope of the Matters Listed in a 30(b)(6) Deposition Notice

By JB Roth

Consider a case where you work through your preliminary questions at a corporate designee's deposition under Rule 30(b)(6), and learn that the person being deposed has been involved in similar lawsuits in the past for other employers. You press on – or rather you try. There and then, the deponent's counsel instructs his client not to answer because the questions are beyond the matters listed in the notice of deposition served under Rule 30(b)(6).¹ Can he be right?

The short answer is, no. And by instructing his client not to answer, the corporation's counsel likely exposed himself to sanctions.

The answer came in the most direct manner from the Northern District of Iowa, which held that “the questioning of a Rule 30(b)(6) deponent is not limited to those subjects identified in the Rule 30(b)(6) notice.”² To find otherwise, another court concurred, would “confer some special privilege on a corporate deponent.”³ The purpose of 30(b)(6) is not to limit the questions the party taking the deposition may ask. Rather, it is to allow a corporate deponent to identify who among its officers, directors, or other employees may best be able to answer the questions that will be propounded at deposition.⁴

That does not mean that it makes no difference whether the question is within or without the scope of the subjects listed in the Notice of Deposition. Rule 30(b)(6) puts the burden on the party taking the deposition to designate the topics that will be addressed. If the person designated by the corporate deponent has no knowledge of those particular topics, the corporation may be subjected to sanctions, since it was under a subsequent duty to designate an agent with knowledge of those topics.⁵ If one then asks questions on other topics, and the person or persons produced by the corporate deponent have no knowledge of those matters, it becomes the questioner's problem.⁶ The corporation is shielded from liability if the people speaking on its behalf know nothing of a topic that was not listed in the 30(b)(6) notice. But such questions may be asked.

It is true that this is not the unanimous view. Some courts have found that limiting the topics that may be talked about at a 30(b)(6) deposition is “implied by the procedures set forth in the rule and the reasons for the rule's adoption.”⁷ This implication comes from three observations.

The first is that it would make “no sense” to make a party list specific matters, make the other party designate a representative with knowledge about those matter, only to “ask the representative about matters totally different from the ones listed in the notice.”⁸

The second prong of that reasoning is that Rule 30(b)(6) already helps parties taking a corporation's deposition. Such party no longer has to name a specific individual as a deponent, and risk deposing someone with no knowledge of the matter at hand. By departing from the tradition that one must name a

specific person, Rule 30(b)(6) streamlines the process. It does so by setting the topics to be addressed and having the corporate deponent select those with knowledge of the listed matters. This streamlining purpose of the rule would be effectively thwarted if a party could ask a corporation's representative, produced pursuant to a 30(b)(6) notice, “to testify as to matters which are totally unrelated to the matters listed in the notice.”⁹

Finally, proponents of limiting the deposition to listed topics find some support in the language of the rule. Rule 30, they argue, would not direct topics to be listed “with reasonable particularity” if the party taking the deposition was then free to ask any question.¹⁰

Courts limiting the scope of questioning appear to be in a minority, though your author found no empirical data. Their reasoning, though, also seems less convincing. The requirement of “reasonable particularity” supports the rationale that the Rule exists to allow a corporation to choose who will testify just as well as it might support limiting the scope of questioning. Likewise, the idea that Rule 30(b)(6) does a favor to those taking a corporation's deposition, and that, therefore, it “should” demand a quid pro quo of sort, sounds more like a policy value than a judicial rationale. Only the streamlining arguments appears to hold water, and it alone cannot counter the arguments in favor of holding a 30(b)(6) deposition like one would conduct any other.

What is more, even those courts that would restrict the scope of questioning do not help the corporation's counsel in the opening hypothetical. Indeed, the circumstances under which a witness may be instructed not to answer are limited in any deposition, and that does not change for corporate deponents. Accordingly, regardless of any “confusion” as to whether questions beyond the scope of listed topics are permitted, an “instruction to the witness not to answer [would be] clearly improper.”¹¹ An exception applies if answering a question would cause “serious harm,” for example by revealing trade secrets.¹²

Counsel for corporate deponents must thus be careful not to overplay their hand. Stopping the deposition, or even a line of questioning, will result in most cases in a losing battle on the other side's motion to compel. With that comes the likelihood of sanctions in the form of attorney fees.¹³

While objections may then be preserved, the deposition must be allowed to continue. This makes sense and promotes judicial economy. After all, a thwarted party prevented from asking a question at a 30(b)(6) deposition and leaving the conference room suspicious of what the answer would have been, would only have to notice the same person's personal deposition. Allowing the deposition to go forward thus serves to avoid unnecessary expense and duplication in conducting two depositions instead of one.

The bottom line may be to avoid needless bickering in the middle of a deposition – always a sounds advice. The fact that a deposition is taken under Rule 30(b)(6) may allow the deponent's attorney one more objection, but it does not alter the deposition landscape. Instructing the deponent not to answer remains a rare exception. The show must go on. **SB**



JB Roth practices in the Greater Jacksonville area of Northeast Florida. He focuses his practice on representing small and mid-size businesses in state and federal litigation, appeals and administrative proceedings. He can be reached at jb@rothlawfirm.net.

Endnotes

¹Fed. R. Civ. P. 30(b)(6) states: “In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify”

²*Am. Gen. Life Ins. Co. v. Billard*, C10-1012, 2010 WL 4367052 (N.D. Iowa 2010)

³*King v. Pratt & Whitney, a Div. of United Technologies Corp.*, 161 F.R.D. 475, 476 (S.D. Fla. 1995) *aff’d sub nom. King v. Pratt & Whitney*, 213 F.3d 646 (11th Cir. 2000) and *King v. Pratt & Whitney*, 213 F.3d 647 (11th Cir. 2000)

⁴ *Id.*

⁵ *See id.*

⁶ *See generally id.*

⁷*Paparelli v. Prudential Ins. Co. of Am.*, 108 F.R.D. 727, 729 (D. Mass. 1985).

⁸*Id.* at 729-30.

⁹*Id.* at 730.

¹⁰*Id.*

¹¹*Batts v. County of Santa Clara*, C 08-00286 JW, 2010 WL 545847 (N.D. Cal. 2010).

¹²*Dominick v. Troscoso*, CIV.A. 94-2395-B, 1996 WL 408769 (Mass. Super. 1996).

¹³Fed. R. Civ. P. 37(a)(5) (“the court *must* ... require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant’s reasonable expenses incurred in making the motion, including attorney’s fees [with exceptions]”) (emphasis added).

Advocacy continued from page 2

tion. Just like it is not a profound or earthshaking revelation to consider that your view of a case after working on it for years may be somewhat myopic. Instead, it is a subtle, but important, shift in the perception of how we do our jobs and benefit our clients.

It is also a reminder that in all aspects of our practices, it is worth taking a step back from our regular routines to evaluate whether that routine really is the best method for accomplishing our goals. Often, we need the push of an external force to help us come to that realization. That is why it is so important for all of

us to allow ourselves the opportunity to get that push. There are many ways to do this: mentoring young lawyers, attending seminars, participating in FBA events, being a panelist or presenter at a seminar, having open and candid discussions with judges and colleagues. Therefore, I urge everyone to take a step back and look at his or her routines in another light. Whether you have been practicing for five years or 50, you may learn something that will make you a better lawyer. **SB**

FEDERAL BAR ASSOCIATION

2013 ANNUAL MEETING AND CONVENTION



September 26–28, 2013 • San Juan, Puerto Rico

False Claims continued from page 9

²²See *id.*

²³See *U.S. v. Bornstein*, 423 U.S. 303, 310 n. 5 (1976) (quoting Cong. Globe, 37th Cong., 3d Sess., 952 (remarks of Sen. Howard)) (“According to its sponsor, the False Claims Act was adopted ‘for the purpose of punishing and preventing ... frauds.’”).

²⁴See FAR § 19.702(a)(1) (“In negotiated acquisitions, each solicitation of offers to perform a contract or contract modification, that individually is expected to exceed \$650,000 (\$1.5 million for construction) and that has subcontracting possibilities, shall require the apparently successful offeror to submit an acceptable subcontracting plan.”).

²⁵This assessment speaks only to civil damages and penalties. Such fraud and dishonesty would likely also give rise to criminal liability.

²⁶See FAR § 19.705-7(a) (“Maximum practicable utilization of small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns as subcontractors in Government contracts is a matter of national interest with both social and economic benefits.”).

Class Actions continued from page 5

they have been written and entered into by the parties.

Given the court’s preference for honoring arbitration agreements (including class-action waivers) and its skepticism of class actions, one cannot help but expect *Italian Colors* to deliver another blow to collective litigation. At oral argument both the small business owners and the U.S. government, through Deputy Solicitor General Malcolm Stewart, contended that the “effective vindication” doctrine in antitrust law weighed in favor of invalidating the class-action waiver. The discussion ranged widely through antitrust law, straying from the original question presented and provoking Justice Kagan to wonder whether it was the wrong question to begin with. But a majority of justices nevertheless seemed willing to follow *Concepcion* and to find that the class-action waiver is enforceable despite the effective-vindication doctrine. If this happens, some think *Italian Colors* has the potential to be the broadest ruling ever against class actions.

And finally, in March the court heard argument in *Oxford Health Plans v. Sutter*,⁶ which comes at class arbitration from another angle. In *Italian Colors*, the court will decide whether a class action waiver in an arbitration agreement can be invalidated to protect the right of plaintiffs to recover small damages. In *Sutter*, the arbitration agreement at issue did not contain a class action waiver; it used only broad language requiring arbitration of any dispute arising under the contract. Here, the question is whether an arbitrator can construe this broad language as authorizing class arbitration. The Second and Third Circuits have held that this is within the power of the arbitrator under the FAA; the Fifth Circuit has held that it is not. The tension is between a long line of precedents holding that arbitrators have broad discretion in determining whether parties have agreed to arbitration, on the one hand, and the court’s decision in *Stolt-Nielsen S.A. v. Animal-Feeds Corp.*, 130 S. Ct. 1758 (2010), on the other, which holds that parties must “affirmatively agree” to class arbitration.

Once again, at oral argument, Justice Scalia and others expressed skepticism toward collective actions—and in par-

ticular, some concern about the possibility that class arbitrations could involve unnamed class members who had never expressly consented to class arbitration. Regardless of how positively the justices might feel about arbitration in general, and about the deference due to the discretion of the arbitrator, it seems *Sutter* could follow *Stolt-Nielsen* as yet another decision reducing accessibility to class arbitration.

As of this printing, *Italian Colors* and *Sutter* have not yet been decided. Many expect these two cases to deliver heavy blows to class-action plaintiffs—but the same was said of *Behrend* and *Knowles*, too, and the actual outcomes in those cases were anticlimactic. Nevertheless, even if the decisions in *Italian Colors* and *Sutter* are more modest than expected, they will likely join *Behrend* and *Knowles* in continuing the Supreme Court’s trend of reshaping and restricting class-action practice. **SB**



Jason Steed is an appellate and commercial litigation attorney in Austin, Texas. His legal updates can be followed on Twitter @5thCircAppeals.

Endnotes

¹Lyle Denniston, *Opinion analysis: Wal-Mart’s two messages*, SCOTUSblog (Jun. 20, 2011), <http://www.scotusblog.com/2011/06/opinion-analysis-wal-marts-two-messages/>.

²*Comcast v. Behrend*, U.S. Supreme Court, No. 11-864.

³*Wal-Mart v. Dukes*, 131 S. Ct. at 2553-54.

⁴*The Standard Fire Ins. Co. v. Knowles*, U.S. Supreme Court, No. 11-1450.

⁵*American Express Co. v. Italian Colors Restaurant*, U.S. Supreme Court, No. 12-133.

⁶*Oxford Health Plans LLC v. Sutter*, U.S. Supreme Court, No. 12-135.

District of Oregon Takes Steps to Control the Cost of Litigation

By Susan Marmaduke

Hon. Ann Aiken, chief judge of the U.S. District Court for the District of Oregon, has made controlling the cost of litigation a priority. Chief Judge Aiken instructed the Local Rules Advisory Committee to search for ways of furthering that goal. The committee proposed four ideas that were implemented in the District of Oregon, effective March 1, 2013.

Streamlining Discovery in Employment Cases Alleging Adverse Action

Under the auspices of the Federal Judicial Center, a nationwide committee of experienced plaintiff and defense employment lawyers developed protocols for discovery in certain employment cases alleging adverse action. To frame the issues early and to minimize unnecessary legal fees, the protocols require the parties automatically to exchange the most relevant information and documents soon after the responsive pleading or motion is filed. The Federal Judicial Center implemented the protocols as a pilot project available to individual district court judges. The District of Oregon adopted the protocols, with only minor modifications, as LR 26-7.

Because the information and documents identified in the new rule are those most likely to be requested by experienced lawyers in such cases, the committee has received informal reports that new lawyers are finding the rule useful as a guide for discovery in other types of cases, as well.

Controlling the Cost of E-discovery in Patent Cases

The Federal Circuit's Chief Judge Randall Rader has developed a model order regarding e-discovery in patent cases. The model order requires the parties to exchange basic documentation concerning the patent, the product or process accused of infringement, prior art, and the relevant financial information. It sets presumptive limits on the number of custodians and search terms for email production requests unless the parties agree otherwise or the court modifies the limits for good cause. The cost of any email discovery beyond those limits is borne by the requesting party.

Recognizing that a major cause of high costs is the pre-production review of documents that lawyers undertake to avoid disclosure of privileged documents, the model order states that, pursuant to Federal Rule of Evidence 502(d), the inadvertent production of work product or other privileged electronically stored information does not waive the privilege.

The District of Oregon adopted LR 26-6, providing that, unless otherwise ordered, the model order governs in all cases in which a claim of patent infringement is asserted.

Providing Tips on Obtaining Testimony in Other Countries

More and more often, litigants need the testimony of witnesses located outside the United States. The committee developed a brief list of authoritative resources on taking depositions in other countries and related procedures, which the Oregon District adopted as a Practice Tip to supplement LR 28 ("Depositions in a Foreign Country").

Posting Court-Approved Forms of Stipulated Protective Orders

Because protective orders are so often needed in federal litigation, the lawyers and judges on the Committee worked together to develop two forms of stipulated protective order that are intended to satisfy the requirements of current Ninth Circuit case law, including *Foltz v. State Farm Mut. Ins. Co.*, 331 F3d 1122 (9th Cir 2003). The district court posted the two forms on its website at www.ord.uscourts.gov/index.php/component/phocadownload/category/54-forms-of-protective-order.

The committee continues to develop other court-approved forms with the twin goals of avoiding the cost to litigants of drafting such forms and streamlining the work of the judges who are presented with them.



Susan Marmaduke served as chair of the Local Rules Advisory Committee for the U.S. District Court for the District of Oregon from 2009-2012. Her practice focuses on litigation and appeals. She can be reached at susan.marmaduke@harrang.com.

Have you recently moved? Please give us your new address!

For fastest results, please log on to www.fedbar.org and sign into the members-only area to update your information. (Your username is the email we have on file for you.) You can also e-mail membership@fedbar.org or call the FBA Membership Department at (571) 481-9100.