SideBAR

Summer 2011 · Published by the Federal Litigation Section of the Federal Bar Association

Opening Statements

Editor's Notes

Robert E. Kohn

In our last issue (*SideBAR*, Spring 2011), John McCarthy and I reviewed a proposal in Congress to amend Rule 11 of the Federal Rules of Civil Procedure. The bill is called the "Lawsuit Abuse Reduction Act of 2011" (H.R. 966). If passed into law, it would repeal the current "safe harbor" provision that allows opponents to withdraw a challenged pleading before a sanctions motion may be filed; it would repeal judicial discretion over monetary sanctions by making them mandatory; and it would authorize additional punitive fines in the court's discretion. On July 7, the H.R. 966 bill was reported from the House Judiciary Committee, and it is expected to receive a vote by the House of Representatives before the end of this session of Congress. Stay tuned to *SideBAR* for news of any further developments on the issue of amending Rule 11—brought to you by the Committee on Federal Rules of Civil Procedure and Trial Practice.

In Chicago during the FBA Annual Meeting & Convention, several members of the Federal Litigation Section's board will join with judges and other experts to explain and consider recent Supreme Court developments in four separate cases affecting class actions in federal courts. Full details are printed on the back page of this issue. Please plan to attend this important CLE on Thursday afternoon, Sept. 8.

Later on Sept. 8, the Federal Litigation Section will host a Hospitality Hour in the Columbus Room, adjacent to the lobby of the convention hotel. Fed. Lit. hospitality knows no peer, and we are thrilled to continue that tradition this year in Chicago. All FBA members and their guests are welcome. Speaking on a very personal basis, I am looking forward to seeing many old friends, and making new ones, throughout our time in Chicago. Please be one of them. **SB**

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 the Hon. Joel F. Dubina of the Eleventh Circuit, Kohn attended Duke Law School. He is the secretary and treasurer of the Federal Litigation Section and co-chairs the committee on Federal Rules of Procedure and Trial Practice. He can be reached at rkohn@kohnlawgroup.com.

Inside this Issue

Where are Victim's Rights under the Foreign Corrupt Practices Act?

By Jordan Maglich

The Foreign Corrupt Practices Act (FCPA) criminalizes bribery of foreign officials and institutes standards governing record-keeping and accounting practices. Enacted in 1977, the FCPA was used sparingly at first, with an average of just three FCPA prosecutions brought per year from 1978 to 2000. *See* Priya Cherian Huskins, *FCPA Prosecutions: Liability Trend to Watch*, 60 STAN L. REV. 1447, 1449 (2008). However, the past few years have seen a dramatic rise in FCPA prosecutions. In 2010 alone, companies settling FCPA-related charges paid $1.8 *billion* in monetary penalties, nearly tripling the $641 million paid in 2009.

These monetary penalties paid to resolve FCPA-related charges go directly to the U.S. Treasury. This result is seemingly in contrast to multiple federal laws that *require* restitution to victims in federal criminal cases, including the Mandatory Victim Restitution Act (MVRA) and the Crime Victims' Rights Act (CVRA). 18 U.S.C. § 3663A (1996); 18 U.S.C. § 3771 (2004). The CVRA created a 'bill of rights' that expressly recognizes a crime victim's right to restitution where provided by law. Under the MVRA, restitution is *mandatory* to victims of offenses prohibited under Title 18 of the U.S. Code. Yet, the Department of Justice (DOJ) rarely addresses restitution in FCPA prosecutions.

A typical FCPA prosecution includes a count of conspiracy to violate the FCPA in the charging documents and/or plea agreement—an offense codified at Section 371 of Title 18. The offense of conspiracy falls under the auspices of the MVRA. *See U.S. v. Quarrell*, 310 F.3d 664, 677 (10th Cir. 2002) (conviction under 18 U.S.C. § 371 satisfies the "under this title" requirement of the MVRA).

The MVRA affords the trial court no discretion in awarding restitution; restitution is mandatory for an offense charged under Title 18. *U.S. v. Futrell*, 209 F.3d 1286, 1290 (11th Cir. 2000). Finally, the definition of victim under the MVRA is extremely broad, and has been interpreted to include a wide variety of individuals and entities, including foreign governments. *U.S. v. Bengis*, 631 F.3d 33 (2d Cir. 2011).

Neither the MVRA nor its sister statute governing enforcement, 18 U.S.C. § 3664, contains any hint that foreign governments or government related entities should not be considered as victims or excluded from restitution in FCPA prosecutions. Under the MVRA and CVRA, simple logic dictates that a conviction or guilty plea to conspiracy to violate the FCPA, a Title 18 offense, would require restitution to any victim. However, this has not been the case. Since the FCPA's enactment in 1977, awards of restitution to foreign governments have been rare, and remain largely absent from FCPA convictions or plea agreements.

See U.S. v. Kenny Int'l Corp., Cr. No. 79-372 (D.D.C. 1979) (ordering restitution to Cook Islands government for guilty plea to FCPA bribery violations); *U.S. v. F.G. Mason Eng'g, Inc.*, Cr. B-90-29 (D.Conn. 1990) (ordering restitution to West Germany government for guilty plea to FCPA bribery violations); *U.S. v. Diaz*, No. 09-cr-20346-JEM, Dkt. 37 (S.D. Fla. Aug. 5, 2010) (Defendant ordered to pay restitution to Haitian government resulting from guilty plea to FCPA bribery violations involving state-owned telecommunications company).

The original focus of the FCPA targeted rampant corruption in connection with foreign business of public companies. With the enactment of victims' rights statutes, the DOJ has failed to enforce victims' rights with respect to foreign governments or companies. This approach has stemmed from the DOJ's belief, expressed by former officials, that entities and individuals in lesser-developed countries are inherently corrupt.

Recent FCPA prosecutions have seen companies increasingly target decision makers of state-run or state-owned enterprises, as opposed to executive members of foreign governments. Rather than benefit the entire enterprise, bribes result in an employer losing honest services owed by bribed employees, who place their own personal enrichment ahead of duties owed to the employer. Such actions can have drastic consequences to the employer and the constituents served by the employer, especially when the bribed employee is induced to purchase overpriced, inferior or outdated products and services. While not the norm, both domestic and foreign government entities have been found to be victims and thus entitled to restitution for bribery of public officials. *U.S. v. McNair*, 605 F.3d 1152, 1221 (11th Cir. 2010); *Bengis*, 631 F.3d 33. There appear to be no cases to the contrary. A policy against restitution to foreign victims of FCPA-related crimes makes little sense and is contrary to applicable laws.

Victims of Title 18 offenses, even when the target of FCPA-related crimes, require DOJ officials to use their "best efforts" to ensure that crime victims are accorded their statutorily-mandated rights under the CVRA. 18 U.S.C. § 3771(c)(1). The DOJ's failure to investigate and determine whether third-parties involved in FCPA-related crimes are victims, and thus entitled to restitution, is directly adverse to the statutory intent of the MVRA and CVRA, and against the basic tenets of justice. Indeed, such a position places the entity using the bribes to advance their business on the same level of culpability as the organization harmed by isolated employees taking bribes for personal benefits. As FCPA prosecutions continue at record-breaking pace, victims' rights must be a foremost, rather than foregone, priority. **SB**

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Five Tips for Getting Patent Claims Indemnified

By R. David Donoghue

Indemnification is a key component of most retail patent litigation. Whether the accused technology is internet-based or focused on a product, there is almost always an indemnitor somewhere in the supply chain. And indemnification can be a $1M+ responsibility. For what is often a seven-figure decision, many companies are surprisingly haphazard about indemnification. Here are five simple steps for ensuring your best indemnification outcomes:

1. **Research Accusations.** The first thing you want to do is understand the scope of plaintiff's claims. This is a critical step in knowing exactly who may have indemnification obligations. Often the patentee will even give you a brief presentation, if they have not provided claim charts, detailing its infringement allegations. Once you understand the scope of the accusations the best you can, determine which of your vendors might be implicated; cast a wide net in the first instance.
2. **Research Agreements.** Once you have determined the universe of possible indemnitors, gather the relevant agreements and look at the indemnification obligations. These will be the backbone of your indemnification demand. On a related note, consider settling upon standard indemnification agreements to use across all agreements company-wide, if you have not done so already. The more uniform your indemnification provisions are, the easier this process is.
3. **Engage Counsel.** Consider hiring patent litigation counsel to assist in the indemnification process. You do not necessarily need outside counsel to do internal research or write indemnification letters, but outside counsel can give you valuable insights into indemnificaiton in similar cases, as well ask make sure you are using the proper language in your letters.
4. **Leverage Business Relationships.** Particularly where you have an ongoing relationship with the potential indemnitor, consider sending the indemnification letter on company letterhead rather than outside counsel. The indemnitor is much more likely to respond positively to its business partner than an outside lawyer that they do not know. Similarly, if you have an executive or purchasing employee with a strong, ongoing relationship with the potential indemnitor the letter may be best received coming from that person.
5. **Start a Conversation.** Instead of just sending the letter, accepting the response and moving forward, contact the potential indemnitor. Particularly if the indemnitor is slow to accept responsibility, consider creative alternatives. For example, work out a payment plan, set fixed fees or if the indemnitor has mulitple customers implicated, suggest that they file a declaratory judgment claim to try to fully resolve the case. **SB**

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The Keys To Handling Complex Multi-Plaintiff Litigation

By Mick Marderosian, Brett Runyon, and Heather Cohen

Taking on a complex multi-plaintiff case can be a very positive experience for both the lawyer and client or can be a very difficult experience if not approached, staffed, and administered correctly. There is no question that these cases will be factually and legally complex, procedurally intense, vigorously defended, time consuming, expensive, and will take a long time to resolve. However, if you have a defined approach and effective administration right from the moment the first call is received, you will find that these cases are very manageable and can be effectively prosecuted.

Right from the beginning, a lawyer that is asked to meet with "other injured parties", "neighbors" or a group who have been similarly affected by a common event should formulate an approach to meet with potential clients, evaluate each client=s particular claims, and enter into a formal attorney-client relationship.

Generally, the initial meeting with a group of potential plaintiffs will take place in a public setting. The best locations are generally those that are easily accessible and centrally located to where the vast majority of plaintiffs reside. Local churches, libraries, gymnasiums, and hotel conference rooms are good locations to consider. Try and use the same location for every group client meeting to avoid confusion.

The initial meeting is typically a question and answer session wherein you are often asked to give opinions on issues that have not yet been fully researched or investigated. What is said during the course of these meetings by you and any potential plaintiffs may be protected under the attorney client privilege whether or not you end up representing each attendee. *See* Fed. R. Evid. 501; *United States v. Martin*, 278 F.3d 988, 999-1000 (9th Cir. 2002); *Barton v. United States Dist. Court*, 410 F.3d 1104, 1106-1112 (9th Cir. 2005). Be aware that potential defendants frequently send representatives or employees to these initial meetings.

Make sure that the initial meeting is effectively staffed to ensure that each attendee is identified in a sign-up sheet so to enable you to contact the potential clients and advise them if you intend to proceed with the case. Even if you don=t intend to proceed with case, it is good practice to notify the attendees so that they can find alternate representation within the applicable statute of limitations.

After the initial client meeting, conduct any additional investigation and research to assist in your evaluation of the case. This research must include identifying any statutory or regulatory requirements pertaining to special claims procedures. By way of example, a claim made under the Clean Water Act requires notice be given 60 days prior to filing suit. Many claims that might arise in a multi-plaintiff complex litigation context have such requirements and failure to comply with such statutory or regulatory requirements could delay or even jeopardize your case.

Plan to designate several administrative staff to help maintain the case files and communicate with the client base. Select people you anticipate will be with your office for the duration of the case as the clients will not be comfortable with continued staff changes. Further, it would be very difficult for different staff to jump into a multi-plaintiff case midway through.

The daily administration of the case will include: (1) collection of client specific information; (2) coordination of client specific files which will include all correspondence and documents such as photographs and client specific damage related documents; (3) coordinating discovery responses; (4) calendaring court dates, depositions, and other important dates; and (5) communicating directly with the clients.

Regular communication with your clients is crucial. Representing a large number of plaintiffs does not negate this obligation to your clients. You should regularly provide clients with updated status reports and promptly respond to their questions. A disorganized client coordination effort could create problems and put the case is jeopardy.

Discovery in a complex multi-plaintiff litigation can initially appear to be a daunting task. The sheer number of interrogatories, requests for production of documents, request for admissions, and depositions can be overwhelming. As such, have multiple attorneys and paralegals involved to assist with preparing and responding to discovery, attending depositions which will often be double tracked, and preparing and responding to discovery motions.

Electronic technology can be a very useful tool in assisting in the management of discovery in a complex case. Documents can be produced and stored in a document repository which will permit all parties access to the documents and which will enable you to do keyword searches to locate relevant documents. Ensure all deposited documents are properly Bates Stamped so that there is no disagreement as to whether a particular document was ever produced. A disorganized system of maintaining, retrieving and using documents and electronic exhibits will be a significant impediment toward the effective prosecution of the case.

Depending on the nature of the complex multi-plaintiff litigation, you may find yourself retaining numerous experts in very complicated and scientific areas of expertise. This will not only be very expensive but will require many hours of involvement and administration. It is very important that your experts be provided with all of the available documentation, deposition testimony, etc so that their opinions are complete, not easily impeached, and not excluded under *Daubert* and its progeny. *See* Fed. R. Evid.702 and *Daubert v. Dow Pharmaceuticals Inc.*, 509 U.S. 579, 594 (1993).

Once you overcome the challenges to your experts and summary judgment motions, formulate an organized trial approach, which admittedly, can be daunting in these cases. You will have to coordinate, schedule, and prepare for testimony offered by a huge number of lay and expert witnesses, and organize and prepare an even larger number of exhibits (which can be made much easier by the use of electronic trial presentation programs). As you develop your trial strategy, remember the importance of taking complex and often scientific or technical issues and presenting them to a jury in a manner that is easy to understand. You have worked on the case long enough to understand all of the complexities, but a jury is hearing the case for the first and only time. Select only those documents that you would consider to be "home

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Challenges on the Horizon in Admissibility of Computer "Testimony"

By Adam W. Cook

In June the Supreme Court narrowly skirted a problem straight out of science fiction. The case was *State v. Bullcoming*, an otherwise typical DWI prosecution.[1] Police in Framington, N.M., determined that the defendant drove with a blood alcohol content of 0.21gms/100ml, well over the legal limit of 0.08. Like almost every local law enforcement office in the country, the Farmington Police determine the BAC using computer analysis of the defendant's breath. The gas chromatograph machine measures the composition of the sample and gives the technician a report indicating BAC. The defendant sought suppression of the chromatograph results because the computer-generated analysis was "a written accusation." The defendant argued that he had not been given proper opportunity under the Sixth Amendment to cross-examine the machine which had accused him.

The New Mexico Supreme Court held that chromatograph results were "raw data" that had been interpreted by a laboratory technician. The Court concluded that the technician, not the machine, was the "true accuser." The machine was merely an exhibit. "A defendant cannot cross-examine an exhibit."[2]

The U.S. Supreme Court agreed, building on its 2009 decision in *Melendez Diaz v. Massachusetts*, in which it first ruled that a forensic laboratory report, created specifically to serve as evidence in a criminal proceeding, was "testimonial" for Confrontation Clause purposes.[3] The Court in *Melendez Diaz* held that a defendant's Sixth Amendment rights were not violated so long as the prosecution produced a live witness to testify to the truth of the report's statements. The *Bullcoming* decision took the issue a bit further, holding that if an analyst is called to give such testimony he or she must be the same analyst who certified the report, unless the certifying analyst is unavailable to testify and the accused had an opportunity, pretrial, to cross-examine that particular scientist. What *Bullcoming* didn't address is a more provocative question: at what point is the lab technician not the accuser but merely an observer of the accuser's actions?

At first glance, the idea of a wholly autonomous machine making an accusation seems absurd. But it may be closer than we think. Anyone who has watched the game show *Jeopardy!* lately knows that computer technology that can imitate human reasoning is developing at impressive speeds. *Jeopardy!* contestant "Watson" is a computer designed by IBM. Acting like an internet search engine, Watson sorts through hordes of data to quickly arrive at answers to trivia. It then responds, like a human, to the question presented. The fact that it bested two of *Jeapordy!*'s winningest competitors put people on notice of the breathtaking advance of computer science and the emergence of "artificial intelligence."

Watson is just the tip of the iceberg. Researchers at Aberystwyth University in Wales have created a computer that can conduct its own scientific research independently.[4] "Adam" makes observations in the field of organic chemistry and develops hypotheses. It then tests these hypotheses in experiments and arrives at findings—all on its own. Rather than simply helping in the research process, the computer is acting as a scientist.

The introduction of this technology into criminal forensic work is all but inevitable. In Sir Arthur Conan Doyle's short story *The Sign of Four*, Sherlock Holmes, perhaps the greatest fictitious detective of all time, states that the three qualities present in an ideal detective are "general knowledge, observation, and power of deduction."[5] A computer is potentially capable of all three with astonishing speed and accuracy.

New technology is blurring the line between the computer and its operator. But when does a machine become an "accuser" in the eyes of the law? Article Six of the Federal Rule of Evidence states that "any person" is competent to testify in a criminal proceeding so long as the person has personal knowledge of the matter he or she is testifying on. The Rule leaves "person" undefined. The Texas Court of Appeals has ruled that a breath analysis machine is not "a person" and thus cannot be treated as a declarant.[6] The court stated that the analysis is not a declaration even though it is "the result of a computer's internal operations." The Tenth Circuit Court of Appeals similarly rejected an argument that a computer-generated header on a webpage containing pornographic images was hearsay, concluding the computer was "not a person."[7] The Fourth Circuit Court of Appeals, ruling that only a *person* may be a declarant making a statement, held that "nothing said by a machine is hearsay."[8]

Achieving "personhood" is a high bar. Although films such as the 1982 futuristic thriller *Bladerunner* envision machines identical to human beings, that doesn't mean they are coming anytime soon. Still, a machine thinking and acting just like a human is not outside the realm of possibility. A team of researchers in Lausanne, Switzerland are attempting to construct a computer version of the human brain. Project Blue Brain seeks to reserve-engineering the anatomy of the brain into a neural network composed of "neurons" in the form of millions of computer chips. The researchers have already had some success constructing a part of the human neocortex, which is thought to be the part of the brain responsible for thought and consciousness. They expect to have a complete and functioning "brain" in 10 years. [9]

Such a device would present at least two obvious challenges to the current Federal Rules of Evidence. First, as noted above, such a machine would presumably be "self-diagnosing." The whole point of *Bullcoming* is that someone must testify that they have diagnosed the accuracy of the machine prior to its use. Artificial intelligence capable of describing its own functions cuts the operator out of the picture. Second, such a machine could be cross-examined. Although the examination may be written rather than oral, the accused would still have the opportunity to question the declarant. These challenges, and many others, will probably have to be addressed by rules committees on the state and federal level at some point. For now, at least one such committee, working for the Court of Appeals of Maryland, has decided that the existing rules "accommodate computer-generated evidence."[10]

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run" documents and avoid getting caught up in the minutia. If your trial presentation is disorganized, redundant and difficult to understand, the persuasive momentum of the case is diminished.

Most complex multi-plaintiff cases will take years to complete and require frequent meetings with your team to ensure a consistent approach. If you decide to take one on, you will likely be working 6-7 days a week in order to keep up with the case and keep your other cases moving forward. While one of these complex multi-plaintiff cases could fill your days without the need of other cases, few of us have the luxury of only handling one case. (After all, office overhead never stops!) That being said, taking on multi-plaintiff cases can be a very rewarding experience for the lawyer and can lead to successful results for every plaintiff if effectively administered, managed and prosecuted by an organized team. **SB**

Mick Marderosian is an experienced civil trial lawyer in both the federal and state court system. As the senior trial attorney for Marderosian, Runyon, Cercone & Lehman, he has 33 years of trial experience. He specializes in complex, multi-plaintiff federal court litigation including inverse condemnation and environmental related issues. He recently tried the first phase of large toxic tort action representing 2,100 plaintiffs who successfully proved longstanding contamination of their neighborhood with hexavalent chromium from a nearby industrial plant. He is a member of the American College of Trial Lawyers and the American Board of Trial Advocates. He is a proud member of San Joaquin College of Law Hall of Fame and is a designated California "Super Lawyer." Brett L. Runyon is a senior partner in the firm of Marderosian, Runyon, Cercone & Lehman. He is a graduate of San Joaquin College of Law and has 24 years of civil litigation experience, representing both plaintiffs and defendants. He is the head of the firm's construction defect litigation department and handles complex multi-party matters that include environmental, inverse condemnation and trade secret litigation in both federal and state courts. Heather S. Cohen is an attorney with Marderosian, Runyon, Cercone & Lehman. Her practice includes entertainment, publishing and sports law, representing artists in music, film, and television; litigation of tax, corporate, and other civil matters; environmental law; and defending governmental and other public entities.

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Finally, there is a more unsettling question. Will a jury of peers really decide a person's fate based on the testimony of a machine? One answer is that they already do. Jurors accept that a properly maintained gas chromatograph can analyze evidence for the purpose of incriminating someone. Another answer is that it depends on the presentation. A robotic witness in the style of the *Terminator* movies is unlikely to engender a lot of sympathy. Simple text on a computer screen might be more persuasive.

The need to answer such questions is, thankfully, a ways off. Despite the exponential improvements in computer technology over the last 50 years, developing actual cognitive machines presents problems that will take years to overcome. In the meantime, criminal defendants, and their lawyers, are safe from what could be a formidable competition. **SB**

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Endnotes

[1]No. 09-10876, slip op. at 2 (N.M. Jun. 23, 2011).

[2]*State v. Bullcoming*, 226 P.3d 1, 10 (N.M. 2010)

[3]No. 07-591, slip op. at 10-11 (Mass. App. Ct. Jun. 25, 2009).

[4]Leslie Katz, *Robo-Scientist Makes Gene Discovery—On Its Own*, CNET News, Apr. 2, 2009, *available at* news.cnet.com/robo-scientist-makes-gene-discovery-on-its-own/.

[5]Sir Arthur Conan Doyle, THE SIGN OF FOUR 9 (Spencer Blackett, 1890).

[6]*Smith v. State*, 920 S.W.2d 342 (Tex. App. Houston 14th Dist. 1993).

[7]*United States v. Hamilton*, 413 F.3d 1138, 1142-1143 (10th Cir. 2005).

[8]*United States v. Washington*, 498 F.3d 225, 231 (4th Cir. 2007).

[9]The Project Blue Brain in Brief, bluebrain.epfl.ch/cms/lang/en/pid/56882 (last visited Jul. 21, 2011).

[10]James E. Carbine and Lynn McLain, *Proposed Model Rules Governing the Admissibility of Computer-Generated Evidence*, 15 COMP. & HIGH TECH. L. J. (1998).

Federal Procurement Litigation: Size Protests: The Basic Rules of the Game

By Edward J. Kinberg

Introduction

In my practice, which is focused on federal contract litigation, I have noticed a significant increase in a unique area: size/status protests. While such protests have been around for years, they have been relatively limited. Size protests arise from an agency's decision to "set-aside" or limit a procurement to a class of contractors based on the size of their business or one of several special statuses established by Congress such as disadvantaged, disabled veteran-owned, woman-owned or other special category.

Contractors that do not qualify according to size and/or status as required by the contracting officer can file a pre-proposal protest challenging the decision to set-aside the solicitation; contractors that qualify for the status can file a post-award protest challenging the status of the contractor selected for award. This article is limited to the issues involved in post-award protests.

With the on-going federal budget crisis and market competition, contractors are increasingly looking for ways to increase their opportunities to bid contracts. One of the more common methods for doing so is for large businesses to "team-up" with small businesses to bid on size/status limited procurements. While this increases their bidding opportunities, it also increases the risk of a protest. Federal litigators need to be aware of the basic issues involved in such protests …

The Basics

Size/status protests are very different from traditional bid protests. They are initially decided by an area office of the Small Business Administration (SBA) with appeal to the SBA Office of Hearing and Appeals (OHA). The rules and procedures for size protests are found in two general sections of the Code of Federal Regulations (CFR). Title 13, Part 121 provides the general rules for size protests. The rules for appealing size determinations are in Part 134 of Title 13.

Size protests involve complaints that the company that won the award does not meet the required size/status standard due to its relationship with a large company. This article will be limited to a review of the basic rules for filing a size protest and the issues involved.

The Basic Rules for Filing a Protest

While you need to carefully read the rules for filing a size protest, the following is a summary of the key requirements:

1. **File the protest on time:** Size protests must be **received** by the Contracting Officer prior to the close of business on the 5th business day following the day sealed bids are opened or a notice of intent to award a negotiated procurement is issued by the Contracting Officer. (13 CFR §121.1004).
2. **The protest must contain specific facts as to the basis for the protest.** The protest does not have to have a substantial amount of detail, but it must contain sufficient information to identify the issue involved. The CFR includes the following examples of an adequate protest:

   > Example 2: An allegation that concern X is large because it exceeds the 500 employee size standard (where 500 employees is the applicable size standard) because a higher employment figure was published in publication Y is sufficiently specific.
   >
   > Example 4: An allegation that concern X is affiliated with concern Y because Mr. A is the majority shareholder in both concerns is sufficiently specific.
   >
   > Example 6: An allegation that concern X exceeds the size standard (where the applicable size standard is $5 million) because it received government contracts in excess of $5 million last year is sufficiently specific.
   >
   > See 13 CFR §121.1007(c)

3. **File a timely appeal of an adverse size determination.** Size decision appeals must be filed within 15 calendar days of the receipt of the formal size determination and NAICS appeals must be filed within 10 days. (13 CFR §134.304)

The Issues

All of the various areas the SBA analyzes in deciding a size protest are based on a single issue: control. While there are specific names for various types of issues, they are all based on determining whether a large business, directly or indirectly, has the ability to control the business that received the contract award (13 CFR §121.103). The SBA can find control even though the large business or individual affiliated with the large business does not have a majority ownership in the small business.

The regulations contain an interesting concept called "negative control" which can be found to exist when "minority shareholder has the ability, under the concern's charter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders." (13 CFR §121.103(a)(3)). Negative control may also exist when "an individual, concern, or entity exercises control indirectly through a third party." (13 CFR §121.103(a)(4)).

These, as well as many other similar types of control, are all included in the CFR under the term "affiliation." The regulation lists the following different types of affiliation:

- Based on stock ownership (13 CFR §121.103(c))
- Arising under stock options, convertible securities and

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Generic Drug Manufacturers Not Subject to State-Law Failure-To-Warn Claims, Says SCOTUS

By William B. Eadie

On June 23, 2011, the US Supreme Court held that a group of plaintiffs could not pursue their state-law failure-to-warn claims against PLIVA Inc., manufacturer of metoclopramide, a drug commonly used to treat digestive tract problems, under the brand name Reglan. The ruling was 5-4 in the case *of Pliva v. Mensing*, with an opinion by Justice Clarence Thomas. The Chief Justice and Justices Scalia and Alito joined the opinion in full, while Justice Kennedy joined as to all but one part. Justice Sotomayor filed a dissenting opinion, which was joined by Justices Ginsburg, Breyer, and Kagan.[1]

The decision was somewhat of a surprise after the Supreme Court's recent decision in *Wyeth v. Levine*, 555 U. S. 555 (2009), which held that federal law does not pre-empt failure-to-warn claims against *brand-name* drug manufacturers.

The gist of the opinion turned on the "impossibility" pre-emption defense that stems from Article VI of the Constitution, which establishes federal law as "the supreme law of the land." If a person or company *cannot* comply with both federal and state law, federal law controls, and the party is excused from compliance with the state law. This has traditionally been a very difficult standard to meet, requiring the party to affirmatively show compliance with both federal and state law is a "physical impossibility."[2] Thus, merely showing that the laws might conflict under some circumstances, or that it would be very difficult to comply with both, has not been sufficient to support the defense.

State law failure-to-warn cases are generally based on the requirement that pharmaceutical manufacturers warn users of the risks of their products, often by increasing the strength of their labeling warnings or package inserts. The FDA monitors and controls drug labeling, but allows brand name manufacturers—who initially create the product, test it, develop the labeling and, for five years, have the exclusive right to sell the product—to unilaterally *increase* the strength of the labeling if they are aware of new or increased risks. This occurs in parallel with their request to the FDA for permission to change the labeling, but at least permits the manufacturer to comply with both state and federal law.

Generic drug manufacturers, by contrast, get in the game late, and are required to match whatever labeling requirements the brand name manufacturer has. And this is where the Court found impossibility: there was no avenue for the *generic* drug manufacturer to unilaterally change their labeling—they violate federal law by deviating from the brand-name labeling without FDA consent. Interestingly, the Court came to this conclusion by deferring to the FDA's interpretation of its regulations and enabling statute.[3] The FDA interpreted the mandate that generic manufacturers match brand-name warnings to prevent both label changes *increasing* the warning strength, and "Dear Doctor" letters in which they would have warned prescribing physicians directly of the increased risk.

There is one mechanism by which the generic manufacturers could have changed the label: by initiating a request with the FDA to change the brand-name labeling. The dissent pointed out that the generic manufacturers did not even attempt this action, and thus should not benefit from an affirmative defense requiring impossibility, not mere inconvenience or reliance on others. But the majority found that to engage in an analysis of what could have been done to encourage others to allow the manufacturer to comply would render the impossibility defense "all but meaningless."

The effect of this decision may be great. Generic drug manufacturers accounted for 75% of the drug market in 2010, according to the Justice Sotomayor's dissent. But the procedural shift in analyzing the impossibility defense may result in increased reliance on the defense in other contexts. Essentially, the bar has lowered from "actual impossibility" to something closer to "actual impossibility absent the intervening act of a third party." Thus, parties are no longer required to try and fail, where trying involved the independent acts or judgment of third parties. This will likely open the door to the defense in situations where, previously, the defendant would have been unable to sustain an impossibility defense based on their not bothering to try and fail—now the hypothetical failure occasioned by the need for third-party cooperation may be effective to sustain the defense. As Justice Sotomayor explained, the tradition of not inferring the Congress intended to preempt state-law causes of action without a clear expression of legislative intent has been wiped away, and this means that drug consumers' right to retribution for an injury may be predicated on what bottle of pills the pharmacist reaches for when filling a prescription:

> As the majority itself admits, a drug consumer's right to compensation for inadequate warnings now turns on the happenstance of whether her pharmacist filled her prescription with a brand-name drug or a generic. If a consumer takes a brand-name drug, she can sue the manufacturer for inadequate warnings under our opinion in *Wyeth*. If, however, she takes a generic drug, as occurs 75 percent of the time, she now has no right to sue. The majority offers no reason to think—apart from its new articulation of the impossibility standard—that Congress would have intended such an arbitrary distinction. **SB**

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Endnotes

[1]A PDF of the opinion can be found at www.supremecourt.gov/opinions/10pdf/09-993.pdf.

[2]*Florida Lime & Avocado Growers Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963); *see also Wyeth*, 555 U. S., at 573.

[3]According to the FDA's interpretation of federal regulations governing generic drug labeling, this "sameness" duty prevents the generic drug manufacturer from using the "changes-being-effected" (CBE) process (under which process the original manufacturer could change the label in order to strengthen it—without preapproval—by merely submitting a concurrent supplemental application for the change to the FDA):

> The FDA denies that the Manufacturers could have used the CBE process to unilaterally strengthen their warning labels. The agency interprets the CBE regulation to allow changes to generic drug labels only when a generic drug manufacturer changes its label to match an updated brand-name label or to follow the FDA's instructions.

Slip op. at 7. The Court deferred to this interpretation. *Id.* at 8 ("We defer to the FDA's interpretation of its CBE and generic labeling regulations.").

Nor could the generic manufacturers utilize "Dear Doctor" letters, according to the FDA, because they constitute labeling. *Id.* ("The FDA argues that Dear Doctor letters qualify as 'labeling.'"). This results in the same argument against a duty:

> Thus, any such letters must be 'consistent with and not contrary to [the drug's] approved … labeling.' 21 CFR §201.100(d)(1). A Dear Doctor letter that contained substantial new warning information would not be consistent with the drug's approved labeling. Moreover, if generic drug manufacturers, but not the brand-name manufacturer, sent such letters, that would inaccurately imply a therapeutic difference between the brand and generic drugs and thus could be impermissibly 'misleading.'

Id. Again, the Court deferred to the FDA, and the plaintiffs did not present argument that this interpretation was clearly erroneous. *Id.* at 8-9.

Size Protests continued from page 7

agreements to merge (13 CFR 121.103(d))
- Based on common management (13 CFR §121.103(e))
- Based on identity of interest (13 CFR §121.103(f))
- Based on the newly organized concern rule (13 CFR §121.103(g))
- Based on joint ventures (13 CFR §121.103(h))
- Based on franchise and license agreements (13 CFR §121.103(i))

In examining these issues, the SBA considers the "totality of the circumstances and may find affiliation even though no single fact is sufficient to constitute affiliation" (13CFR §121.103(a)(5)). As a result, the SBA can find affiliation even though they are unable to find sufficient records to support any of the specific types of affiliation listed in the regulation.

Hidden within the above categories of affiliation is a rule known as the "ostensible subcontractor rule" (13 CFR §121.103(h)). This subsection provides that affiliation can be found if a subcontractor that does not qualify as small will be performing "primary and vital requirements of the contract" or if the prime contractor is unusually reliant on the subcontractor.

In making this determination the SBA will examine the subcontract, the nature of the services or materials for which the subcontractor is responsible, agreements such as bonding assistance or financing, and whether the subcontractor is the incumbent contractor. Again, it is important to keep in mind that the SBA will look at the "totality of the circumstances" and may find affiliation based on a combination of factors even though each in itself may be insufficient to constitute affiliation.

If you would like to learn more information about the various issues involved in size protests, I recommend a web site maintained by Stan Hinton (stanhinton.com). The SBA tab will provide you with quick access to applicable rules and cases.

Conclusion

While initial compliance with federal size standards may seem like an issue for a transactional attorney, reductions in federal spending and increased competition for limited funds is likely to result in a long-term increase in both the number and complexity of size protests. Given the very short period of time to file protests and appeals, it is essential that federal litigators become familiar with issues and rules so they can quickly and accurately represent their clients when the call comes. **SB**

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Class Action Waivers and the Preeminence of the Federal Arbitration Act

By William Frank Carroll

In a much anticipated decision, the U.S. Supreme Court held 5-4 that a California rule which invalidated mandatory arbitration clauses unless they permitted class actions was preempted by the Federal Arbitration Act (FAA). *AT&T Mobility LLC v. Concepcion*, ____U.S.____, 131 S.Ct. 1740 (2011). The decision has significant implications for the future conduct of arbitration proceedings and class actions.

The Dispute and the Arbitration Clause

AT&T offered a "free" phone to anyone who signed up for its service. However, AT&T charged, as it was required to do by California law, a sales tax on the retail value of each phone. The Concepions received the two free cell phones but were charged $30.02 as sales tax. They filed suit alleging that AT&T's requirement for payment of the sales tax on a "free" phone was fraudulent and sought to represent a class of all similar purchasers.[1]

The Wireless Service Agreement (WSA) signed by the Concepcions contained an arbitration clause and a class action prohibition that required any dispute to be brought only in an individual capacity.[2] The WSA also contained provisions waiving AT&T's right to recover attorneys' fees, requiring AT&T to pay a premium of $7,500.00 if the arbitration award was in excess of AT&T's settlement offer and to pay twice the amount of the customer's attorneys' fees.[3]

AT&T moved to compel arbitration. The Concepcions, relying on California case law, opposed arbitration arguing that the class action waiver made the arbitration requirement unconscionable and thus unenforceable under the FAA.

The Lower Court Decisions

Based on the California Supreme Court's decision in *Discovery Bank v. Superior Court*,[4] the District Court refused to enforce the arbitration clause and class action waiver. Relying on California's stated policy of favoring class litigation to "deter fraudulent conduct in cases involving large numbers of consumers with small amounts of damages" the Court found the class action waiver to be unconscionable.[5]

The Ninth Circuit affirmed finding that although the arbitration provision would "guarantee that the company will make any aggrieved customer whole who files a claim," which the Court described as "a good thing," the fact that "not every aggrieved customer will file a claim," invalidated the arbitration/class action waiver provision.

The Ninth Circuit Continues its Supreme Court Success Rate

Considering the Supreme Court's recent and most favorable treatment of arbitration, and the Ninth Circuit's track record generally in the Supreme Court, it was hardly a surprise when the decision was reversed. If there was a surprise it was the breadth of the majority opinion favoring arbitration. The Court could have written very narrowly simply finding that the AT&T clause was not unconscionable since it was so consumer oriented. Also, the Court could have taken the position that unconscionability determinations are to be calculated only as of the time of contracting as Justice Thomas did in his concurring opinion.[6] Rather the Court elected to address the more encompassing issue of preemption.

Section 2 of the FAA Is Not a Thoroughfare But a Narrow Road

Section 2 of the FAA permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of a contract." Of course Section 2 would not permit a state law to prohibit the arbitration of a claim.[7] However, the issue becomes more complex if a normally neutral doctrine such as duress or unconscionability is applied in a fashion to disfavor arbitration.[8]

Although recognizing the savings clause of Section 2, the Court held that there was no intent to preserve state-law rules "that stand as an obstacle to the accomplishment of the FAA's objectives." For example a state case law rule requiring judicially monitored discovery, application of the Federal Rules of Evidence or ultimate disposition by a jury would be invalid even though applicable to all contracts.[9]

In reaching the decision to invalidate the California rule, the Court outlined several principles for evaluating arbitration clauses. First the Court noted that a prime objective of an agreement to arbitrate is to achieve "streamlined proceedings and expeditious results.[10] The change from bilateral to class arbitration is "fundamental" and has inherent problems involving higher stakes litigation, confidentiality and the use of arbitrators who have little or no experience in class certification issues.[11] Switching from bilateral to class arbitration makes the process "slower, more costly and more likely to create a procedural morass than final judgment."[12]

The Court also recognized that class arbitration sacrificed the "principal advantage of arbitration" because it "*requires* procedural formality" to pass constitutional muster.[13] Further, arbitration is poorly suited to "the higher stakes of class litigation because of the limitations on review of the arbitrator's decision" and "defendants would not 'bet the company with no effective means of review.'"[14] The Court concluded that because the California rule "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the FAA, the *Discover Bank* rule is preempted.[15]

The four dissenting justices relied on the savings clause of Section 2 of the FAA arguing that so long as all contracts were treated equally, then a state court could invalidate an arbitration clause disregarding whether the impact on arbitration was disproportionate.[16]

Of more interest is the concurring opinion of Justice Thomas. Fully joining the majority opinion, he notes that it would "be absurd to suggest that § 2 requires only that a defense apply to "'any contract.'" Rather it means that "courts cannot refuse to enforce arbitration agreements because of a state public policy."[17] However, the concurrence offers a different approach to determining the scope of Section 2.

Relying on an analysis of the entirety of the FAA, the concurring opinion concludes that "the FAA requires that an agreement to arbitrate be enforced unless a party successfully challenges the formation of the arbitration agreement."[18] Thus any evaluation of Section 2 must be based on "defects in the making of an agreement."[19] Since the *Discover Bank* rule is based on public policy reasons, it does not concern whether the arbitration agreement "was properly made."[20]

Lessons from AT&T

The full impact of the decision will not be known for some time. The Supreme Court granted certiorari in *Cellco Partnership v. Litman*, No. 10-398, 2011 WL 1631041 (U.S. May 2, 2011) and vacated the decision of the Third Circuit which had held that an unconscionability challenge to a class action waiver under New Jersey law was not preempted by the FAA. Other courts have granted motions to compel arbitration based on *AT&T Mobility*.[21]

Pending further case law development, at least three principles can be derived from the decision. First, a simple incantation that a state rule applies to all contracts will not allow entry into the sale harbor of Section 2. If the state law rule "interferes with fundamental attributes of arbitration," it is preempted.[22] Facial impartiality will not suffice to invalidate the clause if the rule, as applied, adversely impacts arbitration.

Second, one seeking to avoid being compelled to arbitrate in a non-class action format, must find a reason based on something other than "public policy." The grounds are limited and if Justice Thomas' concurring opinion should commend itself to a majority of the Court, those grounds may narrow further.

Third, the decision would counsel a party who wishes to enforce a class action waiver and a mandatory arbitration clause to analyze its current terminology. Although the Supreme Court did not base its decision on the terms of the specific AT&T arbitration clause, it is clear that the clause was tilted far on the side of being consumer friendly. One can speculate that that fact coupled with the fact that the sales tax was required by California law (knowledge with which the plaintiffs would have presumably been charged) may have impacted the decision. The careful company would certainly review existing agreements and forms to try to combat more subtle claims of unfairness, duress or overreaching in new attacks on arbitration/class waiver clauses.

Absent congressional or other regulatory action, *AT&T Mobility* seems likely to be a potent weapon against allowing consumer class actions to proceed in court where there is a class action waiver and an arbitration clause. **SB**

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Endnotes

[1]131 S.Ct. and 1744.

[2]*Laster v. AT&T Mobility LLC*, 584 F.3d 849, 852-53 (9th Cir. 2009).

[3]131 S.Ct. 1744.

[4]36 Cal. 4th 148, 113 P.3d 1100 (2005).

[5]*Laster v. T-Mobile USA, Inc.*, 2008 WL 5216255 *7. (S.D. Cal. Aug. 11, 2008).

[6]131 S.Ct. at 1753.

[7]131 S.Ct. at 1747.

[8]*Id.*

[9]*Id.*

[10]131 S.Ct. at 1749.

[11]131 S.Ct. at 1750-51.

[12]131 S.Ct. at 1751.

[13]*Id.*

[14]131 S.Ct. at 1752.

[15]131 S.Ct. at 1753.

[16]131 S.Ct. at 1762.

[17]131 S.Ct. at 1753.

[18]*Id.*

[19]*Id.*

[20]131 S.Ct. at 1756.

[21]*See e.g. Kanbar v. O'Melveney & Myers*, 2011 WL 2940690 (N.D. Cal. July 27, 2011); *Day v. Persels & Assocs.*, 2011 WL 1770300 (M.D. Fla. May 9, 2011).

[22]131 S.Ct. 1748.

Litigating Data Fraud Under The Computer Fraud And Abuse Act

By Alison Carrinski

As computer use has become vital in every facet of work life, businesses now more than ever face the threat of a disgruntled employee who, without detection, steals proprietary information from the employer. The employee may sneak a flash drive into work, download proprietary information and trade secrets onto the flash drive, and leave unnoticed. Or, the employee may email confidential information to a personal email account and store the information for use after separation from the employer.

In response to the growing use of computers, Congress passed the Computer Fraud and Abuse Act (CFAA) in 1986.[1] The CFAA (codified at 18 U.S.C. section 1030) protects against fraudulent use of computers in which the federal government has an interest. This includes federal government computers, computers used in finance, and computers used in or affecting interstate and foreign commerce.[2] Causes of action under the CFAA are subject to a two-year statute of limitations.[3]

As computer-related crimes grew in complexity and as prosecutors became more familiar with the CFAA, Congress amended the act several times to expand the scope of crimes included. For example, Congress amended the CFAA to criminalize conspiracy to commit a computer hacking crime.[4] Congress also expanded the act, which was originally only a criminal statute, to include civil causes of action.[5] Now victims, including employers, can recover compensatory damages and injunctive relief for violations of the act.[6]

The anti-fraud subsection of the CFAA, subsection (a)(4), has been the basis for numerous prosecutions throughout the country. This subsection punishes anyone who "knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value."[7] Punishment for violation of this subsection may not exceed a fine of $250,000 and five years imprisonment or, for a second offense, ten years imprisonment.[8] The term "protected computer" is defined broadly to include computers "used in or affecting interstate or foreign commerce or communication,"[9] encompassing almost any business-related computer in the county. For purposes of this subsection, an employee "exceeds authorized access" when he or she "access[es] a computer with authorization and use[s] such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter."[10] The Act does not define "without authorization."

The meanings of the phrases "without authorization" and "exceeds authorized access" have been the subject of extensive litigation. For instance, some courts, including the First and Seventh Circuit Courts of Appeals,[11] have interpreted these terms broadly, holding that an employee acts without authorization or in excess of authorization as soon as the employee acts with adverse or nefarious interests. Other courts have adopted a narrower interpretation of the subsection. These courts have viewed the Act as intending to punish intrusions by company outsiders, such as computer hackers, rather than employees who overstep their authorizations. Therefore, these courts hold that an employee only violates this anti-fraud subsection of the CFAA when acting without even initial authorized access to the computer or data.

Recently, the Ninth Circuit Court of Appeals addressed the scope of subsection (a)(4) in *U.S. v. Nosal*, and held for the first time that employees exceed authorized access whenever they violate the employer's computer and data access policies.[12] In this case, David Nosal, a former employee of an executive search firm, engaged two current employees of the firm to help him start a competing business. The search firm had a clear policy that restricted use of its proprietary information to only legitimate business reasons. All employees, including Nosal when he was employed, entered into agreements with the employer acknowledging the policy restricting use and disclosure of all employer information. Before every attempt to log in to the firm's computers, the computer system would display a notice that accessing any system information without authority may lead to discipline and criminal prosecution. In violation of the employer's policy, these employees, at Nosal's direction, accessed the search firm's trade secrets and proprietary information and then transferred extremely valuable and confidential information to Nosal.

The U.S. government indicted Nosal on 20 counts, including seven counts alleging that Nosal conspired with current employees to violate subsection (a)(4) of the CFAA. Nosal argued that he could not be liable under the CFAA because the employees were not accessing the computer system without authorization, i.e., they were not hacking into the system. The district court agreed with Nosal and dismissed the majority of charges against him, reasoning that, because the employees had initial access to the proprietary information, they did not exceed authorized access even when they used the information for nefarious purposes.[13] The government appealed the dismissal of charges.

The Ninth Circuit disagreed with Nosal, reasoning that, by violating the employer's clearly stated policy, the employees exceeded their authorized computer access and may, along with Nosal, be liable under the CFAA. The Court first examined the plain language of the Act to determine that "exceeds authorized access" could include an accesser who is not entitled to access data in a certain manner. Next, the Court addressed its recent decision *LVRC Holdings LLC v. Brekka*[14], where an employee who sent confidential work emails to his and his wife's personal email accounts was not held liable under the CFAA. The Court distinguished *Brekka* from *Nosal* based on the fact that the employer in *Brekka* did not notify the defendant employee of any computer restrictions, either through a policy or in an employment contract. Without such a policy or contract, the employee had no way to know when his access became unauthorized, the Court reasoned. Nosal, in contrast, knew the boundaries of computer access and intentionally exceeded them. The Ninth Circuit clarified that its decision in *Nosal*, while expanding its interpretation of the anti-fraud subsection of the CFAA, should not risk criminalizing mundane violations of an employer's computer use policy, such as checking personal email accounts or surfing the web. Rather, the Court explained that, in order to violate the CFAA, an employee must not only violate an employer's computer use policy, but must do so with

intent to defraud and by furthering the intended fraud.

The Court's decision in *Nosal* brings its interpretation in line with other Circuit Court interpretations of the CFAA.[15] In general, when considering liability under the anti-fraud subsection of the CFAA, the existence and scope of a business's computer use policy can determine the extent of liability. For example, if an employer does not publish a written policy, it will be unable to hold an employee liable under the anti-fraud provision of the CFAA when the employee uses a computer in an unauthorized manner with the intent to commit fraud. Therefore, it is important for businesses to maintain written up-to-date computer access policies that limit use of work computers to work activities only, and that limit access to confidential and sensitive data to only those employees who need such information to perform their jobs. **SB**

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Endnotes

[1]*See* S. Rep. No. 432, 99th Cong., 2nd Session, 1986 U.S.C.C.A.N. 2479 ("The proliferation of computers and computer data has spread before the nation's criminals a vast array of property that, in many cases, is wholly unprotected against crime.").

[2]18 U.S.C. § 1030(e)(2).

[3]18 U.S.C. § 1030(g); *State Analysis, Inc. v. American Financial Services Ass'n*, 621 F.Supp. 309 (E.D. Va. 2009). The statute of limitations begins to run from the date of the misconduct or the date that the misconduct is discovered. 18 U.S.C. § 1030(g).

[4]18 U.S.C. § 1030(b).

[5]18 U.S.C. § 1030(g); *P.C. Yonkers v. Celebrations the Party and Seasonal Superstore, LLC.*, 428 F.3d 504 (3rd Cir. 2005).

[6]However, the CFAA does not provide for recovery of attorneys' fees.

[7]18 U.S.C. § 1030(a)(4).

[8]18 U.S.C §§ 1030(c)(3), 3571.

[9]18 U.S.C § 1030(e)(2). In 2008, Congress expanded the definition of "protected computer" under the CFAA to make use of Congress's full powers under the Commerce Clause, thereafter including any computers used in interstate commerce.

[10]18 U.S.C. § 1030(e)(6).

[11]*See Int'l Airport Ctrs. LLC v. Citrin*, 440 F.3d 418 (7th Cir. 2006); *EF Cultural Travel BV v. Explorica, Inc.*, 274 F.3d 577 (1st Cir. 2001).

[12]*U.S. v. Nosal*, ___ F.3d ___ (9th Cir. 2011) [2011 WL 1585600].

[13]*U.S. v. Nosal*, No. C 08-0237 MHP, 2010 WL 934257 (N.D.Cal. Jan. 6, 2010).

[14]*LVRC Holdings LLC v. Brekka*, 581 F.3d 1127 (9th Cir. 2009).

[15]For example, see *U.S. v. Rodriguez*, 628 F.3d 1258 (11th Cir. 2010), where a former employee of the Social Security Administration violated the CFAA by accessing data for non-business reasons, while SSA policy explicitly prohibited using such data for personal purposes. *See also U.S. v. John*, 597 F.3d 263 (5th Cir. 2010) (Citibank employee liable under the CFAA by using company data for unauthorized purposes in violation of clear employer policy).

Approaching the Bench

New Eastern District of Texas Procedures Aim to Curb "Nuisance Value" Lawsuits

By Fred Berretta and Nick Transier

The Eastern District of Texas has been a favorite of patent plaintiffs seeking speedy access to its often-generous jury pool. Recently, however, certain judges of this district have invoked novel case management procedures to curb what they perceive as abusive litigation tactics by plaintiffs in large, multi-defendant patent disputes. What is troubling these judges are so-called "nuisance value" or "cost-of-defense" strategies in which a patent plaintiff files a weak claim against some defendants in hopes of quickly settling at or near the cost of defending the case, *i.e.* the "nuisance value" of the case. So, in patent cases with many defendants, judges in this district have begun to require an early and limited *Markman* and summary judgment hearing to eliminate claims against defendants who do not belong in the litigation.

The "nuisance value" patent lawsuit can be lucrative because defendants will often opt to settle even weak patent cases near what they perceive as the cost to defend the case and avoid the uncertainty of litigation. This enables patent plaintiffs to extract unwarranted settlements from large numbers of defendants without regard for the merits of the plaintiff's case. Moreover, the local case management "Patent Rules," put in place to increase the speed and efficiency of all patent cases, may exacerbate the problem by creating large up-front discovery costs for defendants. In the case of multi-defendant litigations, joint-defense coordination complexities also drive up defendants' perceived defense costs, further pushing defendants to offer overly generous settlement amounts in lieu of litigating the case on the merits. Three recent cases have highlighted the court's attempt to reign in abusive patent litigation practices related to nuisance value suits by using new case management techniques that depart from the typical flow of a patent case in the Eastern District of Texas.

In *Parallel Networks LLC v. Oriental Trading Company, Inc., et al*, 6:10-cv-00474 (E.D. Texas, filed Sept. 14, 2010), the court consolidated four cases across which Parallel Networks had sued 124 defendants for infringing a single patent. The court had a special status conference to discuss plaintiff's litigation and settlement strategy and invited the parties to offer suggestions for effective case management. In particular, "the court asked plaintiff why it elected to sue such a large number of defendants at once, *as opposed to the more common approach of selecting a few target defendants to proceed against first*." *Parallel Networks*, Memorandum Opinion and Order [Doc. 12] at 3, filed March 15, 2011 ("Parallel Networks Order") (emphasis added). The plaintiff responded that "its strategy made sense from a cost view" and that its strategy was "not to go after one defendant and ask for $30 million", but "to go after a lot of defendants, get those issues resolved, hopefully by settlement." Parallel Networks Order at 3-4.

The plaintiff also stated that its early settlement demands, *inter alia*, "are substantially less than what a defendant would need to spend to bring its case to trial or *Markman*." *Id.* at 4. Further, plaintiff pointed out that its early settlement demands were based on "an analysis of defendants' sales and *defendants' cost of defense*." *Id.* (emphasis added). When the court inquired about the defendants' goals in the case, they responded that "they seek a cost-effective way to defend themselves from suits like these without being forced to settle based upon cost of defense." *Id.* at 4-5. The court responded by pointing out that "[it] has always endeavored to move cases toward an efficient and timely resolution on the merits of the case" and that "[t]he Patent Rules and docket control order are designed for this purpose." *Id.* at 5. However, the Court opined that the current Patent Rules did not serve their purpose in a case where the plaintiff was essentially seeking settlements based on the cost of litigation:

> Plaintiff's strategy in this case, however, makes it unlike the typical patent case. Plaintiff has sued over 100 *Defendants with the goal of early resolution of the disputes through settlement in a range that essentially amounts to litigation costs*. In this case, the Patent Rules and the court's standard docket control order—including early production of extensive electronic discovery—make defending the case almost cost prohibitive. With over 100 parties in these cases, even a simple joint proposed discovery order turns into hours of attorney communication—with that cost being passed on to the attorneys' clients.

Id. at 6. The court noted the difficulty in being a defendant in such circumstances and set forth its basis for departing from the typical case management in the Patent Rules:

> [W]hen combined with the requirements of the Patent Rules and the court's standard docket control order, Plaintiff's strategy presents Defendants with a Hobson's choice: spend more than the settlement range on discovery, or settle for what amounts to cost of defense, regardless of whether a Defendant believes it has a legitimate defense. *Because the Patent Rules and the court's standard docket control order do not achieve their intended result in this particular case, it is necessary to depart from them in an effort to accomplish both parties' objectives in the most cost effective manner.*

Id. at 6 (emphasis added). The court relied on local Patent Rule 1.2 to justify its departure from the general case management rules, which allows the court to "accelerate, extend, eliminate, or modify the obligations or deadlines set forth in these Patent Rules based on the circumstances of any particular case, including, without limitation, the complexity of the case or the number of patents, claims, products, or parties involved." *Id.* at 6, n.5. Accordingly, the court ordered that defendants submit three potentially case-dispositive claim terms for an early *Markman* hearing, and set a summary judg-

ment hearing regarding those terms. *Id.* at 7. Significantly for the defendants, the court stayed all discovery pending the early *Markman* and summary judgment rulings. *Id.*

Seemingly following the lead of the *Parallel Networks* case, the court took a nearly identical approach in *Whetstone Electronics LLC v. Xerox Corporation et al*, 6:10-cv-00278 (E.D. Texas, filed June 3, 2010). In *Whetstone*, after the plaintiff brought a patent infringement suit against 19 defendants, the court set an early *Markman* hearing to review three claim terms selected by the defendants and stayed most discovery until after the claim construction ruling. *Whetstone*, Order [Doc. 156], filed April 7, 2011 (Whetstone Order).

Plaintiffs who offer to settle cases in exchange for very small "nuisance value" payments also risk sanctions under Rule 11. In another recent case, *Raylon LLC v. Complus Data Innovations, Co. et al*, 6:09-cv-003455 (E.D. Texas, filed August 8, 2009), defendants won summary judgment rulings based on a *Markman* construction—and then moved for sanctions against Raylon arguing that Raylon's infringement theory was so legally untenable that it violated Federal Rule of Civil Procedure 11(b)(2). They argued that "Raylon's settlements with other defendants for less than the cost of defending the case [was] evidence that Raylon's infringement theory was frivolous." Raylon Order at 4. In considering the defendants' arguments, the court noted that "Raylon did settle with some defendants for substantially less than their cost of defense" and "[i]n some situations, a plaintiff asserting a large damages model while making very low offers of settlement early in the case may indicate that the plaintiff realizes its case is very weak or even frivolous." *Id.* However, the court also countered that "[g]enerally, taking losing positions on claim construction or infringement will not warrant sanctions" and that "Rule 11 sanctions are only merited when an attorney's arguments are objectively frivolous." *Id.* The court went on to hold that Rule 11 sanctions were not justified against Raylon. However, the court noted its strong aversion to cost-of-defense strategies and explicitly warned that frivolous "nuisance suits" may warrant sanctions:

> [T]his court has some concerns about plaintiffs who file cases with extremely weak infringement positions in order to settle for less than the cost of defense and have no intention of taking the case to trial. Such a practice is an abuse of the judicial system and threatens the integrity of and respect for the courts. Often in such cases, a plaintiff asserts an overly inflated damages model, seeking hundreds of millions of dollars, and settles for pennies on the dollar, which is far less than the cost of defense. *Where it is clear that a case lacks any credible infringement theory and has been brought only to coerce a nuisance value settlement, Rule 11 sanctions are warranted.*

Id. at 5 (emphasis added). The court further admonished: "[t]his Court has high expectations for the parties and counsel who file patent cases in the Eastern District of Texas, and an attorney who files a patent case has a serious responsibility to ensure that his case has merit and that he is prepared to take the case to trial … *when it appears to the Court that the cost of the litigation is more of a driving force than the merits of the patent-in-suit, then this Court will not hesitate to put the emphasis back on the merits of the patent-in-suit and consider Rule 11 sanctions if necessary.*" *Id.* at 5-6 (emphasis added).

The *Raylon* court did note, however, that "there may be legitimate cases where a plaintiff settles with a few smaller defendants in an effort to raise needed capital in order to proceed to trial against the remaining major defendants. In those situations, plaintiffs typically settle with smaller defendants and proceed to trial against larger defendants who have larger damage potential. Such is a legitimate trial strategy," and that "the Court does not want to discourage early settlement of some or all defendants. This Court has always taken a favorable view of business resolutions to legitimate commercial disputes when those settlements are based on the case's merits and risks." Raylon Order at 5.

For patent defendants forced to litigate in the historically perilous Eastern District of Texas, *Parallel Networks*, *Whetstone* and *Raylon* signal a welcome change in the court's tolerance for patent plaintiffs' cost-of-defense or nuisance value litigation strategies. By creating an entirely new procedural step available in certain patent cases—the early and limited *Markman* and summary judgment hearing—the Eastern District of Texas has provided defendants a new and potentially very effective mechanism to quickly and efficiently dispose of questionable patent infringement lawsuits before incurring large discovery costs. It remains to be seen whether the court will take the next step and actually sanction a plaintiff who files a meritless or frivolous patent case in the Eastern District of Texas seeking merely nuisance value settlements. **SB**

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Dukes v. Wal-Mart Stores Strikes Blow to Plaintiffs' Class Action Bar

By Bradford G. Harvey

The U.S. Supreme Court in *Dukes v. Wal-Mart Stores, Inc.* (June 20, 2011),[1] reversed a ruling by the U.S. Court of Appeals for the Ninth Circuit that had certified a nationwide gender discrimination class action challenging pay and promotions practices. As certified, the class had included approximately 1.5 million women. Justice Antonin Scalia wrote the Court's opinion, in which the conservative block plus Justice Anthony Kennedy joined fully. The remaining justices dissented in part, with Justice Ruth Bader Ginsburg writing that the majority went too far in disqualifying class actions "at the starting gate."[2] The Court's analysis can be applied broadly to class actions asserting discrimination based on a theory of delegation of decision-making authority. Addressing many of the touchstone issues of class certification, the Court repeatedly gave employers all they could have hoped for, if not more.

Platitudes Do Not Establish Commonality

Rule 23 of the Federal Rules of Civil Procedure establishes the requirements for class certification. One requirement under Rule 23(a) is for plaintiffs to show "questions of law or fact common to the class." Some courts had accepted generic questions such as were class members discriminated against. Rejecting this approach, the Court stressed that the commonality requirement "is easy to misread, since '[a]ny competently crafted class complaint literally raises common 'questions.'"[3] Instead, "claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor."[4]

Social Scientist Psychobabble

The Court ruled that the plaintiffs could not establish commonality "without some glue holding the alleged *reasons* for [millions of employment] decisions together."[5] Plaintiffs may connect decisions through "significant proof" of a "general policy of discrimination."[6] In this regard, the plaintiffs offered Dr. William Bielby, who concluded that delegation of discretionary decision-making authority allowed for decisions based on stereotypes. Dr. Bielby, though, admitted he "could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking."[7] The Court rejected this evidence as "worlds away" from what is required.[8]

Absence of a Central Policy Does Not Equal a Central Policy

Lacking any central policy of discrimination, the plaintiffs argued that discrimination arose from a "policy" of giving supervisors discretion. The Court, though, ruled "that is just the opposite of a uniform employment practice that would provide commonality needed for a class action; it is a policy *against having* uniform employment practices."[9] The Court further ruled that such delegation is "a very common and presumptively reasonable way of doing business."[10] Finally, the Court concluded that it would be "quite unbelievable that all managers would exercise their discretion in a common way without some common direction."[11]

Fun with Numbers

The plaintiffs also relied on evidence of statistical disparities in pay and promotions at a regional and national level. Meanwhile, Wal-Mart focused on the absence of any disparity at most stores. In finding an absence of commonality, the Court stressed that regional and national disparities would not establish disparities at individual stores. Moreover, the plaintiffs still would need to show that a "specific employment practice" caused disparities.[12] The Court's willingness to analyze dueling statistical evidence also reflects its understanding that "proof of commonality necessarily overlaps with [the plaintiffs'] merit contention that Wal-Mart engages in a *pattern of practice* of discrimination."[13]

Show Me the Money

Plaintiffs also must show that their class meets one of the categories in Rule 23(b). Most employment plaintiffs have sought certification under Rule 23(b)(2), which applies where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Noticeably absent is any reference to money.

Previously, the U.S. Court of Appeals for the Fifth Circuit in *Allison v. Citgo Petroleum*[14] ruled that declaratory and injunctive relief must "predominate" over any money sought in a 23(b)(2) class. The Fifth Circuit held that compensatory and punitive damages present individualized issues which often preclude certification. Most circuits adopted *Allison*, while the Second and Ninth Circuits crafted more liberal tests.

Hoping to sidestep the issue, the plaintiffs in *Dukes* did not seek compensatory damages for the class. Nevertheless, their *back pay* claims tripped them up, even though most lower courts had allowed these claims in a 23(b)(2) class. As the Court ruled, "claims for *individualized* relief (like the backpay at issue here) do not satisfy" Rule 23(b)(2).[15] Instead, "individualized monetary claims belong in Rule 23(b)(3)," which includes additional safeguards, such as a "super-commonality" requirement that common issues predominate and the requirement that class members receive notice and an opportunity to opt out.[16] The Court further ruled that even *Allison*'s "predominance" test "does nothing to justify elimination of Rule 23(b)(3)'s procedural protections."[17]

No Trial by Formula

Finally, the Court rejected the concept of "Trial by Formula." Under this approach, damages of a "sample set" would be projected to the class. In rejecting this approach, the Court stressed that Rule 23 could not change Wal-Mart's right to defend itself against any individual's claim.[18]

Impact on Future Cases

Dukes makes it much more difficult to certify class actions challenging the decisions of multiple individuals. Additionally, courts will not be able to certify monetary damage claims requiring individual calculations under Rule 23(b)(2). While the *Dukes* plaintiffs did not seek certification under 23(b)(3), they could not have met the "super-commonality" requirement of that rule given their inability to establish the more permissive commonality requirement under 23(a).

Dukes also will impact other types of class and collective actions. For example, the U.S. District Court for South Carolina in *MacGregor v. Farmers Insurance Exchange* cited *Dukes* in denying certification of Fair Labor Standards Act ("FLSA") collective action where the plaintiffs' claims would challenge the actions of multiple managers. As the court ruled, while "collective actions under the FLSA are 'not subject to the provisions generally associated with class actions under FRCP 23 … *Dukes* is nonetheless illuminating."[19]

Of course, *Dukes* also will be the mother of invention. The U.S. District Court for the Eastern District of New York in *United States v. City of New York*[20] relied on its ability to certify particular issues under Rule 23(c)(4) to proceed with a post-*Dukes* employment class action. The representative plaintiffs, who had intervened after the United States initiated litigation, challenged written examinations that New York has used in hiring firefighters. The court first ruled that *Dukes* did not prohibit it from certifying the liability phase of the case under Rule 23(b)(2). Next, the court ruled that it could use Rule 23(b)(3) to calculate back pay damages on an aggregate basis, distribute these damages, and address priority hiring and retroactive seniority relief on a class basis. Finally, assuming the right to a jury trial were waived, claims for compensatory damages would be addressed through the use of a special master and individual hearings. One might foresee that the Supreme Court would be uncomfortable with some of these mechanisms, though it did not have an opportunity to rule upon them in *Dukes*. Still, the ruling shows just how creative plaintiffs must become to obtain certification. Moreover, because the claims were focused on written examinations, the plaintiffs did not face the commonality hurdles highlighted in *Dukes*. Some in the plaintiffs' class bar may simply stop taking multi-location employment discrimination class actions and instead shift their practice to other areas. **SB**

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Endnotes

[1]131 S.Ct. 2541, 2011 WL 2437013 (June 20, 2011).
[2]*Id.* at 2562.
[3]*Id.* at 2551 (quotation omitted).
[4]*Id.*
[5]*Id.* at 2552.
[6]*Id.* at 2553 (quoting *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 159 n. 15 (1982)).
[7]*Id.* at 2554.
[8]*Id.*
[9]*Id.* (emphasis in original).
[10]*Id.*
[11]*Id.*
[12]*Id.* at 2555-56.
[13]*Id.* at 2552 (emphasis in original).
[14]151 F.3d 402 (5th Cir. 1998).
[15]*Dukes*, 131 S.Ct. at 2557 (emphasis in original).
[16]*Id.* at 2558.
[17]*Id.*
[18]*Id.* at 2561.
[19]2011 WL 2981466, *4 (D.S.C. July 22, 2011).
[20]2011 WL 2680474 (E.D.N.Y. July 8, 2011).

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DuPont v. Kolon: *A Post-*Zubulake *Reminder that Litigation Holds and Efforts to Avoid Spoliation Are Not Static*

By Linda M. Jackson, Emily Jenkins, Anum Pervaiz

Much has been said post-*Zubulake V*[1] on the issue of spoliation, and the duty to preserve and produce electronic evidence. A recent decision from the Eastern District of Virginia further highlights these obligations as investigations progress, claims and defenses expand, and counterclaims are introduced. *Zubulake V* makes clear that a party's duty to preserve evidence attaches at the time the party reasonably anticipates litigation and extends to all individuals likely to have relevant information—i.e., the likely key players of the litigation. The case of *DuPont v. Kolon* makes clear that this obligation is not static—key players, and the scope of evidence at issue, may change as the case develops and new information is revealed.[2]

Background of Litigation Between DuPont and Kolon

According to DuPont, it realized in April or May 2007 that Michael Mitchell, a former employee, misappropriated its trade secrets and shared confidential information with his new employer, Kolon Industries Inc. From its initial investigation, DuPont determined that Mitchell gave Kolon information regarding DuPont's production of the fibers that comprise its trademarked product Kevlar. While DuPont had not yet discovered the full scope and nature of the misappropriated information, it anticipated seeking injunctive relief against Mitchell and Kolon to prevent further dissemination of confidential information.

At the same time, DuPont contacted the FBI and the Department of Commerce to advise them of the theft of trade secrets and possible violation of export control laws. The government instructed DuPont to keep its internal investigation confidential while it concurrently investigated Mitchell's conduct. In March 2008, a search warrant executed on Mitchell's home revealed that Mitchell had misappropriated confidential financial spreadsheets related to DuPont's production of Kevlar at a Virginia plant. In April 2008, the government told DuPont generally that portions of financial spreadsheets had been sent to Kolon. In December 2008, DuPont received actual copies of the misappropriated information.

DuPont filed suit against Kolon on Feb. 3, 2009, asserting trade secret claims and other business torts. Kolon responded in April 2009, alleging defenses and counterclaims for violations of antitrust laws. In August 2009, as a result of Kolon's document production, DuPont learned that Mitchell also gave Kolon information regarding its collection of competitive intelligence. In October 2009, Kolon issued discovery requests for information on DuPont's methods for gathering competitive intelligence. As the Court later put it, the October 2009 discovery was the first time DuPont's competitive intelligence gathering practices were "injected" into the litigation.

DuPont's Three Litigation Hold Letters

DuPont issued a total of three litigation hold letters. The first was issued in June 2007 as a result of DuPont's initial investigation. Eighteen employees working in the business unit that dealt with DuPont's production of the Kevlar fibers received the letter, as they were identified as likely to have relevant information in a potential suit against Mitchell and/or Kolon. On Feb. 3, 2009, the same day it filed suit, DuPont issued its second litigation hold, which was distributed to all 2,500 employees in the business unit in which Mitchell worked. DuPont issued a third hold letter, updated and revised to reflect Kolon's counterclaims, in April 2009.

Kolon's Motion for Sanctions

Kolon alleged that DuPont failed to preserve the email accounts of four former DuPont employees, and moved for spoliation sanctions. The four employees were not in the group of eighteen who received the first litigation hold, and all four had left DuPont before the litigation was filed and the second litigation hold issued. Their email accounts were deleted as part of DuPont's normal document retention policy. Kolon claimed that the four employees—two of whom created and maintained the production spreadsheets provided to Kolon by Mitchell, and two of whom gathered competitive intelligence for DuPont—had relevant information regarding Kolon's affirmative defenses.

Kolon argued that DuPont should have anticipated its positions in June 2007 and identified these individuals as key players such that the first litigation hold would have been issued to them and their accounts preserved. Kolon requested that the court make specific adverse findings regarding the employees whose email accounts were deleted, or in the alternative, that the court instruct the jury that it may draw adverse inferences against DuPont as a result of the deletions.

The court denied the motion, and determined that DuPont had taken reasonable and appropriate steps to preserve data.

Law Of Spoliation

The court first reviewed the legal principles of spoliation. Spoliation is a rule of evidence administered at the discretion of the trial court under the principles of federal law.[3] It refers to the destruction or material alteration of evidence in pending or reasonably foreseeable litigation. Spoliation has two possible consequences: the court may sanction a party for spoliation based on its inherent power to control the judicial process and/or the court may allow the fact finder to draw a negative inference against the spoliator based on its destruction of the evidence.[4] The sanctions are intended to serve the dual purpose of leveling the evidentiary playing field, and sanctioning improper conduct.

Any level of fault suffices for a finding of spoliation. To that end, a party is culpable if it has engaged in spoliation either (1) in bad faith, or (2) by intentionally or deliberately destroying evidence it knew was relevant to an issue at trial, or (3) by negligently failing to preserve evidence that it knew to be relevant.[5]

The party alleging spoliation has the burden to establish a reasonable possibility, based on concrete evidence, that access to the lost material would have produced evidence favorable to its case. Once the party has made a prima facie showing of relevance, the burden shifts to the spoliator to show that the

destroyed evidence was actually inconsequential.[6]

The Court's Analysis Of The DuPont Employees At Issue

Two of the four employees were custodians of information related to the financial spreadsheets that Mitchell misappropriated. Both employees retired in April 2008. DuPont argued that by the time it became aware that these employees might control relevant data, their accounts were no longer retrievable. DuPont argued it did not know Mitchell had retained certain spreadsheets until April 2008, and did not learn precisely which spreadsheets had been misappropriated or the scope of the misappropriation until December 2008. By that time, the first employee already had retired and his email account deleted in accordance with DuPont's retention policy. The second employee also had retired by April 2008, even though he continued working for DuPont in a limited capacity on an unrelated project. The court ruled that, because the e-mail accounts were deleted without being subject to a duty to preserve, there had been no spoliation.

The other two employees at issue collected competitive intelligence for DuPont. Both employees left DuPont in January 2009, and as such neither received the first litigation hold. Here, the court looked at whether DuPont could have anticipated Kolon's defenses in June 2007, and held that DuPont could not have reasonably known in June 2007 that Kolon would raise a defense of unclean hands or reasonably anticipated that the process of intelligence collection would be relevant to Kolon's defense. The court further determined that it was not until Kolon issued discovery to DuPont in October 2009 that DuPont should have realized that DuPont's intelligence collection efforts were relevant. The court also noted that while reasonable counterclaims and defenses must be anticipated, counsel cannot anticipate every theory.

Practice Tips

For practitioners, *DuPont* is an excellent reminder that the timing, content, and key players for litigation holds may evolve as the case evolves, and requires careful analysis at each juncture of the case. Practice points to remember:

- Evaluate early whether a litigation hold letter is needed, as the duty to preserve often arises prior to litigation.
- Anticipate the claims and defenses that may reasonably be anticipated in response to your claims. Though this need not be an exhaustive exercise in issue spotting, counsel should have a good grasp on the key players and relevant issues that will be involved in defenses or counterclaims.
- Assess the scope and distribution of the litigation hold letter as the pre-litigation investigation progresses and as litigation itself evolves with each defense, counterclaim, and issue raised in discovery.
- Identify key players at the outset of threatened or pending litigation. The list of key players also should be revisited as the litigation progresses, and subsequent letters should be issued to any newly identified individuals.
- Understand your client's document retention and deletion policy. Encourage clients to adopt a clear policy, and to carefully follow it. A court may review compliance with the retention policy as closely as the litigation hold letter if allegations of spoliation arise.

The litigation hold letter is vital to a party's ability to comply with its duty to preserve evidence. Failure to issue a litigation hold letter could result in the destruction of evidence and resulting court sanctions. An effective litigation hold letter coupled with a clear document retention policy can save a client money and prevent serious consequences once litigation has begun. **SB**

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Endnotes

[1]*Zubulake v. UBS Warburg*, 229 F.R.D. 422, 2004 U.S. Dist. LEXIS 1620866 (S.D.N.Y. July 20, 2004).

[2]*E.I. Du Pont De Nemours & Co. v. Kolon Industries Inc.*, Civil Action No. 3:09cv58, 2011 U.S. Dist. LEXIS 4588 (E.D. Va. Apr. 27, 2011).

[3]*DuPont* slip. op. at *8 (quoting *Hodge v. Wal-Mart Stores Inc.*, 360 F.3d 446, 449 (4th Cir. 2004)).

[4]*Id.* slip. op. at *8 (quoting *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001)).

[5]*Id.* slip. op. at *10.

[6]*Id.* slip. op. at *10 (quoting *Sampson v. City of Cambridge*, 251 F.R.D. 172, 179-80 (D. Md. 2008)).

Timing is Everything: Timing Orders for Trials in Federal Court

By Bryon Rice and Sara Hilkemann

When U.S. District Judge Alvin Hellerstein issued a timing order equally dividing the time the parties had to present their case at trial in the Southern District of New York in the last wrongful-death suit resulting from the 9/11 attacks, the attorneys were shocked.[1] Their reaction is not surprising. Having spent years preparing for trial, the last thing the attorneys wanted to hear is that the judge is restricting the time in which they have to present their case.[2]

But timing orders in federal court are not uncommon. Many district judges routinely limit the time in which lawyers have to present evidence at trial. Take, for example, the following two cases in which the district judge restricted the number of hours that the parties could use to present their case. In *Seymore v. Penn Maritime Inc.*, the court restricted the defendant's cross-examination and presentation of its case to ten hours.[3] On a plain error review, because the defendant did not object at trial, the U.S. Court of Appeals for the Fifth Circuit determined that the district court not only did not abuse its discretion, but stated that, "We are convinced … that Penn had sufficient time to develop its defensive theories and present its case."[4] Similarly, in *McClain v. Lufkin Industries Inc.*, a complex Title VII class action that spanned almost a decade and in which plaintiffs questioned the defendant corporation's subjective decision-making, and implicated all of its divisions, the district court allowed each side only twenty hours to present its case.[5] Chief Judge Edith H. Jones empathized with the defendant corporation—writing, "[W]e do not doubt that it was difficult for Lufkin to mount a defense … in the mere twenty hours the district court allowed each side"—but nevertheless found that Lufkin had failed to persuade the Court that it "suffered reversible prejudice," depriving it of a fair trial.[6]

Indeed, federal judges have broad discretion in marshalling cases through their courts: not just in ruling on evidentiary matters or in sentencing convicted criminals, but also in deciding how much time that the parties take in their courtrooms to present their cases to the jury. The U.S. Court of Appeals for the Fifth Circuit has recognized that implementing time restrictions on trial—through a timing order or by simply controlling the pace and time of examination of witnesses—is a valid and effective method for a federal judge to use in managing a docket.[7] Although these time restrictions cannot be onerous or favor one party over the other, a federal judge may "comment on the evidence, question witnesses, elicit facts not yet adduced, or clarify those previously presented," and "maintain the pace of the trial by interrupting or *setting time limits on counsel*."[8] Moreover, the Fifth Circuit has made it clear that requiring parties to enter stipulated facts, not permitting lawyers to refer to stipulated facts, actively managing the trial, and expediting the presentation and questioning of witnesses "are all procedures that we view as tools that well serve our system of dispute resolution."[9] Only when "information to a jury is judicially restricted to the extent that the information becomes incomprehensible" and "the essence of the trial itself has been destroyed" does the Fifth Circuit say that a trial judge's tactics have gone too far.[10] Indeed, one of the most useful tools for a judge, in ensuring that a case moves along, is the implementation of a timing order. Its effectiveness in compelling lawyers to streamline their cases and focus on the important aspects of trial is unparalleled, even if unpopular.

But timing orders are not just useful in civil cases. Several circuits have found these same judicial tools also appropriate in *criminal* cases.[11] For instance, in *United States v. Gray*, the Fifth Circuit noted that the district judge

> frequently interrupted the defense testimony and questioning with admonitions not to waste time, to leave various issues for final argument, and to avoid repetition. The court strictly curtailed questioning on cross examination that appeared to go outside the scope of the direct examination, and … ordered [Defense] counsel during cross examination to **sit down before his time was finished** … and twice told the prosecutors to sit down.[12]

The Fifth Circuit characterized the district court's actions as made "not by partiality for the prosecution, but by antipathy to wasted trial time," noting that the trial court had directed the same tactics at both the prosecution and the defense.[13]

Many other courts agree that the district court may place time limitations upon the presentation of evidence and examination of witnesses in criminal cases.[14] In *United States v. Vest*, for instance, the Seventh Circuit approved of the district court setting time limits on cross-examination.[15] The court found that the time limits were reasonable because they "were reasonably anchored to the defendant's own requests for time and to the amount of time the Government used on direct."[16] The court recognized that the district court "issued an order asking the parties to estimate the time needed for direct and cross-examination" and allowed the defense to have double the amount of time that the Government used on direct.[17] Similarly, the Fourth Circuit, in *United States v. Janati*, found that the trial court was well within its discretion to limit to three days the time in which the government had to present its evidence in a 62 count healthcare fraud case.[18] Citing the Fifth Circuit's opinion in *Sims v. ANR Freight Systems*, and the First Circuit's opinion in *Borges v. Our Lady of the Sea Corporation*, the *Janati* court reiterated the broad discretion a district court has to "manage trials," even in criminal cases.[19]

Without doubt, the decision to issue a timing order in a criminal trial takes more care and scrutiny by the court. The defendant, of course, is not guilty until proven so beyond a reasonable doubt. He has no burden or requirement to present any evidence. Defense attorneys are not obligated to ask even one question. So soliciting an outline of the proposed time they may need to present their case requires prudence. The Fifth Circuit, however, has repeatedly upheld timing orders issued in criminal cases.[20] And because the judge who entered the order is also trying the case, he or she has the flexibility to extend the time that a lawyer may take in presenting their case. As one court stated: "Time limits are best used as guideposts rather than deadlines

in criminal trials, and time limits are no substitute for involved trial judges who must always shepherd trials along, curtailing repetitive, irrelevant, and immaterial questioning."[21]

So how do timing orders work in practice? Most commonly, the judge will issue an order before trial, eliciting from the parties the time they think they will need for trial, including the time for opening statements, direct and cross-examination, and in some cases, summation. After reviewing the parties' estimates, the judge will determine, using his or her discretion and experience in trying similar cases, how much time the parties will actually need. Careful not to deprive any party of the time necessary to adequately present their case, or unduly burden a party with too-restrictive of an allotment, the judge will measure the amount of time that each side will be given (weighing the number of witnesses the parties each plan to call, the number and complexity of the claims alleged to be decided by the jury, and the number of exhibits to introduced into evidence). The judge will then enter the timing order, laying out a specific amount of time that each side's attorneys will have to put on their entire case. More often than not, the time allowed is substantially less than the time that the attorneys proposed. One U.S. district judge in the Southern District of Texas has stated that during his 25 years on the bench, during which he has routinely issued timing orders in numerous cases, only once has he found it necessary to grant the parties additional time beyond what was allowed for in the timing order. In that rare instance, an intervenor was given thirty extra minutes. The case involved complex railroad tariffs and the role of the intervenor was unclear from the start. After recognizing the intervenor's role, the judge gave the party the time it needed to adequately present its case.

Although timing orders may be generally unwelcome, attorneys are well-advised to accept rather than fight them. If an attorney believes the judge's timing order unduly burdens his or her opportunity to present the case, the attorney can always ask for some additional time and explain the reasons extra time is necessary. The outcome of Judge Hellerstein's order in the 9/11 case is yet to be determined. Regardless, the judge has given each party its day in court—even if it if is measured in hours. **SB**

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Endnotes

[1]*See* Benjamin Weiser, *Judge Hearing A Last 9/11 Suit Has Set Timer*, NY. TIMES, April 28, 2011, at A1.

[2]*Id.*

[3]*Seymore v. Penn Maritime, Inc.*, 281 Fed. App'x 300, at 302 (5th Cir. June 5, 2008) (per curiam).

[4]*Id.*

[5]*McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 282 (5th Cir. 2008).

[6]*Id.*

[7]*See, e.g., Sims v. ANR Freight Sys., Inc.*, 77 F.3d 846, 849 (5th Cir. 1996) (Parker, J.) ("We recognize that a district judge has broad discretion in managing his docket, including trial procedure and the conduct of the trial.").

[8]*Id.* at 849 (emphasis added).

[9]*Id.*

[10]*Id.*

[11]*See United States v. Colomb*, 419 F.3d 292, 298–300 & n.15 (5th Cir. 2005) (Fitzwater, J., sitting by designation) (recognizing the district court's discretion to utilize "structural limits," such as limits on time and on the number of witnesses); *United States v. Maloof*, 205 F.3d 819, 828 (5th Cir. 2000) (Dennis, J.); *United States v. Janati*, 374 F.3d 263, 273 (4th Cir. 2004); *United States v. Gray*, 105 F.3d 956, 962–65 (5th Cir. 1997) (Jones, J.); *United States v. Wallace*, 32 F.3d 921, 928 (5th Cir. 1994).

[12]*Gray*, 105 F.3d at 963–64 (emphasis added).

[13]*Id.* at 964.

[14]*See United States v. Cousar*, No. 06-007, 2007 WL 4456798, at *5 (W.D. Pa. Dec. 16, 2007) (imposing time limits in thirty-nine count mail fraud and conspiracy trial of forty hours for the Government and twelve hours for the defense based on parties' estimates); *United States v. Hildebrand*, 928 F. Supp. 841, 844 (N.D. Iowa 1996) ("There seems to be no disagreement among the federal courts that district judges have broad discretion in managing their dockets, including trial procedure and the conduct and pace of trials.").

[15]*United States v. Vest*, 116 F.3d 1179, 1186 (7th Cir. 1997) ("[T]he District Court imposed time limits on the cross-examination of the Government experts. When Vest's counsel reached those time limits, the District Court prohibited further questioning even though Vest's counsel had not yet cross-examined the expert regarding four [other issues].").

[16]*Id.*

[17]*Id.*

[18]*Janati*, 374 F.3d at 275.

[19]*Id.* at 273–75 ("[D]istrict courts have the discretion to … fix the length of a jury trial … and to place limitations upon the cross-examination of witnesses." (citing *Sims*, 77 F.3d at 849; *Borges v. Our Lady of the Sea Corp.*, 935 F.2d 436, 442–43 (1st Cir. 1991)).

[20]*See supra* note 11.

[21]*Vest*, 116 F.3d at 1186–88.

Appeals from Judicial Criticism of Lawyers

By Timothy J. Miller

If you have been described in unflattering terms by a federal district court judge, you should seriously consider whether the criticism is justified. If, however, the criticism is unjustified, you may wish to seek redress from a higher court. Whether you have any recourse to judicial criticism depends, in part, on where the judge who criticized you is sitting. The chart below lists various judicial findings about lawyers and whether the lawyer was allowed to appeal from the finding.

Finding	Appealable
Formal Reprimand	Yes
Admonition	Yes
Violated Rules 11, 26, and 37 and constituted civil contempt	No
Violated Rules of Professional Conduct	Yes
Violated Federal Rules	Yes
"Reprehensible"	No
"Blatant misconduct"	Yes
"Pure baloney"	No
"A lack of professionalism and good judgement"	No

Id. As apparent from the chart, the content of criticism does not alone determine whether an appeal is possible. The apparent disparity between not allowing an appeal from a finding that an attorney violated specific rules and committed civil contempt, but allowing an appeal from a finding that an attorney committed "blatant misconduct" is explained by the fact that the circuit within which a court is located is a key factor in determining whether judicial criticism is appealable At the extremes, one circuit holds that judicial criticism that does not involve a monetary penalty is not appealable, while another circuit apparently holds that criticism that affects a lawyer's reputation is appealable. Most circuits permit appeal from a "sanction" (e.g., a formal reprimand), but do not allow an appeal from mere criticism.

Monetary Sanction Required

In the Seventh Circuit, the rule is simple: judicial criticism of a lawyer's conduct that is not accompanied by a monetary penalty is not appealable. For example, in *Clark Equipment Co. v. Lift Parts Mfg. Co. Inc.*, the court reviewed a district court's finding that a lawyer's "conduct violated Federal Rules of Civil Procedure 11, 26 and 37 and constituted civil contempt … ."[1] The Seventh Circuit held that "an attorney may not appeal from an order that finds misconduct but does not result in monetary liability, despite the potential reputational effects."[2]

Verbal Sanction Enough

The majority of circuits reject the Seventh Circuit's rule that only a monetary sanction is appealable. In most circuits, an order that is labeled a "sanction" or that finds that a specific rule was violated is appealable. Nonetheless, mere criticism is not appealable.

For example, in *Precision Specialty Metals, Inc. v. United States*, the Federal Circuit considered whether it had jurisdiction to review an unpublished order of the Court of International Trade. The lower court found that an attorney violated Rule 11 and "reprimanded" her because she had misquoted and selectively edited the authorities she cited in her brief. The judge wrote: "An attorney before this court violated USCIT Rule 11 in signing motion papers which contained omissions/misquotations. Accordingly, the court hereby formally reprimands her."[3] No monetary penalty was imposed.

The Federal Circuit concluded that the lower court's order was reviewable. The court reviewed other decisions and concluded that:

> a trial court's reprimand of a lawyer is immediately appealable even though the court has not also imposed monetary or other sanctions upon the lawyer. This principle reflects the seriously adverse effect a judicial reprimand is likely to have upon a lawyer's reputation and status in the community and upon his career. On the other hand, judicial statements that criticize the lawyer, no matter how harshly, that are not accompanied by a sanction or findings, are not directly appealable.[4]

The court thus drew a distinction between a reviewable "reprimand" and unreviewable "criticism."

Like the Federal Circuit, in the First Circuit, reprimands of attorneys, even without a monetary penalty, are appealable, but critical comments, by themselves, are not. For example, in *In Re Williams*, a judge's characterization of a lawyer's conduct as "pure baloney" was held to be unappealable.[5] The First Circuit held, however, that if the lower court had explicitly labeled its criticism a "reprimand," the order would have been appealable.[6] The First Circuit reasoned that only "decisions, judgments, orders, and decrees" are appealable, whereas "opinions, factual findings, reasoning, or explanations" are not. [7] The court held that criticism that amounted to a decision, such as a "sanction," was appealable, but criticism that did not amount to a sanction was not. The First Circuit held that the reputational effect of a formal sanction justified allowing an appeal:

> It is trite, but true, that a lawyer's professional reputation is his stock in trade, and blemishes may prove harmful in a myriad of ways. Yet not every criticism by a judge that offends a lawyer's sensibilities is a sanction.[8]

Nonetheless, the court held that "a jurist's derogatory comments about a lawyer's conduct, without more, do not constitute a sanction."[9] Thus, regardless of the reputational effect of calling a lawyer's conduct "baloney," no appeal was allowed because the lower court did not formally reprimand the lawyer.

The Ninth Circuit also focuses on the formality of the criticism leveled at a lawyer. In *Weissman v. Quail Lodge Inc.*, the lower court found that a lawyer's conduct "reflects a serious lack of professionalism and good judgment."[10] The Ninth Circuit followed the First Circuit's decision in *Williams* and held that because the lower court had not expressly identified its finding as a reprimand, the order was not appealable. In contrast, in *United States v. Talao*, the lower court found that a lawyer violated the California Rules of

Professional Conduct. Although the lower court did not formally "reprimand" the lawyer, the Ninth Circuit held that such an order was appealable. The court held:

> The district court in the present case, however, did more than use 'words alone' or render 'routine judicial commentary.' Rather, the district court made a finding and reached a legal conclusion that Harris knowingly and wilfully violated a specific rule of ethical conduct. Such a finding, *per se*, constitutes a sanction. The district court's disposition bears a greater resemblance to a reprimand than to a comment merely critical of inappropriate attorney behavior … . We do not invite appellate review of every unwelcome word uttered or written by the district courts. Indeed, a formal finding of a violation eliminates the need for difficult line drawing in much the same way as a court's explicit pronouncement that its words are intended as a sanction.[11]

Similarly, in *Butler v. Biocare Med. Techs. Inc.*, the Tenth Circuit addressed a district court order that found that an attorney violated the rules of professional conduct, and it ordered its finding mailed to every court where the attorney was admitted to practice. The Tenth Circuit held the district court's order was appealable, even though it "neither expressly identified itself as a reprimand nor imposed any sanction, monetary or otherwise."[12] The Tenth Circuit reviewed other opinions on the subject and held that "an order finding attorney misconduct but not imposing other sanctions is appealable under §1291 even if not labeled as a reprimand[.]"[13] While the court noted that "not every negative comment or observation from a judge's pen about an attorney's conduct or performance" is appealable, the court did not provide guidance as to how to distinguish appealable from unappealable criticism.[14]

In *Sullivan v. Comm. on Admissions and Grievances of the U.S. Dist. Ct. for the Dist. of Columbia*, the D.C. Circuit concluded that an order finding that an attorney had violated cannons of ethics but dismissing the charges with an "admonition" was appealable. The court held:

> [T]he District Court has determined that Appellant was guilty of proscribed conduct and this determination plainly reflects adversely on his professional reputation. In a sense, Appellant's posture is not unlike that of an accused who is found guilty but with penalties suspended. We conclude this gives him standing to appeal. [15]

The Second and Third Circuits appear to take the same approach.[16]

Criticism Appealable

The Fifth Circuit appears to be at the other end of the spectrum from the Seventh Circuit. In *Walker v. City of Mesquite*, the trial court found an attorney "guilty of 'blatant misconduct.'"[17] No monetary penalty was imposed and no magic words such as "reprimand" or "sanction" were used by the lower court. Nor did the court find that a specific rule had been violated. Nonetheless, the Fifth Circuit held that the lower court's order was appealable.

> In the case at bar Peebles was reprimanded sternly and found guilty of blatant misconduct. That reprimand must be seen as a blot on Peebles' professional record with a potential to limit his advancement in governmental service and impair his entering into otherwise inviting private practice. We therefore conclude and hold that the importance of an attorney's professional reputation, and the imperative to defend it when necessary, obviates the need for a finding of monetary liability or other punishment as a requisite for the appeal of a court order finding professional misconduct.[18]

Recently, the Fifth Circuit recognized that its view of appealability is "expansive." The Court held that because a lower court made factual findings that "negatively impacted" a lawyer's "professional reputation," an order was appealable. [19] Thus, it allowed an appeal from a lower court's recommendation that a state bar investigate a lawyer for possible discipline, but that did not sanction the lawyer or find that any particular rule had been violated.[20] The court also allowed an appeal from a finding that the lawyer committed civil contempt, but it analyzed the appealability of the recommendation to the state bar separately from the finding of contempt.[21]

Outcomes

In the chart at the top of this article, five cases allowed an appeal. In two, the criticism/sanction was affirmed,[22] in two it was reversed[23] and one was remanded for further proceedings.[24] The author has not endeavored to do a complete survey of such appeals, but these rates of reversal imply that, if one is permitted to appeal a judicial criticism, the chances of success are reasonable. On the other hand, the two lawyers who appealed and lost are now faced with published decisions at the appellate level confirming their misdeeds. Beware!

Conclusion

Judges occasionally criticize lawyers. Frequently, such criticism is justified. On the other hand, judges have been known to err and/or overreact. In some Circuits, depending on what the court says, a lawyer may be able to appeal from a critical judicial comment. The lawyer will, of course, have to decide whether the costs and risks of the appeal (*e.g.*, the possibility of a published appellate court decision affirming a critical comment) are justified. **SB**

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Endnotes

[1]972 F.2d 817, 818 (7th Cir. 1992).

[2]*Id.* at 820. *See also Bolte v. Home Ins. Co.*, 744 F.2d 572,572-573 (7th Cir. 1984) (order describing lawyer's conduct as "reprehensible" not appealable).

[3]315 F.3d 1346, 1350 (Fed. Cir. 2003)

[4]*Id.* at 1352.

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Companies Face Expanding Dangers And Pitfalls Under State False Claims Statutes

By Vince Farhat and Kristina Azlin

Since 1986, more than 4,000 *qui tam* suits have been filed under the federal False Claims Act (FCA), recovering over $6 billion in funds for the government—of which over $960 million has been paid directly to corporate whistleblowers. Most FCA cases involve companies that do business directly with the government. But companies that have never dealt with the government also face the prospect of expanded liability under a unique and seldom-invoked provision contained in the FCAs of 12 states. Indeed, for companies with *any connection whatsoever* to persons or entities that provide products or services to the government, either directly or indirectly, the risk of being named as a defendant in an expensive and burdensome FCA case, and exposed to potential liability for treble damages, civil penalties and attorneys' fees and costs, may be even higher than you thought.

The Federal False Claims Act

The federal FCA, 31 U.S.C. §§ 3729–3733 (hereinafter FFCA), also known as the Lincoln Law, imposes liability on persons and entities that knowingly submit, or cause another person or entity to submit, false claims for payment of government funds. The FFCA is intended to protect the "public fisc," and courts throughout the country have held that it should be construed broadly to effect that purpose. If found to have violated the FFCA, a defendant may be held liable for three times the government's damages *plus* civil penalties of $5,500 to $11,000 per false claim, as well as reimbursement of attorneys' fees and costs.

The FFCA was first enacted in 1863 in response to widespread fraud committed by companies selling supplies to the Union Army during the Civil War. President Abraham Lincoln strongly advocated passage of the FFCA, which included a *qui tam* provision that enabled private individuals (relators) with knowledge concerning fraud on the government to come forward and file civil actions on behalf of the government. As an incentive, the whistle blowing relator was allowed to keep a significant portion of any recovery.

The FFCA was amended in 1943 to, *inter alia*, reduce the relator's share of the recovered proceeds. It soon thereafter fell into disuse. However, prompted by reports of widespread fraud against the government, Congress took another look at the FFCA in 1986 and enacted significant amendments making it easier and more rewarding for private citizens to sue. Notably, the 1986 amendments provided that whistleblowers who brought successful cases would be entitled to 15 to 30 percent of the government's recovery (*i.e.*, treble damages and civil penalties) *and* their attorneys would be entitled to a guaranteed payment of their regular hourly fees by the defendant.

In May 2009, Congress enacted the Fraud Enforcement Recovery Act of 2009 (FERA), broadening the scope of the FFCA again. *See generally* Pub. L. No. 111-21, § 4; 123 Stat. 1617 (2009). Among other expansions, FERA allows a government complaint to relate back to an original Relator's sealed complaint (even if the government complaint is filed years later with no notice to the defendant), increases utilization and sharing of Civil Investigative Demand information between the government and Relators, and expands the "reverse false claim" provision of the FFCA, which now makes the retention of government funds that were paid in error a violation.

The State False Claims Act

When the *qui tam* provisions of the FFCA were strengthened in 1986, no states had yet enacted their own FCAs with *qui tam* provisions. In 1987, just one year later, California was the first to do so. Backers of the California False Claims Act (CFCA), Cal. Gov. Code § 12650 *et seq.*, emphasized that it was "patterned directly on the Federal FCA", but failed to point out that the proposed law would actually add a brand new basis for liability that was not found in the FFCA; namely, the so-called Inadvertent Submission/Beneficiary (IB) provision, which imposes liability on a person or entity who "is a beneficiary of an inadvertent submission of a false claim, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the state or the political subdivision within a reasonable time after discovery of the false claim." *See* Cal. Gov't Code § 12651(a)(8).

Since the CFCA was enacted, many other states have enacted their own general and/or healthcare FCAs. Of those, 12 have elected to include IB provisions, including the District of Columbia, Hawaii, Kansas, Massachusetts, Montana, Nebraska, Nevada, New Hampshire, New Mexico, Oregon, Tennessee, and Wisconsin.[1] Under the doctrine of supplemental jurisdiction, 28 U.S.C. § 1367 and 31 U.S.C. § 3732(b), U.S. district courts may exercise jurisdiction over state law claims that form the same transaction or occurrence as a claim under the FFCA—including claims alleged under the state FCAs. Such jurisdiction has been found to be appropriate even where no single false claim transaction involves both the federal government and a state entity, on the grounds that the same transaction or occurrence requirement can be satisfied through allegations that the defendant engaged in a system or scheme of false claims. *See, e.g., U.S. ex rel. Anthony v. Burke Engineering Co.*, 356 F. Supp. 2d 1119 (C.D. Cal. 2005).

State IB Provisions Expand FCA Liability To Uncertain Limits

The IB provisions differ from the typical bases for liability in the federal and state FCAs and, as such, raise many interesting legal considerations. All other bases for FCA violations, the U.S. Supreme Court has made clear, "penalize[] a person *only* for his own acts" that "cause false claims to be presented"—"not for the acts of someone else." *United States v. Bornstein*, 423 U.S. 303, 313 (1976). This is true even where a defendant had direct and concrete knowledge of a fraud on the government but did noting to stop it, even if that defendant benefited financially from the fraud. *See, e.g., U.S. ex rel. Grynberg v. Ernst & Young LLP*, 323 F. Supp. 2d 1152, 1155 (D.Wyo., 2004).

In contrast, the IB provisions purport to impose the very same liability (treble damages, civil penalties and more) on *passive* actors—*i.e.*, people and companies that ostensibly acquired a duty to make particular disclosures to particular governmental entities, but failed to do so. The problem, is that unlike the other basis of liability under the FFCA and its state counterparts, the scope, content, and timing of what is required under the IB provisions remains uncertain; the provisions themselves contain several key

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undefined terms and there is no clear legislative guidance and very little case law applying these provisions.

For both named and potential defendants, these uncertainties are daunting and could potentially result in significant, and unexpected, liability. For example, although the FFCA and the state FCAs specifically define many of their key terms, such as "claim," "knowingly," and even "material," neither the IB provisions nor any case-law construing these provisions defines who may be included as a "beneficiary" of an inadvertently submitted false claim—the predicate to liability under these provisions. Without a statutory definition, the term "beneficiary" may be argued to take any of a number of over-broad meanings—including, conceivably, anyone who receives *any* benefit, however slight or remote, arising from the submission of a false claim. Not only would this class of persons be nearly limitless, leading to absurd results in contradiction of any plausible legislative intent, but the great majority of entities and persons engaged in ordinary business would simply have no means to ascertain their risk of being held liable.

Further, the IB provisions require a beneficiary of an inadvertently submitted false claim to report *the claim* to the government if the beneficiary "subsequently discovers the falsity of the claim." Yet, this element again raises more questions than it answers: On their face, the IB provisions do not purport to impose any duty to investigate suspected "false claims" and there are *thousands* of governmental entities in the states of the U.S. that have adopted IB provisions. Is a company with a suspicion that a false claim might have been submitted downstream to an unknown governmental entity liable? If so, why? Who at the company needs to hold that suspicion? Is broad awareness that some "claims" among many *may* have been false sufficient, or is actual and specific knowledge of a particular false claim required? Presumably, since the IB provisions are—at heart—disclosure statutes, the "discovery" element must require the defendant to have actually discovered enough basic information about *the* underlying false claim, including most importantly to whom the "claim" for payment had been submitted and how it was false, to have had the *ability* to "disclose" such false claim to *the affected government entity*. However, to date, there is no clear guidance on this issue—opening the door for creative *qui tam* attorneys to name as defendants persons and companies that never actually "discovered" that any particular false claim for payment had, in fact, been submitted or acquired enough information to have made the requisite disclosures.

Thus, not only may it be uncertain in many cases whether an IB provision applies to a putative defendant at all, it is also not clear what actions the statutes require—or which omissions they punish—even if a provision does apply. With increased pressure on state and local governments to find additional and varied sources of public revenue, creative *qui tam* lawyers may try to invoke these unique IB provisions against unsuspecting companies with no direct link to government purchasers. All companies should be aware of the potential for increased FCA liability, institute compliance programs and seek the advice of counsel if potential liability is suspected. **SB**

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Endnote

[1]The IB language of the CFCA was emulated in these other states. As a result, the statutes are substantially the same as to the elements, and the content of each element, required to be established to show a violation. *See* Cal. Gov't Code § 12651(a)(8); D.C. ST § 2-308.14(a)(8)-(9); Haw. Rev. Stat. §§ 661-21(a)(8); K.S.A. 75-7503(a)(7); Mass. Gen. Laws ch. 12 § 5B(9); Mont. Code Ann. §§ 17-8-403(1)(h); N.H. Rev. Stat. Ann. § 167:61-b(1)(f); Nev. Rev. Stat. Ann. § 357.040(l)(h); N.M. Stat. Ann. §44-9-3(A)(9); Or. Stat. § 180.755(1)(i) (using slightly different language); Tenn. Code Ann. 4-18-103(a)(8); and Wisc. Stat. § 20.931(2)(h) (does not use the term "inadvertent.").

Criticism continued from page 23

[5]*In Re Williams*, 156 F.3d 86, 88(1st Cir. 1998).

[6]*Id.* at 92.

[7]*Id.* at 90.

[8]*Id.* at 90.

[9]*Id.* at 92.

[10]179 F.3d 1194, 1196 (9th Cir. 1999).

[11]222 F.3d 1133, 1137-38 (9th Cir. 2000).

[12]348 F.3d 1163, 1167 (10th Cir. 2003).

[13]*Id.* at 1168.

[14]*Id.* (quoting *United States v. Gonzales*, 344 F.3d 1036, 1047 (10th Cir. 2003) (Baldock J., dissenting)).

[15]130 U.S. App. D.C. 16 (D.C. Cir. 1967).

[16]*Keach v. County of Schenectady*, 593 F.3d 218, 223 (2d Cir. 2010) (mere critical commentary not appealable);_*Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524, 542-44 (3d Cir. 2007) (order granting motion for sanctions but not imposing monetary penalty was appealable.

[17]129 F.3d 831, 832 (5th Cir. 1997).

[18]*Id.* at 832-33.

[19]*United States v. Woodberry*, 405 Fed. App. 840, 843 (5th Cir. 2010).

[20]*Id.* at 844-45.

[21]*Id.* at 845.

[22]*Precision Specialty Metals*, 315 F.3d at 1358; *Butler*, 348 F.3d at 1175.

[23]*United States v. Talao*, 222 F.3d at 1141; *Walker*, 129 F.3d at 831.

[24]*Sullivan*, 130 U.S. App. D.C. at 957.

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SideBAR is published by the Federal Litigation Section of the Federal Bar Association; the views expressed herein do not necessarily represent those of the FBA. Send all articles or other contributions to: Robert E. Kohn, Kohn Law Group, Inc., 1901 Avenue of the Stars, Suite 200, Los Angeles, CA 90067, rkohn@kohnlawgroup.com, (310) 461-1520. Sarah Perlman, managing editor.