



# Side BAR

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## OPENING STATEMENTS

### Editor's Notes

**Robert E. Kohn**

The Federal Litigation Section announces proudly that Shelline Bennett of Fresno, Calif., has become chair of the section. Shelline had served as vice chair. Frank Carroll of Dallas, Texas, has become vice chair. Our immediate past chair, Rick Pocker, remains active in section affairs.

Shelline is the managing partner of Leibert Cassidy Whitmore's Fresno office, where she focuses on representing management in labor and employment law matters. She has worked with both private and public employers, including cities, counties, special districts, housing authorities, and community colleges. Shelline is a distinguished graduate of the University of California Hastings College of Law. She encourages all members of the section to contact her about joining our Board and getting involved in section business.

Frank Carroll, our rising vice chair, is of counsel in Cox Smith in Dallas. Frank has a primary emphasis on federal court, class action, financial institutions, antitrust, securities, and intellectual property trials and appeals, as well as the defense of grand jury, FTC, state attorney general, and other government investigations. He has been an arbitrator since 1979. Frank also serves as an adjunct professor of law at his alma mater, Southern Methodist University Dedman School of Law, where he has taught antitrust law, complex federal litigation, and trial practice since 1978. He is currently working hard to organize a litigation CLE panel to present recent Supreme Court developments affecting class action practice, which the section plans to sponsor at the FBA Annual Meeting and Convention in Chicago this September.

Our section owes deep thanks to Rick Pocker for his service as chair over the past three years. During his tenure, Rick distilled the section's views into balanced analyses that he provided to the FBA's government relations counsel concerning legislation affecting the judiciary and the administration of justice. In that important advocacy role, he cogently assessed a variety of proposals for amending laws such as the Federal Tort Claims Act, the Bail Reform Act, and the Prison Litigation Reform Act. Rick remains active as a member of the section's Board—on top of his busy role as administrative partner for the Nevada office of Boies, Schiller & Flexner LLP. A former assistant U.S. attorney and later U.S. attorney for the District of Nevada, he is a graduate of

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*Right photo: Richard Pocker, immediate past section chair; Far right photo: Shelline Bennett, new section chair.*

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## BRIEFING THE CAUSE

### *The Coming Conundra: Real Laws in an Augmented Reality*

**Brian D. Wassom**

Over the past decade, there has been no shortage of articles, CLEs, and speeches in legal circles about the implications of “virtual reality.” Many an academic hand has been wrung over the rules that govern control of the bits of data that translate into “objects” and “real estate” in online environments. To date, however, the vast majority of attorneys have safely managed to go about their business without needing to give a second thought to the question of who owns what in Second Life.

That is about to change. No longer content to remain on two-dimensional computer screens, virtual objects and other digital data have begun a mass migration into the “real” world. The buzzword for this phenomenon is “augmented reality”—digital data superimposed on the physical world—and it is poised to take our everyday lives, and the laws that govern them, by storm.

#### **The AR Revolution**

First-generation augmented reality, or “AR,” has been around for some time. Think of the yellow first down line that has become a staple in NFL broadcasts. The players don’t see the line, of course, but those equipped with special viewing devices—in this case, televisions—see it as if it were right there on the field.

Over the past year, more creative uses of the technology have emerged. Scores of print advertisements and greeting cards feature special, barcode-like codes that, when held up to a computer webcam, reveal a virtual object on the user’s monitor. In some stores, customers can hold a box of Legos up to a webcam and see a virtual representation of the fully assembled toy.

Mobile applications are where the real growth in AR is happening today. Hold a video-equipped smartphone up to the nighttime horizon, for example, and Google Sky will connect the dots of constellations and tell you their names. Stand in front of a restaurant, and Yelp will display consumer reviews as if they were floating in space in front of the door. Other programs like Tagwhat and TwittARound will show you user-generated content floating in the place from which they were posted. Work is underway on facial recognition programs that will display a person’s Facebook profile in a bubble over their head. And in some cities, you can already get directions to the nearest subway station not on a 2-D map, but in a 3-D yellow line that appears on your videophone’s screen as if it were painted on the sidewalk you’re standing on.

Such features are useful up to a point—specifically, the point where users’ arms get tired of holding their video phones out in front of them. Mobile AR will truly take off when individuals can see virtual data not on a screen, but through video-enabled glasses that superimpose data on the lenses.

Think this is mere science fiction? It’s not—at least, not for long. Prototypes of such devices already exist.<sup>1</sup> In all likelihood, these will become mainstream devices in much less time than it took for the cell phone to go from a hefty automotive accessory to an indispensable, pocket-sized gateway to a global computer network.

Meanwhile, the number of objects fitted with location-aware sensors, RFID tags, and the like grows every day. Combine this explosion of interactive capability with an always-on means of viewing virtual data, and you have the ingredients for a fully customizable, completely immersive augmented reality.

#### **Augmented Legality**

How might laws, and the ways we apply them, need to adapt to a world where AR is omnipresent? It may be too soon to know the answers, but framing the right questions is the first step. Let’s consider just a few aspects of life—and litigation—that may be affected.

*Advertising and Unfair Competition.* In a fully immersive AR world, advertisements will float in midair, untethered to billboards, or appear as if digitally painted on physical objects. What boundaries must such content observe? Courts today are still wrestling with what to do when search engines display a competitor’s ads next to search results for a brand name. But what if a Burger King ad appeared in your field of vision every time you physically looked at the Golden Arches? The pressure for time, place, and manner regulation of advertising would surely increase in a world where ads could literally appear anytime, anywhere. But where would the lines be drawn? And how much restriction would the First Amendment allow?

*Copyrights.* Owners of copyrights control the right to publicly display, publicly perform, reproduce, distribute, and make derivatives of their works. Yet uses by others that “transform” the work in a new, noncompetitive (and, usually, noncommercial) way are generally considered “fair.” Where does that line get drawn when inanimate content gets adapted into something physically interactive—such as an interactive avatar of a famous fictional character? What if that creation is only viewable to an individual user, in a personal “layer” of data that only he can perceive? In a sense, it’s the Napster, Grokster, and RIAA cases all over again, except this time the users can walk amongst their downloads rather than storing them on hard drives.

*Intentional Torts.* When virtual data can be instantly associated with facial recognition software, all sorts of new avenues for defamation, disclosure of embarrassing facts, and even infliction of emotional distress open up. And if a person encounters a threatening person or thing that she doesn’t realize is virtual, can she have a reasonable apprehension of harm, and therefore be assaulted? If so, who is liable? What about AR graffiti—could it be considered a nuisance, property damage, or trespass to chattels?

*Augmented Reality continued on page 19*

## *Negotiation as an Alternative Means to Dispute Resolution in Mexico*

**By Esteban Maqueo Barnette**

It's pitiful that in Mexico the culture of solving disputes through alternative means is still very underdeveloped. Arbitration seems to be the most sophisticated alternative to litigation in Mexico. There are good arbiters and rules that regulate the arbitration process, however no other alternative methods have been appropriately encouraged. The judicial powers have been promoting mediation centers, as an alternative to judicial disputes. Despite the efforts, not a single mediator has been known to have become one as a result of taking that course in law school. Few are the mediators or attorneys who have attended seminars or workshops given by persons, who in many cases have not studied the fine points of the mediation process beyond simply attending a course. The point is that negotiation, as an alternative means for solving disputes in Mexico has not been duly exploited. The reasons could be many. The culture is undoubtedly a very important factor in the lack of an effective practice of a negotiation process prior to initiating litigation or during its process. The most common negotiation is the one in which the contending parties undergo after a judgment has been entered against one of them. I believe this phenomenon is due to the hope that attorneys have in obtaining a favorable sentence in a higher court. Then, he who has been deemed the loser of the litigation, threatens to hinder the enforcement process with actions which are borderline fraudulent. Sometimes they are. Then the victor knows that the enforcement of the judgment will be complicated and the defeated knows that he owes. As a result, it is not until then and not always, that the parties negotiate when it could have done so prior to the litigation and arrive to the same agreement.

But what happens when the parties wait until then to begin negotiating? It is clear that litigation make the parties incur in expenses. In addition and depending on the case, they have paid in full or partially the litigating attorney's fees. They risked everything they could get because, lets face it, bringing justice in courts is a breed of its own. I have seen medical, physical, and emotional problems deriving from the stress of bearing a conflict that could last years. In a nutshell, the cost of litigation is not limited to only expenses and attorney fees.

Our personality as Mexicans many times does not benefit the interests in conflict. These can be our clients' or that of the attorneys. There are those who would rather not give alternatives to their clients because the fees charged would be lower or the agreed contingent compensation would be determined from a probably lower base amount. No attorney wishes to portray and even more in a case that he put together, by suggesting the possibility of a negotiation, even when there is no such weakness. These are some of the reasons for which, in my experience, negotiation processes have been interrupted.

These problems, which make negotiations an infrequent, alternate solution or prevention of disputes can be lessened by a few factors. First of all, we have the education of law students in college. For those of us that did not take this course in law school, there are courses, workshops, and post-grad certificates in Mexico

and abroad. Negotiation as a means to solve or prevent disputes is not the same as a business negotiation, although both share some traits.

A person who knows about negotiation to prevent or to solve disputes and prevent them from reaching the courts, knows how to give value of things that can be useful to the counterparty and at no expense to he who offers it. Not everything is solved with cash. There is value in actions, goods and services that can be valuable for some people and inexpensive for others.

Negotiation is not only about persuading, but also about giving value to things that can be used for negotiation. It requires patience, study, analysis and sacrifice.

Harvard Law School in Cambridge, Mass., has a negotiation program within its law student program. In 2006, when I attended the workshops there, the basic program taught us to create value in deals and disputes. It is surprising how much you can negatively affect a client by not exploiting, to his or her benefit, the opportunity of having a negotiated agreement. Few are those who take the time to estimate the cost of a two or three year litigation process and determine whether this cost is greater or less than what could be settled as the result of a negotiated agreement or a sentence. Neither do they bother to consider which would be their best alternative to a negotiated agreement, in other words, evaluate whether if the negotiation fails to provide the minimum required compensation to avoid the conflict, which is the alternative and what will the cost be?

In Mexico City (Federal District), we have "conciliators" in the courthouses. In my experience, I have found their intervention to be very minor and they are an absurd expense for taxpayers. Who has walked in a hearing in which the conciliator has not limited his participation to asking if the parties have reached an agreement? In the best scenario, like robots, they recite, "We invite you to reach an agreement;" however, I have never seen them explain to the parties the process by which they can determine whether the possibility of an agreement even exists before the trial is over.

In Mexico, I have seen two negotiation trends. The first one is where one party or its attorney gives the counterparty an ultimatum and often with ridiculous conditions. The most common is "Pay me what I am suing you for or there will be no agreement." As if granting all the wishes of a single party was any type of agreement or negotiation. The other trend I often see is the one in which one of the parties makes a ridiculous offer and expects to receive a counteroffer close to the first one. This is typical: "I owe you 100, but I offer you 25 and expect you to counteroffer 50."

I personally find this offensive. Not offensive to the counterparty, but offensive to the client since this immediately closes the door for the chance of avoiding the dispute and going home with a good settlement instead of withstanding a long period of conflict-ridden environment. We the litigators are used to this, but not our clients and for all those who have something to lose, this causes them stress, which is quite normal. On the other hand, it is immoral to forget that our job is to help our client, not to give him or her a heart attack.

I applaud the government's interest in promoting alternative

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## Recent Federal Court Litigation Over Nazi Stolen Artworks

Thanks to the initiative of U.S. Magistrate Judge Michelle H. Burns of the U.S. District Court of Arizona (Phoenix), the FBA's Phoenix Chapter and the Federal Litigation Section co-sponsored a luncheon lecture by Raymond J. Dowd on recent developments in federal litigation involving Nazi looted art, including his successful appeal at the Second Circuit in *Bakalar v. Vavra*, a case involving the provenance of Egon Schiele's famous painting *Dead City*. Over 90 people attended the lecture at the Sandra Day O'Connor U.S. Courthouse in Phoenix, Ariz., on Feb. 17, 2011. Several survivors of the Nazi holocaust attended and participated in the lively discussions.

Phoenix Chapter President Alison Bachus gave the opening remarks, and Robert E. Kohn of Los Angeles introduced Dowd to the audience. Kohn is the secretary and treasurer of the Federal Litigation Section. David B. Rosenbaum, chair of the Fellows of the Foundation of the Federal Bar Association, was active in supporting and encouraging the event.

Dowd is a member of the Federal Litigation Section who serves as FBA general counsel and as vice president for the Second Circuit. He is a partner in Dunnington, Bartholow & Miller LLP in New York and the author of *Copyright Litigation Handbook* (West Publishing).



At the lecture—(l to r) Monique Mendel, vice president of Phoenix Holocaust Survivors Association; Rob Kohn, Federal Litigation Section; Nancy Fordonski (survivor); Judge Michelle Burns, FBA Board member; Jeannette Grunfeld (survivor); Ray Dowd; Ralph Schuster; Gert Schuster (survivor); and Joan Sitver, president of Phoenix Holocaust Survivors Association.

### Negotiation continued from page 3

means for solving disputes. I do so not because of the reason they do it, to avoid a greater workload, but the fact that they promote it is great. I believe that this issue should be analyzed with greater detail and the universities should create academic programs that include all the alternative means for solving disputes and not limit them to arbitration.

In commercial relations, more and more arbitral clauses are being added. This practice may not be the best choice for all cases because eventually the time to enforce an award before a judge will come. Let's imagine a dispute between two merchants in which one is a supplier of a given good or service of the other and an exclusivity clause has been agreed to between them. If the supplier is not paid for the goods or services, is he obliged to keep supplying the other? If an exclusivity agreement exists between them, the supplier cannot sell goods or services to third parties until the trial or arbitration has ended? However, these merchants could agree to a clause in their contract stating a negotiation period that must be fulfilled before having to go before a judge or mediator. The attorneys would have to be compliant with the clause, because otherwise a condition needed to begin the litigation would be missing.

The disadvantage I see to the pact of a negotiation process is the additional delay for the duration agreed upon and the remuneration of the negotiators. Aside from these slight disadvantages, which can be minimized through establishing a very short nego-

tiation period and the remuneration agreement that each person has with their representative, I see many advantages.

The first is to increase the probability of ending disputes without having to recur to judicial or arbitral controversy. Continuing to do business with the counterparty is more feasible than after a dispute. The time and money saved from avoiding the controversy. The professional fees can be less for 10 days of work rather than for two years. The parties would have, in the very short term, answers to certain aspects over which dissidence existed, because despite not reaching agreements to each and every one of the matters subject to negotiation, there is a chance that some of them could be left out of litigation. In the previous example, one could negotiate that the supplier be released from the exclusivity with its customer and in return frees the client from liability from the damage caused. Anyhow, this is only a possibility.

In conclusion, we should nurture the culture of negotiation as a means to prevent disputes, without the stigmas or formulas in which we have all taken part of, in other words, leave behind all the ultimatums and proposal of ridiculously large sums of money to arrive at the midpoint. Each individual acting in self capacity or representing a corporation should have an open mind, stop being visceral and be prepared for a negotiated agreement which could bring large savings of time, money and stress, even in the case of resulting the winner in a controversy. **SB**

## Tell Me a Story

By Rick Stone

*“Humans are essentially storytellers.”*  
— Walter Fisher<sup>1</sup>

Civil jury trials are relatively rare events. Only about 1% of cases in the state court systems and 2% in the federal system end with a verdict by a civil jury. What every trial lawyer wants to know is: how do juries make their decisions? Of course, every jury is different, so no one source of information could hope to predict what will happen in the next case. But I have come to some general conclusions about what makes a jury tick. In this article, I'm going to focus on one of these—the power of storytelling.

Systematic jury research began in 1953 with the Chicago Jury Project, a multiyear effort undertaken by a team of researchers at the University of Chicago. The most well-known and influential product of the Chicago Jury Project is Kalven and Zeisel's 1966 book, *The American Jury*, which reported the results of a massive field study comparing actual jury verdicts with the verdicts favored by the trial judges. Over 500 judges from around the United States participated in the research, returning questionnaires on 3,576 criminal trials and over 4,000 civil trials. Judges and juries agreed 78% of the time on the appropriate verdict in the civil cases. Comparable results were observed in the criminal jury trials that were studied.

To identify the sources of disagreement, Kalven and Zeisel conducted extensive post-deliberation interviews with jurors from 225 trials to reconstruct the distribution of verdict preferences on the first ballot during deliberations. When the distribution of verdict preferences was compared with final verdicts, interviewers discovered that the verdict preferred by the majority on the first ballot was the jury's final verdict over 90% of the time. This was probably Kalven and Zeisel's single most striking finding. What it means is that 1 in 10 trials will result in a reversal of the verdict preference initially favored by the majority. In other words, a substantial number of trials will necessarily hinge on the deliberation process. This finding begs the question, how do jurors come to their initial verdict preferences?

In 1981, social scientists Lance Bennett and Martha Feldman took a look at how lawyers communicate with juries in real trials. In their ground-breaking book, *Reconstructing Reality in the Courtroom*, Bennett and Feldman concluded that *conflicting stories* were at the heart of trials.<sup>2</sup> Although they did not directly investigate juror decision-making, Bennett and Feldman observed that, in a jury trial, each side tries to develop and tell a story—or maybe alternative stories—that are consistent with the position they need to win the trial. Arguing that jurors probably processed information in terms of the conflicting narratives, Bennett and Feldman hypothesized that individual jurors would construct their own narratives from the trial evidence based on their personal life experiences and biases. Because individuals develop different societal norms that they apply in different social contexts (a set of biases), you can change a juror's perspective as to the appropriate societal norms—and the juror's preferred outcome in a case—by tapping into a different set of experiences and biases. In other words, you can change the outcome by shifting the “paradigm.”

Steven Covey, author of *Seven Habits of Highly Effective People*,

illustrates how a paradigm shift in the way a person views the world can shift that person's perspective by re-framing the issue. Covey calls this a “paradigm shift,” but what he's talking about is a shift in the societal norms a person will apply to a social context based on the person's previous life experience and biases regarding that situation. Covey describes an actual incident on a New York subway where a father with a number of unruly children entered his subway car and began to make an enormous ruckus. Believing that children should be controlled by their parents, Covey admonished the man for permitting the children to disrupt the other passengers in the car. The man sadly replied that the children were returning from their mother's funeral and he did not have the heart to discipline their behavior, knowing they were acting out their grief. The funeral explanation shifted the social paradigm, immediately causing Covey to feel empathy for the man and his children.

Bennett and Feldman used the notorious Patty Hearst trial of the 1970s to illustrate their argument. Hearst, a wealthy heiress, was charged with willingly participating in a bank robbery staged by her militant Symbionese Liberation Army kidnapers. The trial presented conflicting narratives to the jury. The prosecution and the defense agreed that Hearst had been kidnapped, and that she had carried a gun during the holdup. At issue was the meaning of her behavior during the robbery. Hearst's defense—that she acted under threat or coercion—was persuasive if the jurors believed she followed rules that members of society follow when they are acting under coercion. The prosecutors argued Hearst did not follow the rules of society because, by the time of the robbery, she had become a loyal member of the group. Hearst was convicted, but Bennett and Feldman believe she might have avoided conviction by arguing that she was brainwashed—rather than coerced—because it would have forced the jurors to consider a different set of societal norms.

Ten years later, Nancy Pennington and Reid Hastie confirmed Bennett and Feldman's hypothesis by studying how individual mock jurors processed trial information. Pennington and Hastie recruited people who had been called for jury duty, but not empanelled to serve on an actual trial. The recruits watched a movie of a murder trial, realistically reenacted by professional actors. Each was asked a series of detailed questions to outline the reasoning that led them to declare the defendant innocent or guilty. The procedure was repeated with multiple panels of would-be jurors.

The researchers found that 45% of what the jurors used as the basis for their decisions had not been presented in the courtroom. It came instead from each juror's experience, assumptions about human nature, and judgments about the character and psychology of the participants in the case. The jurors paid attention to what was presented—collectively, the panels accurately recalled 93% of the facts in the case—but found it inadequate to make sense of what had occurred. To solve this problem, the jurors, in effect, made up stories to connect the disconnected evidence points into a whole script that was coherent in terms of their personal experiences. Pennington and Hastie called this the “Story Model” of

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jury decision-making, and it is now widely accepted as a general description of how individual jurors process information and reach their decisions.<sup>3</sup>

In the Story Model, jurors use their prior experience to remember and organize trial evidence into a plausible story.<sup>4</sup> They don't simply record and store for later use evidence as they receive it; they actively select and organize the evidence to construct their own story about what happened. The story they construct is based on the evidence, but jurors also use it to fill in gaps in the evidence by drawing inferences based on their understandings of how the world works. Jurors then attempt to match the story to available verdict categories, selecting the verdict that provides the best fit.

Tom Mauet, director of trial advocacy and a professor at the University of Arizona College of Law, is a well known author and speaker on trial practice at NITA and other seminars across the country. His handbook, *Trial Techniques*, is one of the best in print. Writing about the "psychological principles of jury persuasion," Mauet believes "jurors are primarily affective, not cognitive thinkers." While cognitive persons are "orderly, logical information seekers, and *inductive* problem solvers," affective persons are "selective perceivers of information and base decisions largely on previously held attitudes about people and events." Thus, according to Mauet, jurors primarily employ *deductive*, not inductive, reasoning—"a few basic premises and facts are used to reach quick decisions and other information is then accepted, rejected, or distorted to 'fit' the already determined conclusions."<sup>5</sup>

My personal experience with juries—especially in complex cases—leads me to a more optimistic conclusion. I believe juries try very hard to "get it right." The available research suggests that juries tend to be either "evidence-driven" or "verdict-driven." There must be a strong temptation for juries to immediately vote as soon as they get into the jury room. It's one of the reasons why I always remind the jurors in my cases that both sides want them to wait, listen to what both sides have to say, and carefully consider all of the evidence before making up their minds. I usually make this point two times—once in my opening and again in my closing—because I firmly believe it is the right thing for them to do. I don't want them to vote right away in any complex case that I try, and I don't think that they do.

When they consider the evidence, I have no doubt that juries are influenced by stories. After all, stories have been the basic media for human communication forever. When we

were children, we listened to the bedtime stories told by our parents. Many of us have swapped stories around a campfire at least a couple of times in our lives, just like our ancestors did in the long ago. Our written literature grew out of an oral story-telling tradition. There has always been—and there still is—great power in stories. If you want to be a jury trial lawyer, you should learn to be a good storyteller. I promise you will be richly rewarded. **SB**

*Rick Stone has 40 years of national experience in law and public service. A partner of Ball Janik LLP, he has been called one of the best trial lawyers in Oregon and in California. In 2006, he won the largest plaintiff's jury verdict in the United States—an \$850 million award that is the biggest award in Oregon history. He was a top aide at the Pentagon and the Department of Energy for President Jimmy Carter, has served on numerous public boards and commissions, and has led high-profile special investigations on behalf of public and private clients, such as the Los Angeles Police Commission's study of the Rodney King civil disturbances. He has been profiled in Chambers USA, The Best Lawyers in America, Oregon Super Lawyers, The American Lawyer, The Los Angeles Daily Journal, The Portland Business Journal, and in the Marquis Who's Who in American Law, Who's Who Among Emerging Leaders, Who's Who in the West, Who's Who in America, and Who's Who in the World.*

**Endnotes**

<sup>1</sup>Walter R. Fisher, *Human Communication as Narration: Toward a Philosophy of Reason, Value, and Action* 64 (U. S.C. 1989).

<sup>2</sup>W. Lance Bennett and Martha S. Feldman, *Reconstructing Reality in the Courtroom: Justice and Judgment in American Culture*, (New Brunswick, NJ, Rutgers University Press, 1981).

<sup>3</sup>Reid Hastie, Steven D. Penrod and Nancy Pennington, *Inside the Jury* (Cambridge, Massachusetts: Harvard University Press, 1983).

<sup>4</sup>R. Hastie, S. D. Penrod, and N. Pennington, *Inside the Jury* (Harvard Univ. press, Cambridge, 1983); N. Pennington and R. Hastie, *Psychol. Bull.* 89, 246 (1981).

<sup>5</sup>Thomas A. Mauet, *Trial Techniques* (Little, Brown and Company, 4<sup>th</sup> ed. 1996), at 462-463.

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the University of Virginia Law School.

This issue of *SideBAR* benefits, as always, from the contributions of you: the federal litigation bar. We need you to write the varied and insightful articles that Federal Litigation Section members enjoy each time this newsletter is published. Thank you. **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 a member of the District of Columbia and California bars. Kohn 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.*

## FEDERALLY SPEAKING

### *Amendments to the Federal Rules of Civil*

#### *Procedure*

**By Alan M. Ruley**

Rules 26 and 56 of the Federal Rules of Civil Procedure have been amended. As to cases filed Dec. 1, 2010, and thereafter, the amendments affect Rule 26(a)(2), which concerns disclosure of expert testimony, and 26(b)(4), concerning depositions of trial experts. Work product protection is extended to drafts of expert reports and most attorney-expert communications, and certain information must be provided on experts who are not required to write reports. Meanwhile, as to all pending cases, Rule 56 has been largely re-written effective Dec. 1, 2010. While the amendments to Rule 56 are not intended to change the summary judgment standard or burdens, the procedures for presenting and deciding summary judgment motions under Rule 56 are changed substantially.

#### **1. Work Product Protects Drafts and Most Communications.**

Rule 26(b)(4) contains a new subsection (C), which confers work product protection for most communications between attorneys and retained experts. Under the amended rule, Rules 26(b)(3)(A) and (B) (which provide work product protection for documents and tangible things prepared in anticipation of litigation or for trial) now apply to protect from disclosure all communications between an attorney and a retained testifying expert, except for three categories of attorney-expert communication that are still fair game for discovery:

1. Compensation for the expert's study or testimony;
2. Facts or data provided by the attorney that the expert considered in forming the opinions to be expressed; and
3. Assumptions provided to the expert by the attorney that the expert relied upon in forming the opinions to be expressed.

Rule 26(a)(2)(B), which lists the items that must be contained in the retained expert's written report, is amended in subsection (ii) to provide that an expert's written report must contain the "facts or data" considered by the expert in forming his or her opinions. Under the old rule, the report was required to contain the "data or other information" considered, which necessarily included communications with counsel.

Finally, Rule 26(b)(4) also contains a new subsection (D), which expressly extends work product protection to drafts of expert reports and disclosures.

#### **2. Information on "No Report" Experts.**

Under Rule 26(a)(2), written reports are required only from experts who are "retained or specially employed to provide expert testimony in the case or ... whose duties as the party's employee regularly include giving expert testimony." In practice, this meant that persons such as treating physicians, or employees with expertise whose duties did not include regular expert testimony, but who were expected to testify as experts, were not required to

provide written reports.

Amended Rule 26(a)(2) includes a new subsection (C), which provides that if an expert is not required to provide a written report, a party's expert disclosures must state (1) the subject matter on which the witness is expected to present evidence; and (2) a summary of the facts and opinions to which the witness is expected to testify. This disclosure necessarily will come from counsel, rather than in the form of a report prepared by the retained expert.

#### **3. Blackline of the Changes to Rule 26.**

Rule 26(a) (2) *Disclosure of Expert Testimony.*

(A) *In General.* [unchanged]

(B) *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) the facts or data or other information considered by the witness in forming them;
- (iii) - (vi) [unchanged]

(C) *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure [i.e., the disclosure required in Rule 26(a)(2)(A) must state:

- (i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and
- (ii) a summary of the facts and opinions to which the witness is expected to testify.

\* \* \*

Rule 26(b)(4) *Trial Preparation: Experts.*

(A) *Deposition of an Expert Who May Testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(b) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Trial-Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

*FRCP continued on page 8*

*FRCP continued from page 7*

(C) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

- (i) relate to compensation for the expert's study or testimony;
- (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
- (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

\* \* \*

#### **4. Citing to the Record in Summary Judgment Proceedings Required**

Under the amendments to Rule 56(c), a party asserting that a fact (1) cannot be genuinely disputed, or (2) is genuinely disputed, now *must* support that assertion by either citing to particular parts of the record before the Court or showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

#### **5. Affidavits or Declarations.**

Old Rule 56 referred only to affidavits. Amended Rule 56(c)(4) permits affidavits or declarations to be used, so long as they are made on personal knowledge, set forth admissible evidence, and show competence. The Advisory Committee's Report explains that in addition to affidavits, a party may submit an unsworn written declaration, certificate, verification, or statement under penalty of perjury in accordance with 28 U.S.C. § 1746.

#### **6. Options Where Facts Not Properly Supported or Addressed**

The amended rule provides if a party fails to properly support an assertion of fact, or fails to properly address another party's assertion of fact, the Court has several options. It may (1) give the party an opportunity to properly support or address the fact; (2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if supported by the motion and supporting materials; or (4) issue any other appropriate order. Rule 56(e).

The amended rule also expressly provides that, after giving notice and a reasonable time to respond, the Court may grant summary judgment for a nonmovant; grant summary judgment on grounds not raised; or consider summary judgment on its own, after identifying for the parties material facts that may not be genuinely in dispute. Rule 56(f).

Moreover, if the Court does not grant all the relief requested by the motion, it may enter an order stating any material fact that is not genuinely disputed, and treating that fact as established in the case, including an item of damages or other relief. Rule 56(g).

#### **7. "Shall" Reinstated in Ruling on Summary Judgment Motions**

In 2007, the word "shall" in Rule 56 was changed to "should" ("The judgment sought should be rendered if [the record] shows that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."). The 2010 amendments replace "should" with "shall." Neither change, however—shall to should, or should to shall—was intended to change the standard for when summary judgment is to be granted. **SB**

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## “Disability” After the ADAAA—The Courts Start Weighing In

By Jana Terry

It has been more than two years since the ADA Amendments Act (the “ADAAA”) became effective on Jan. 1, 2009. Only recently, however, have courts begun deciding cases under the ADAAA. This article will summarize the key changes of the ADAAA, the EEOC’s proposed regulations, and the first cases interpreting the ADAAA.

### The ADAAA - Casting A Broad Net To Determine “Disability”

“Disability” under the ADA means “with respect to an individual—(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment, or (C) being regarded as having such an impairment.”<sup>1</sup> This basic definition has not changed, but its component terms have now been fleshed out in an effort to overturn federal court precedents and EEOC regulations that, in Congress’s view, incorrectly narrowed the scope of the ADA. In particular, the ADAAA was meant to overturn two Supreme Court cases holding that (i) the terms of the ADA must be “interpreted strictly to create a demanding standard for qualifying as disabled,” (ii) an impairment is not substantially limiting unless it “prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives”<sup>2</sup> and (iii) a person whose impairment is corrected by mitigating measures does not have an impairment that “substantially limits” a major life activity.<sup>3</sup> Rejecting narrow interpretations of “disability,” Congress amended the ADA to provide “broad coverage” of individuals “to the maximum extent permitted” by the ADAAA.<sup>4</sup> Specifically, in addition to the basic definition, the ADAAA now provides guidance as to how courts should construe the terms “impairment,” “substantially limits” and “major life activities.” A few of the significant changes include:

(1) The term “major life activities” now explicitly includes “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” The term “major life activities” also includes major bodily functions such as “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.” Further, a person may have a disability even if he or she has an impairment that substantially limits only one major life activity.

(2) A person may satisfy the “regarded as” prong if the person has been subjected to a prohibited action “because of an actual or perceived impairment” even if the impairment does not limit or is not perceived to limit a major life activity.

(3) Although for purposes of the “regarded as” prong of the disability definition the term “impairment” does not encompass impairments that are “transitory [lasting six months or less] and minor,” the ADAAA does *not* provide that impairments must

have an expected duration longer than six months in order to constitute a disability under the impairment and record of impairment prongs of the definition. Further, “[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”

(4) The determination of whether an impairment “substantially limits” a major life activity is to be made without regard to “the ameliorative effects of mitigating measures” such as medication, medical devices, prosthetics, hearing aids, accommodations, auxiliary aids or services, or learned behavioral or adaptive neurological modifications.”<sup>5</sup>

### Guidance from the EEOC

On Sept. 23, 2009, the EEOC published proposed regulations to implement the ADAAA. After a 60-day comment period and a long delay, the EEOC privately approved its final draft regulations in January 2011 and forwarded them to the Office of Management and Budget for review and comment during an additional 90-day period.<sup>6</sup> Since the final draft regulations have not been published, the extent to which they differ from the proposed regulations is unclear. However, the proposed regulations show a clear trajectory toward very broad coverage under the ADAAA. These are the highlights:

- An impairment does not have to “prevent” or “significantly or severely restrict” a major life activity in order to be “substantially limiting.”<sup>7</sup>
- The term “disability” should be “construed in favor of broad coverage” and making determinations “should not require extensive analysis.” The “focus of an ADA case should be on whether discrimination occurred, not on whether an individual meets the definition of ‘disability.’”<sup>8</sup>
- In addition to the “major life activities” identified in the statute, the activities of sitting, reaching, and interacting with others and the major bodily functions of the hemic, lymphatic, musculoskeletal, special sense organs and skin, genitourinary, and cardiovascular systems are also “major life activities.”<sup>9</sup>
- Examples of impairments that are episodic or in remission may include epilepsy, hypertension, multiple sclerosis, diabetes, major depression, bipolar disorder, schizophrenia and cancer.<sup>10</sup>
- The determination of whether an individual has a disability does not depend upon what an individual is able to do in spite of the impairment.<sup>11</sup>
- Generally, it will be unnecessary to determine whether someone is substantially limited in the major life activity of “working” because a person with a disability will be substantially limited in another major life activity.<sup>12</sup>
- A prohibited action based on actual or perceived impairment includes an action based on the symptoms of such impairment or any medication or mitigating measures used for the impairment.<sup>13</sup>
- “Regarded as” coverage can be established regardless of whether the employer is motivated by fears, myths or stereotypes. Further, evidence that the employer believed that the

*ADAAA continued on page 10*

*ADAAA continued from page 9*

individual was substantially limited in any major life activity is not required.<sup>14</sup>

- The “transitory and minor” exception to the “regarded as” prong of the disability definition applies only where the impairment is both transitory *and* minor.<sup>15</sup>
- Some example impairments are classified into three categories: impairments that will (1) almost always, (2) sometimes, and (3) usually not constitute a disability under the ADAAA:<sup>16</sup> (see chart below)

**Highlights from the First Court Decisions Interpreting the ADAAA**

1. **The ADAAA is not retroactive.** With few exceptions, the federal courts of appeal have concluded that the ADAAA cannot be applied retroactively.<sup>17</sup> Rather, it applies only where an adverse employment or other prohibited action has occurred after January 1, 2009, the effective date of the ADAAA.<sup>18</sup>
2. **The ADAAA results in a relaxed standard for pleading “substantial limitation” for purposes of deciding motions to dismiss.** Several decisions indicate that it will be easier

for ADAAA plaintiffs to withstand motions to dismiss for failure to sufficiently allege a substantial limitation on a major life activity.

*Gil v. Vortex, LLC (monocular vision)*. Although the Supreme Court has held that courts must conduct “case-by-case” determinations to determine whether individuals with monocular vision have an impairment that is substantially limiting, the *Gil* court held that the plaintiff’s failure to describe the precise nature of his substantial limitations should not result in dismissal; plaintiff had pled enough to satisfy the “relaxed disability standard” of the ADAAA.<sup>19</sup>

*Franchi v. New Hampton School (eating disorder)*. A complaint alleging that plaintiff continued to drop weight in the days following six weeks of outpatient and inpatient treatment at eating disorder clinics was sufficient to state a claim that the plaintiff’s eating disorder substantially limited the major life activity of eating, particularly under the broad construction dictated by the ADAAA.<sup>20</sup>

*Horgan v. Simmons (HIV positive)*. Where plaintiff’s com-

<i>Almost Always a Disability</i>	<i>Sometimes a Disability</i>	<i>Usually Not a Disability</i>
Deafness	High blood pressure	Common cold
Blindness	Back and leg impairments	Seasonal or common flu
Intellectual disability	Learning disabilities	Sprained joint
Missing limbs	Panic or anxiety disorders	Minor, non-chronic gastrointestinal disorders
Mobility impairments requiring use of a wheelchair	Some forms of depression	Broken bone expected to heal completely
Autism	Carpal tunnel syndrome	Appendicitis
Cancer	Hyperthyroidism	Seasonal allergies
Cerebral palsy	** This category “may require somewhat more though still not extensive analysis.”	** Other temporary, non-chronic impairments of short duration with little or no residual effects
Diabetes		** BUT an impairment may still be substantially limiting even if it lasts fewer than 6 months (e.g.m a 20-pound lifting restriction lasting several months)
Epilepsy		
HIV/AIDS		
Multiple sclerosis		
Muscular dystrophy		
Major depression		
Bipolar disorder		
Post-traumatic stress disorder		
Obsessive-compulsive disorder		
Schizophrenia		

plaintiff alleged that he had been HIV positive for 10 years and that his employment was terminated one day after the company president compelled him to disclose his HIV status, the complaint was not subject to dismissal. Although defendant argued that plaintiff had failed to plead that the HIV impairment had a substantial limitation on a major life activity, the court denied defendant's motion to dismiss and noted that it was "certainly plausible—particularly under the amended ADA—that plaintiff's HIV positive status substantially limits a major life activity: the function of his immune system."<sup>21</sup>

**3. Court classifications of impairments under the ADAAA have been inconsistent.** The few courts that have entered summary judgment rulings concerning whether certain impairments may constitute disabilities under the ADAAA have been inconsistent.

*Hoffman v. Carefirst of Fort Wayne, Inc. (cancer in remission).* As the parties agreed that Stage III renal cancer would substantially limit a major life activity when active, plaintiff, whose Stage III renal cancer was in remission at the time of the adverse employment action, did not need to show that he was substantially limited in a major life activity at the actual time of the adverse employment action in order to prevail in his ADAAA case. The court found that its conclusion followed "the clear language of the ADAAA" and refused to certify its order denying defendant's motion for summary judgment for interlocutory appeal.<sup>22</sup>

*Wurzel v. Whirlpool Corp. (Prinzmetal angina).* Plaintiff with Prinzmetal angina, which causes unpredictable coronary artery spasms, failed to make out a prima facie claim under the ADAAA because his angina was intermittent. Without citing the ADAAA's provision including episodic impairments within the definition of "impairment" and without consulting the EEOC's proposed regulations, the court found under *Toyota* that "[t]he princip[le] that intermittent impairments, such as those resulting from plaintiff's sporadic angina spasms, are not deemed disabling remains good law."<sup>23</sup>

*Noriega-Quijano v. Potter (arched feet/ plantar fasciitis and chronic lower back pain).* Where plaintiff had two service-related disabilities (highly arched feet with plantar fasciitis and chronic lower back pain), the Department of Veterans Affairs had assigned the plaintiff a disability rating of 60% and doctors had limited plaintiff to an 8-hour work day and 40-hour work week and had restricted him from running, jumping, marching, lifting, or prolonged standing, the court found that plaintiff did not qualify as disabled "even under the newly broadened standards set forth in the ADAAA" because the restrictions do not rise to the level of a substantial limitation on a major life activity "even when those terms are broadly construed."<sup>24</sup>

*Lowe v. American Eurocopter LLC (obesity).* Where the plaintiff alleged that she was disabled due to her weight

and that her disability made her "unable to park and walk from the regular parking lot," the court refused to dismiss the case despite the existence of pre-ADAAA cases and EEOC Interpretive Guidance providing that obesity is not a disabling impairment except in rare circumstances. The court found such pre-ADAAA guidance irrelevant and held that plaintiff had stated a claim for relief for purposes of Rule 12(b)(6) by asserting that her obesity affected her major life activity of walking. By alleging merely that her employer harassed her for parking in a handicap parking spot, treated her "differently," and forced her to perform "more and additional work" than others due to her obesity, the court found that she also stated a claim for disability-based workplace harassment.<sup>25</sup>

**Implications for Practice**

Since the ADA was first passed in 1990, much of ADA jurisprudence has centered on the question of whether a plaintiff was "disabled" for purposes of the statute. All indications are that those days are over and impairments ranging from hypertension to depression to cancer in remission may now be disabilities per se. Moving forward, cases will start to turn on the *defendant's conduct* rather than the *plaintiff's health*. **SB**

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**Endnotes**

<sup>1</sup>42 U.S.C.A. § 12102(1)(A)-(C) (citations omitted).

<sup>2</sup>*Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 197-98 (2002).

<sup>3</sup>*Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482-83 (1999).

<sup>4</sup>42 U.S.C.A. § 12102(4)(A).

<sup>5</sup>*Id.* at §§ 12102(2)(A) & (B), 12102(3)(A) & (B); 12102(4)(C), (D) & (E) (However, the mitigating effects of ordinary eyeglasses or contact lenses may still be considered in determining whether the impairment constitutes a disability).

<sup>6</sup>See <http://hr.blr.com/HR-news/Discrimination/Disabilities-ADA/EEOC-Approves-ADAAA-Draft-Final-Regs/>

<sup>7</sup>Regulations To Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 74 Fed. Reg. 48431, 48440 (proposed Sept. 23, 2009) (to be codified at 29 C.F.R. pt. 1630.2(j)(1)).

<sup>8</sup>*Id.* (to be codified at 29 C.F.R. pt. 1630.2(j)(2)(i)).

## APPROACHING THE BENCH

### ***UK Bribery Act 2010 and the U.S. FCPA: Similarities, Differences, and What the New Law Means for Individuals and Businesses Worldwide***

**By Colin da Silva Vint**

**Edited by Peter D.P. Vint**

Since the passage of the Foreign Corrupt Practices Act (FCPA) by Congress in 1977, the U.S. has led the world in prohibiting bribery of foreign governments and foreign officials to obtain public contracts. For much of that time, the rest of the world failed to see the benefit of such an approach, and in fact most foreign (and many U.S.) businessmen viewed the FCPA as a handicap for companies doing business overseas. Many foreign companies were enmeshed in scandals involving corrupt governments and the paradigm began to shift. In particular, Britain was criticized for being lax on corrupt business practices, for having an antiquated body of law on the subject, and for avoiding prosecution of firms that engaged in bad practices. That has now changed. With the enactment of the UK Bribery Act 2010, Britain has embarked on a get tough program that in some ways is even stronger than the U.S. FCPA.

This article will highlight some of the key provisions of the Bribery Act and the FCPA, detail the differences between the two, and hypothesize how recent FCPA decisions would have come out if brought under the Bribery Act. With its passage, the Bribery Act expands the reach of what the FCPA has encompassed for the last 30-odd years. First, it criminalizes payments not only to government officials, but to private citizens as well. Second, it eliminates “grease payments,” a gray area of bribery that has remained legal in the United States. Third, the Bribery Act creates a strict liability offense for corporation officials who fail to prevent bribery on the part of one of their employees. Finally, the Bribery Act doubles the potential jail time for offenders from 5 years to 10, and eliminates caps on fines that exist under the FCPA. In this author’s opinion, the Bribery Act fills the gaps left in the FCPA and creates the strict “no tolerance” policy towards bribery that all nations should strive to achieve. With no seminal case yet decided under the Bribery Act, there is still vast uncertainty on how to fall into compliance for international organizations and individuals.

In February 2009, Halliburton and Kellogg Brown & Root agreed to pay \$579 million in fines related to allegations of foreign bribery, “the biggest fines ever paid by U.S. companies in a foreign corruption case.”<sup>1</sup> The allegations claim that Halliburton and KBR formed a joint venture that gave \$182 million in bribes to Nigerian government officials over a 10-year period, resulting in over \$6 billion in awarded construction contracts. On April 1, 2010, Daimler AG and three subsidiaries resolved charges stemming from a Foreign Corrupt Practices Act (FCPA) violation by pleading guilty to various

provisions and agreeing to pay criminal fines and penalties totaling \$93.6 million.<sup>2</sup> Daimler admitted to making hundreds of improper payments amounting to tens of millions of dollars to foreign officials in over 20 countries to secure government contracts for the purchase of their vehicles, worth hundreds of millions of dollars. Daimler also admitted that it agreed to pay kickbacks to the former Iraqi government in connection with various U.N. contracts.<sup>3</sup>

On April 30, The World Bank debarred Macmillan Limited, a large UK publishing company, and banned it from bidding for any of its contracts for six years after Macmillan admitted to engaging in bribes to Sudanese officials in an attempt to get a contract to print textbooks for an education project in Southern Sudan.<sup>4,5</sup> But perhaps the most monumental anticorruption penalty assessed came in 2008 at the hands of Siemens AG, which pled guilty to a number of FCPA violations and agreed to payment of \$1.6 billion in fines, penalties, and disgorgement of profits, the largest monetary sanction ever imposed in an FCPA case.<sup>6</sup> Given the dates of these settlements, and the U.S. presence or activity of these major companies, one can understand why they were resolved in the United States, under U.S. law.

According to a recent study on the global enforcement of anti-bribery statutes, only 22 countries have pursued enforcement of their foreign bribery laws, while only 35 have pursued enforcement of their domestic bribery laws against foreign entities.<sup>7</sup> Since the enactment of the FCPA 33 years ago, the United States has had three foreign bribery enforcement actions for every one pursued by all other countries in the world.<sup>8</sup> Such a statistic should be taken with a grain of salt, however, as it was not until the OECD Convention came into force in 1999 that many countries began to enact anti-corruption statutes, so the United States has had a significant head start. The fight against global corruption took a recent turn, however, as the United Kingdom enacted the Bribery Act 2010 on April 8, 2010, a comprehensive effort to consolidate and update old, fragmented law. While not yet in effect, the Bribery Act has implications that should have corporations and individuals alike reviewing their methods of obtaining international business.

A hot topic of discussion is the Bribery Act’s divergence from the FCPA. The Bribery Act is much broader than the FCPA, and they differ on a number of issues. The FCPA focuses solely on bribery or corruption of foreign government officials, while the Bribery Act additionally covers private citizens, making bribery in general illegal. Additionally, the FCPA allows for “facilitation payments,” or payments for routine government action of a foreign official, while the Bribery Act provides no such exception and in fact expressly prohibits it in some instances. The newly enacted Bribery Act also has strict liability for corporation officials for failing to prevent bribery on the part of one of their employees, while the FCPA has no strict liability. Finally, the potential imprisonment and fines are significantly higher for Bribery Act violations. As mentioned, this article looks to examine the Bribery Act

and highlight the differences between it and the FCPA. Recent case law will be considered to determine the pros and cons of the two's provisions, their reasonableness, and which are preferable.

### **Bribery Act 2010<sup>9</sup>**

Since signing the Organization for Economic Co-Operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the UK has faced criticism from the OECD for failing to establish and implement substantive prohibitions and penalties under the convention. Recently passed into law, the UK's reformed effort in the Bribery Act 2010 aims to address the criticisms.

Under §1 of the act, it is an offense to offer, promise, or give a bribe when it is intended to induce improper performance or to reward a person for improper performance of a relevant function or activity.<sup>10</sup> Additionally, it is an offense if the person providing the bribe knows or believes that acceptance of the bribe would itself constitute the improper performance. According to the act, a bribe may be a "financial or other advantage."<sup>11</sup>

Requesting, agreeing to receive, or accepting a bribe with the intention of improperly performing a relevant function is also punishable under the act.<sup>12</sup> This section mirrors §1 in language but deals exclusively with the beneficiary of a bribe (not necessarily the receiver). Actual receipt of the bribe is not necessary, and it does not matter whether the person knows or believes that the performance of the function or activity is improper.<sup>13</sup> The act has been drafted broadly enough to include bribes that have been routed through third parties, as was evident in the Daimler settlement.<sup>14</sup>

It is important to note that bribery can be found both in public and private action.<sup>15</sup> Within the public realm, it will be an offense to bribe a foreign public official, including government, judiciary, public agency, and international organization officials.<sup>16</sup> Payment to a third party at the foreign official's request is included. The person giving the bribe must intend for the bribe to obtain business or a business advantage, even if the function being performed by the foreign public official is outside of his or her official capacity.<sup>17</sup>

Under the act, it is now a strict liability offense for a commercial organization to fail to prevent bribery committed by an "associated person."<sup>18</sup> "Commercial organization" includes both domestic and international companies, and "associated person" means any person who performs services for or on behalf of the organization. This appears to be very broad, although no guidelines have been established yet to determine who would fall within this scope. Among various potential individual defenses, the only defense available to corporate offense is if the organization can show that it had "adequate procedures" in place to prevent bribery by associated persons.<sup>19</sup> The secretary of state is expected to publish guidelines as to what would constitute adequate procedures, but to date none have been established.

Potential penalties for liability under the act appear quite severe. Individuals found guilty will be subject to a jail sentence of up to 10 years per offense, a fine, or both.<sup>20</sup> Fines to be levied are unlimited, irrespective of whether the guilty party is a business or an individual. Also of note is the reach of the act. The

act applies to any individual or business in the United Kingdom, or with a UK presence. This includes UK residents, UK citizens living abroad, corporations with branches or subsidiaries in the United Kingdom, or potentially even corporations that employ UK citizens. The offense need not take place in the UK.<sup>21</sup>

### **FCPA Provisions**

The U.S. authorities have been at the forefront of prosecuting international bribery and corruption offenses under the FCPA.<sup>22</sup> Recently, there has been an increase in FCPA prosecutions, but 2010 has proven to be unlike previous years. In just the first quarter, the Government brought or resolved charges against 36 companies or individuals, significantly more than the four in the first quarter of 2008 and the six in the first quarter of 2009.<sup>23</sup> Generally, the FCPA prohibits U.S. companies and citizens, as well as foreign companies and persons with a U.S. presence, from paying or offering to pay money or anything of value to a foreign official to obtain or retain business. The FCPA also requires issuers of securities traded on a U.S. exchange to keep accurate books and records of business transactions, and to maintain adequate internal controls.

Specifically, it is unlawful for any company or citizen on a U.S. exchange to offer, pay, promise to pay, or authorize payment of any money, offer, gift, or anything of value to any foreign official for the purposes of influencing any act or decision of that foreign official in his official capacity, or omitting action, in order to obtain or retain business.<sup>24</sup> Similarly, it is prohibited to provide anything of value to any foreign political official or candidate for foreign political office to influence any act of government in order to help the issuer obtain or retain business.<sup>25</sup> These prohibitions shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official for the purposes of expediting or securing the performance of a routine governmental action by a foreign official, political party, or party official.<sup>26</sup> Additionally, the FCPA's "books, records, and internal controls" provisions require issuers to maintain these in reasonable detail to accurately reflect business transactions, and to maintain a full system of internal accounting controls.<sup>27</sup>

The FCPA does have affirmative defenses included. Companies and individuals can assert an affirmative defense if the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, or candidate's country.<sup>28</sup> Additionally, if the payment, gift, or thing of value was a reasonable and bona fide expenditure incurred by or on behalf of a foreign official, party official, or candidate, directly related to the promotion or demonstration of products or services, or the execution or performance of a contract with a foreign government or agency, it can be asserted as an affirmative defense.<sup>29</sup> Examples of this include travel and lodging expenses.

The FCPA does not define "anything of value" or list potential instances which may fit into its scope, and the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have taken it upon themselves to interpret this broadly. A suitcase full of new, crisp, nonsequential large bills comes

*Bribery continued on page 14*

*Bribery continued from page 13*

to mind as an obviously sketchy payment, but this is hardly the end all for bribes in today's global interaction. In addition to the obvious, discounts, materials, use of equipment or facilities, lodging, meals and drinks, entertainment, or other benefits are all things of value.<sup>30</sup> Since the "thing of value" does not have to amount to a particular minimum, how the recipient views the object is a key subjective factor taken into account when determining if a bribe has been given.<sup>31</sup>

"Foreign official" is also a term that has been interpreted broadly, and has been used to include employees of state controlled companies as well. The thought is that if a company is even partially owned by a foreign state, it can be considered an "instrumentality" of the foreign government.<sup>32</sup> If a company is considered an instrumentality of a foreign government, then all of its employees are considered a foreign official under the FCPA. Additionally, companies and individuals may be liable for third party action through subsidiaries or business partners.<sup>33</sup>

Under the criminal penalties, businesses are subject to fines up to \$2 million, while individuals related to the corporation are subject up to \$250,000 and up to five years imprisonment.<sup>34</sup> Fines imposed on individuals may not be paid by his or her employer. As for civil penalties, fines of up to \$10,000 may be levied against firms or related individuals.<sup>35</sup>

***Divergences Between the Two Acts***

The Bribery Act is much broader than the FCPA, and they differ on four main points. First, the FCPA focuses solely on bribery or corruption of foreign government officials. The Bribery Act prohibits bribery of government officials, but also specifically prohibits the bribery of private citizens. Further, the FCPA is directed at individuals offering or making the bribe, not the official receiving it, while the Bribery Act is not limited to the offeror, thus making bribery in general illegal.

That said, although the FCPA does not provide a mechanism to prosecute foreign officials for receiving bribes, US officials are increasingly sanctioning both foreign officials and individuals who are not government officials, such as private sector individuals.<sup>36</sup> Additionally, the DOJ intends to prosecute corrupt foreign officials under other federal statutes (i.e., U.S. Travel Act<sup>37</sup> and wire fraud statutes<sup>38</sup>), as evident in its recent prosecution of Haitian government officials for accepting bribes. Robert Antoine, director of international affairs for state-owned Telecommunications D'Haiti from May 2001 to April 2003, accepted bribes from three U.S. telecommunications companies and laundered them through intermediary companies to disguise them.<sup>39</sup> Antoine was among five individuals charged, and one of two officials from Telecommunications D'Haiti. In the announcement, in which Antoine admitted that \$800,000 of the bribes were intended for him personally, U.S. Attorney Jeffrey Sloman said that the conviction "... should be a warning to corrupt government officials everywhere that neither they nor their money will find any safe haven in the United States."<sup>40</sup> U.S.

DOJ Assistant Attorney General for the Criminal Division Lanny Breuer added comments that regardless of location, officials "will not allow U.S. financial institutions to be used as a vehicle for laundering illicit proceeds."<sup>41</sup> Thus, while the FCPA and Bribery Act differ on paper, the United States has found alternate means of prosecuting corrupt foreign officials as a supplement to the FCPA's prohibitions.

Second, the FCPA allows for "facilitation payments," while the Bribery Act provides no such exception. Facilitation payments, more practically referred to as expediting or grease payments, are payments given to induce foreign officials to perform routine government functions they are otherwise obligated to perform. Examples include processing papers, issuing permits, and other actions of official government action such as police protection. Routine governmental action does not include a discretionary decision to award or continue doing business with a company. The payment is not intended to influence the outcome of the official's action, only its timing.<sup>42</sup> Currently, the only countries that permit facilitation payments are the United States, Canada, Australia, New Zealand, and South Korea; still, the payments are illegal under the internal law of every country in which they are paid.<sup>43</sup> Facilitation payments have increasingly been criticized as inconsistent with the purpose of anti-corruption statutes, and the OECD recently issued guidance recommending that member countries, including the United States, ban their practice.<sup>44</sup> Specifically, the OECD recommended that member countries should periodically review their policies and approach to effectively combat the use of facilitation payments, encourage companies to discourage their use in their ethics programs, and to raise awareness among public officials of the payments' "corrosive effect."<sup>45</sup>

As there is no monetary threshold that must be reached in determining whether a payment was a facilitation payment or a bribe, the decision of what to allow is at the mercy of a particular official's discretion. For example, if there is a nominal fee for processing and delivering passports, but it takes two to three weeks for receipt of the passport, a \$75 "expediting" payment may be considered a facilitation payment. Would a \$750 payment? By explicitly opting to not include such an exception in their act, the UK has embraced the OECD's belief that any such payment, regardless of nature, is to be treated as an impermissible bribe.

Third, the newly enacted Bribery Act also has strict liability for corporation officials for failing to prevent bribery on the part of one of their employees; the FCPA has no strict liability. Strict liability exists for companies that fail to prevent their employees, subsidiaries, or agents acting on the company's behalf from engaging in bribery, even if the companies' senior management took no part or had no knowledge that the bribery was taking place.<sup>46</sup> That said, the Bribery Act allows for companies to assert the affirmative defense that "adequate procedures" had been implemented to prevent bribery.

Finally, the potential imprisonment and fines are signifi-

cantly higher for Bribery Act violations than for FCPA violations. Under the Bribery Act, criminal penalties for up to 10 years per violation may be assessed, while the maximum is five years per violation under the FCPA. Depending on the particular defendant (individual or corporation) and whether it is a civil or criminal violation, the FCPA has a limit on fines that may be assessed. The Bribery Act carries no limits on the amount in fines an individual or corporation may be assessed.

### ***“Adequate Procedures” Under the Bribery Act Yet to Be Determined***

Thus far, there is no definitive guidance available to businesses to adapt what they would consider “adequate procedures” under the Bribery Act to ensure a defense from prosecution. The UK secretary of state is set to publish guidelines in the near future which will help provide guidance, but for now corporations should begin looking to the draft guidelines provided by the GC100 to implement compliance systems. The GC100, a group of general counsels from leading UK companies, provided its views on key elements of what may amount to adequate procedures in the Draft Bribery Bill.<sup>47</sup> As it is only a suggestion of factors that the larger UK companies plan to take into account, the list is by no means dispositive. Still, it provides an idea of what the Secretary of State will likely publish: as a strict liability offense has been created, with liability resting on senior management, board responsibility for the anti-corruption compliance program must be established. The board of directors is accountable for establishing an ethical corporate culture, and designing and implementing an effective compliance program. In particular, the most senior officer will take the fall if the corporation is found guilty of failing to prevent corruption, so he or she should undertake the responsibility overseeing the anti-corruption program. In facilitation of such a program, an ethical code of business conduct must be created that presents a clear and unambiguous set of rules and responsibilities, including an anti-corruption element. This code should be published in a manner by which the employees are aware, including in print available via the company website.<sup>48</sup> Policies need to be examined for potential corruption issues via a risk management protocol, and employment procedures should be established to determine which employees should be subject to examination. Typically a matter of discretion, organizations should develop and implement a policy concerning gifts and hospitality that provide employees guidance for giving and receiving gifts, entertainment, hospitality, and benefits.<sup>49</sup>

Once established and implemented, organizations must ensure that their employees fully understand the new codes and policies, best accomplished through training. Before establishing new business in another country, due diligence should be carried out on the country’s laws as well as on potential business partners in order to determine any potential risk of corruption.<sup>50</sup> Companies should formalize their decision-making process in a way that ensures that where a greater risk of corruption is perceived, the decision is made by a senior individual within the organization. Organizations can also minimize their risk of committing corrupt acts against others,

or having a corrupt act committed against them, by establishing financial controls.<sup>51</sup> A system of supply chain management should be created where possible, using procurement and contract management procedures that work to minimize the potential for corruption by subcontractors and suppliers affecting the company. Finally, organizations should develop and implement reporting and investigation procedures, such as whistle blowing procedures for reporting corruption, that enable employees to report corruption safely and in a confidential manner to a responsible senior officer within the organization.<sup>52</sup>

### ***Recent FCPA Cases Considered in Light of the Bribery Act***

Turning back to the cases first mentioned in this note, each company could have faced different sanctions had they been charged under Bribery Act violations. Halliburton (Scotland) and KBR (England) are U.S. companies that both have a corporate presence in the United Kingdom, and thus are subject to UK law. While Halliburton admitted no guilt, their joint venture with KBR was alleged to have given over \$182 million in bribes to Nigerian government officials over the course of 10 years. If it could be narrowed down to those individually responsible for giving the bribes, they would be subject to fines as well as significant jail sentences. The companies would be charged under the corporate offense of failing to provide adequate measures to prevent bribery, which they would be forced to refute. Halliburton and KBR both have published their ethics guidelines, but they would be critically examined to determine if they were in fact “adequate.” At this point, no case law has been established to refer to as guidance in this regard, but both appear to adhere to the GC100’s recommended guidelines and thus may be safe.

While the Macmillan publishing case was a World Bank debarment and not an FCPA action, the stipulated facts would have violated both the FCPA and the Bribery Act. Macmillan admitted to paying bribes to Sudanese officials. This falls squarely within the realm of a punishable offense, and both individuals and the corporate entity itself would be subject to harsher penalties under the Bribery Act.

Daimler settled FCPA violations by paying fines but admitted no guilt. Even with clear violations, the USDOJ claimed a victory based on the monetary fines. Given how quickly the Bribery Act passed through Parliament before becoming law, it seems the UK is more concerned with making examples of those who violate corruption law. With clear instances of violations, it is probable the UK Serious Fraud Office (SFO) would prosecute to the fullest extent possible. Companies guilty of FCPA violations, content to settle US enforcement actions, now will be subject to harsh prosecution in the UK.

Siemens AG agreed to payment of \$1.6 billion in fines, the largest ever monetary sanction imposed in an FCPA case. With unlimited fines available under the Bribery Act, this number may not seem like such an exorbitant amount for companies earning billions of dollars in contracts as a result of corrupt practices.

*Bribery continued on page 16*

*Bribery continued from page 15***Who Got it Right?**

For years, American businesses took issue with the FCPA. While they supported the idea of eradicating corruption in business, it created an uneven playing field when competing against foreign companies for foreign government contracts that were not subject to the same restrictions. The United States embarked on the global campaign for international prohibition, coming to fruition when the OECD Convention was passed, nearly 20 years after the FCPA's passage. Most of the signatories passed anti-corruption statutes in the early 2000s, but as discussed earlier, the United States far and away continues to be the dominant force in bringing enforcement actions.<sup>53</sup> As stated earlier, the United States has brought more than one third of the total number of bribery enforcement actions worldwide. The UK was a distant second with only 4.3% of the total number of actions brought over the last 33 years, arguably because of their fragmented and outdated statutes covering the subject. It appears now that the UK will play a much larger role in international enforcement thanks to the Bribery Act, and from all angles it is this author's opinion that it is much more comprehensive than the FCPA.

The Bribery Act does not appear to be as subjective as the FCPA. The FCPA leaves open to interpretation the definition of "foreign public official." While, given history, this has been construed quite broadly by U.S. authorities, it is an issue that will not come into play with the Bribery Act. It may be that the original focus in enacting the FCPA was too narrow in scope; eradicating corruption in international business. The Bribery Act aims to eradicate international corruption, with no tag on particularity. Under the act no judgment call must be made to determine an individual's capacity with a foreign government and whether or not that fits the criteria, to then turn and bring action against the payer. If a bribe has been paid, the briber is liable. Along the same vein, the recipient of a bribe is equally as culpable as the individual or entity that paid the bribe. Again, legislative intent while drafting may be the issue. That said, U.S. authorities have found a way to supplement the FCPA and are increasingly bringing corruption action against foreign government officials via alternative statutes, as discussed above.<sup>54</sup> Still, one of the arguments in enacting the new Bribery Act was that prior law was fragmented and outdated. Similar reasoning could be applied to US law; it may be time to update the FCPA to consolidate supplemental statutes and tailor the law towards current and projected international business trends.

Facilitation payments play no legitimate role in business transactions. What begins as a grease or expediting payment may soon turn to the norm, thus requiring ever-increasing sums to be paid for what otherwise should have been obligatory routine government action. Allowing facilitation payments to persist while prohibiting other very similar payments, with no guidance or threshold established to objectively determine what sum is in fact large enough to be a bribe, creates an air of doubt and blurs the line between okay and illegal. The Bribery

Act has done away with the confusion by simply stating that such payments will not be granted an exception. This falls in line with the recent policy guidance provided by the OECD. While the guidance is not mandatory, and must voluntarily be passed into law in each individual signatory's legislature, it does indicate that the international community is ready to clamp down on these type of payments. Some successful bribery suits prosecuted under the FCPA could arguably be considered legal facilitation payments, but the DOJ and SEC view the exception narrowly; the violations are often found in inadequate accounting and recording-keeping. Still, the exception exists in writing; to date, no legislation has been proposed to formally remove the exception. Again, the FCPA appears to be falling behind the changing international perspective.

The strict criminal liability for corporations incentivizes international organizations to be proactive in drafting or revamping their ethics compliance guidelines and training programs.<sup>55</sup> While not a strict liability offense, the FCPA does require companies to maintain sufficient internal controls, which in practice amounts to keeping accurate books and establishing company-wide ethical guidelines. Guidance has not yet been given by the secretary of state as to what constitutes adequate procedures, so it is difficult to predict which statute requires more to comply with. Still, the creation of the new offense sends the message that burying one's corporate head in the sand and ignoring signs of corruption will not be tolerated; superior officers must actively monitor and make sure that their employees are aware of ethics guidelines and laws.

Finally, the harsher jail sentences and unlimited fines also send a clear message of the intent of the drafters of the Bribery Act: there is no place for corruption in today's globalizing economy and business dealings. Those who support such action, which adversely affects the nations in which the bribery is taking place, will be punished.

**Future Implications**

The United States' goal was to "internationalize" the FCPA. Now, U.S. companies that have UK offices or employ UK citizens will be responsible for complying both with the FCPA as well as the Bribery Bill. As the Bribery Bill is much stronger both in its language and in its potential penalties, U.S. companies will be forced to revise any compliance programs they already have in place in order to accommodate these new provisions. Additionally, U.S. lawyers, who for years have preached compliance with the FCPA to foreign corporations, will now be forced to immerse themselves in foreign law to properly counsel their clients.

Facilitation payments have been described as "corrosive ... particularly on sustainable economic development and the rule of law" by OECD Secretary General Angel Gurría in an interview leading up to the OECD's guidance publication.<sup>56</sup> A growing consensus has opined that there really is no difference between grease payments and commercial bribery, and to treat them differently creates confusion when it comes to compli-

ance measures. This change by the OECD may do away with facilitation payments completely, something U.S. businesses have enjoyed, and possibly even exploited. Companies that make use of facilitation payments are on notice that if they have a UK presence, they may be liable under the Bribery Act even if the payment falls within the scope of the FCPA exception. U.S. companies should recognize the weakening of the argument supporting a facilitation payment exception and should develop compliance policies that do not permit any kind of grease payments so as to avoid confusion in what is lawful and what is not.

At the recent Compliance Week 2010<sup>57</sup> summit, DOJ Assistant Attorney General Breuer weighed in on the current U.S. administration's outlook for FCPA prosecutions. When asked about facilitation payments and whether the United States plans to shift toward the UK model of prohibition, he said that the issue needed consideration as compliance standards are evolving on a worldwide basis. Still, he conceded that he was not aware of any proposed change to the FCPA. If this is the direction the DOJ and SEC wish to steer the FCPA, they will have to do so on a case-by-case basis absent sweeping legislation, a burdensome endeavor.

The UK Serious Fraud Office is looking to score a major first victory in bringing a corporate offense case. International businesses will be eagerly anticipating publication of the UK secretary of state's adequate measures guidelines; they will have a limited amount of time to comply before the Bribery Act comes into true force. With the ability to levy unlimited fines, as well as longer jail sentences for individuals, all will be watching closely to see just how serious the United Kingdom is about eradicating domestic and international corruption. To date, the UK's seminal Bribery Act case has not been brought. When that date comes, the current leader, the United States, will have a ringside seat. **SB**

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### Endnotes

<sup>1</sup>Zachary A. Goldfarb, *Halliburton, KBR Settle Bribery Allegations*, *The Washington Post* (February 12, 2009), available at [www.washingtonpost.com/wp-dyn/content/article/2009/02/11/AR2009021103400.html](http://www.washingtonpost.com/wp-dyn/content/article/2009/02/11/AR2009021103400.html).

<sup>2</sup>*Daimler AG and Three Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay \$93.6 Million in Criminal Penalties: Combined Criminal and Civil Penalties of \$185 Million to be Paid*, *The United States Department of Justice Office of Public Affairs* (April 1, 2010), available at [www.justice.gov/opa/pr/2010/April/10-crm-360.html](http://www.justice.gov/opa/pr/2010/April/10-crm-360.html).

<sup>3</sup>*Id.*

<sup>4</sup>*The World Bank Group Debars Macmillan Limited for Corruption in World Bank-supported Education Project in Southern Sudan: Eight-year proposed debarment reduced due to early admission of corrupt payments—can be reduced further based on future cooperation*, *The World Bank*, Press Release No:2010/370/INT (April 30, 2010), available at [go.worldbank.org/FWNGB-CJQK0](http://go.worldbank.org/FWNGB-CJQK0).

<sup>5</sup>Rupert Neate, *Macmillan admits to bribery over World Bank Sudan aid deal: Macmillan, the British publishing giant, has admitted it made "corrupt payments" in an attempt to win a World Bank aid contract in Africa*, *The Telegraph UK* (May 5, 2010), available at [www.telegraph.co.uk/finance/newsbysector/mediatechnologyand\\_telecoms/media/7683139/Macmillan-admits-to-bribery-over-World-Bank-Sudan-aid-deal.html](http://www.telegraph.co.uk/finance/newsbysector/mediatechnologyand_telecoms/media/7683139/Macmillan-admits-to-bribery-over-World-Bank-Sudan-aid-deal.html).

<sup>6</sup>Linda Chatman Thomsen, *SEC Speech: Statement at News Conference Announcing Siemens AG Settlement*, U.S. Securities and Exchange Commission (December 15, 2008), available at [www.sec.gov/news/speech/2008/spch121508lct.htm](http://www.sec.gov/news/speech/2008/spch121508lct.htm).

<sup>7</sup>*Global Enforcement Report 2010*. TRACE Anti-Bribery Compliance Solutions (June 10, 2010), available at <https://secure.traceinternational.org/documents/TRACEGlobalEnforcementReport2010.pdf>.

<sup>8</sup>*Id.*

<sup>9</sup>Bribery Act 2010. 2010 c. 23.

<sup>10</sup>*Id.* at §1.

<sup>11</sup>*Id.*

<sup>12</sup>*Id.* at §2.

<sup>13</sup>*Id.*

<sup>14</sup>*Supra*, note 2.

<sup>15</sup>Bribery Act 2010 at §3.

<sup>16</sup>*Id.* at §6.

<sup>17</sup>*Id.*

<sup>18</sup>*Id.* at §7.

<sup>19</sup>*Id.*

<sup>20</sup>*Id.* at §11.

<sup>21</sup>*Id.* at §12.

<sup>22</sup>Foreign Corrupt Practices Act of 1977; 15 U.S.C. §78dd-1 et seq.

<sup>23</sup>*First Quarter of 2010 Shows Sharp Increase in FCPA Enforcement*. Willkie Farr & Gallagher LLP (April 15, 2010), available at [www.willkie.com/files/tbl\\_s29Publications%5CFileUpload5686%5C3301%5CFirst%20Quarter%20of%202010%20Shows%20Sharp%20Increase.pdf](http://www.willkie.com/files/tbl_s29Publications%5CFileUpload5686%5C3301%5CFirst%20Quarter%20of%202010%20Shows%20Sharp%20Increase.pdf).

<sup>24</sup>*Id.* at (a)(1).

<sup>25</sup>*Id.* at (a)(2).

<sup>26</sup>*Id.* at (b).

<sup>27</sup>*Id.*

<sup>28</sup>*Id.* at (c).

<sup>29</sup>*Id.*

<sup>30</sup>*The FCPA Explained*. FCPA Enforcement (provided by Foley & Larder LLP), available at [www.fcpenforcement.com/explained/explained.asp](http://www.fcpenforcement.com/explained/explained.asp).

<sup>31</sup>*Id.*

<sup>32</sup>*Id.*

<sup>33</sup>*Id.*

<sup>34</sup>15 U.S.C. §77dd-3.

<sup>35</sup>*Id.*

<sup>36</sup>*Supra*, note 23.

<sup>37</sup>See generally 18 U.S.C. 1952, punishing interstate and foreign travel or transportation in aid of racketeering enterprises.

*Bribery continued on page 18*

*Bribery continued from page 17*

<sup>38</sup>See 18 U.S.C. 1343, punishing, among other things, obtaining money via wire transfer by means of fraudulent pretenses or promises.

<sup>39</sup>Former Haitian Government Official Pleads Guilty to Conspiracy to Commit Money Laundering in Foreign Bribery Scheme, The United States Department of Justice Office of Public Affairs (March 12, 2010), available at [www.justice.gov/opa/pr/2010/March/10-crm-260.html](http://www.justice.gov/opa/pr/2010/March/10-crm-260.html).

<sup>40</sup>*Id.*

<sup>41</sup>*Id.*

<sup>42</sup>Stuart H. Deming. *The Foreign Corrupt Practices Act And the New International Norms*. American Bar Association (2005).

<sup>43</sup>Thomas Fox. *Changes Coming to US Sentencing Guidelines, UK Bribery Act, and Facilitation Payments*, Corporate Compliance Insights (June 6, 2010), available at [www.corporatecomplianceinsights.com/2010/changes-coming-to-us-sentencing-guidelines-uk-bribery-act-and-facilitation-payments/](http://www.corporatecomplianceinsights.com/2010/changes-coming-to-us-sentencing-guidelines-uk-bribery-act-and-facilitation-payments/).

<sup>44</sup>The Recommendation for Further Combating Bribery of Foreign Public Officials, OECD (November 26, 2009), available at [www.oecd.org/dataoecd/11/40/44176910.pdf](http://www.oecd.org/dataoecd/11/40/44176910.pdf).

<sup>45</sup>*Id.*

<sup>46</sup>*Supra*, note 18.

<sup>47</sup>Draft Bribery Bill – Joint Committee on the Draft Bri-

bery Bill, UK Parliament Website (July 28, 2009), available at [www.publications.parliament.uk/pa/jt200809/jtselect/jtbribe/115/115we13.htm](http://www.publications.parliament.uk/pa/jt200809/jtselect/jtbribe/115/115we13.htm), Appendix 1.

<sup>48</sup>*Id.*

<sup>49</sup>*Id.*

<sup>50</sup>*Id.*

<sup>51</sup>*Id.*

<sup>52</sup>*Id.*

<sup>53</sup>*Supra*, note 7.

<sup>54</sup>See *supra*, notes 37 and 38.

<sup>55</sup>Corporations with a UK relation, at least. Given the broad wording of the Act, UK jurisdiction will have a very long arm over international corporations.

<sup>56</sup>Mark F. Brzezinski, et al, *OECD Seeks to Ice Grease Payments*. Martindale.com (December 11, 2009), available at [www.martindale.com/business-law/article\\_McGuireWoods-LLP\\_870158.htm](http://www.martindale.com/business-law/article_McGuireWoods-LLP_870158.htm).

<sup>57</sup>See generally [www.complianceweek.com](http://www.complianceweek.com).

*ADAAA continued from page 11*

<sup>9</sup>*Id.* (to be codified at 29 C.F.R. pt. 1630.2(i)(1)-(2)).

<sup>10</sup>*Id.* at 48441 (to be codified at 29 C.F.R. pt. 1630.2(j)(4)).

<sup>11</sup>*Id.* at 48442 (to be codified at 29 C.F.R. pt. 1630.2(j)(6)(C)).

<sup>12</sup>*Id.* (to be codified at 29 C.F.R. pt. 1630.2(j)(7)(i)).

<sup>13</sup>*Id.* at 48443 (to be codified at 29 C.F.R. pt. 1630.2(l)).

<sup>14</sup>*Id.* at 48448 (Appendix to Part 1630.2(l)–Interpretive Guidance).

<sup>15</sup>*Id.*

<sup>16</sup>74 Fed. Reg. at 48441-42 (to be codified at pt. 1630.2(j)(5)-(6); Appendix to Part 1630.2(j) - Interpretive Guidance).

<sup>17</sup>See, for example, *Carmona v. Southwest Airlines*, 604 F.3d 848, 857 (5th Cir. 2010); *Milholland v. Sumner County Bd. of Educ.*, 569 F.3d 562, 565-67 (6th Cir. 2009); *Fredricksen v. United Parcel Serv. Co.*, 581 F.3d 516, 521, n.1 (7th Cir. 2009); *Becerril v. Pima County Assessor's Office*, 587 F.3d 1162, 1164 (9th Cir. 2009); *Lytes v. DC Water & Sewer Auth.*, 572 F.3d 936, 941 (D.C. Cir. 2009); *Villanti v. Cold Spring Harbor Central Sch. Dist.*, No. 08-CV-434 ADS MLO, 2010 WL 3303375, at \*3 (E.D.N.Y. Aug. 20, 2010) (noting the Second Circuit's holdings in unpublished summary orders); but see *Jenkins v. National Bd. of Medical Examiners*, No. 08-5371, 2009 WL 331638, at \*1-2 (6th Cir. Feb. 11, 2009) (applying the ADAAA because the plaintiff was seeking a prospective accommodation for a test that would occur after the effective date of the ADAAA); *Rohr v. Salt River Project Agricultural Imp. & Power Dist.*, 555 F.3d 850, 861-62 (9th Cir. 2009) (declining to reach the question of retroactivity but noting

that “the ADAAA sheds light on Congress’ original intent when it enacted the ADA” and “the original congressional intent as expressed in the amendment bolsters [the court’s] conclusions.”)

<sup>18</sup>See *Gil v. Vortex, LLC*, 697 F. Supp. 2d 234, 236 (D. Mass. 2010) (plaintiff last turned away from work on January 2, 2009); *Cook v. Equilon Enterprises, L.L.C.*, Civil Action No. 4:09-cv-0756, 2010 WL 4367004, at \*6 (S.D. Tex. Oct. 26, 2010) (reclassification of leave status in February 2009)

<sup>19</sup>697 F. Supp. 2d 234, 239-40 (D. Mass. 2010).

<sup>20</sup>656 F. Supp. 2d 252, 258-59 & n.4 (deciding case involving pre-ADAAA conduct under ADAAA as defendant did not question that the ADAAA’s provisions applied).

<sup>21</sup>704 F. Supp. 2d 814, 818-19 (N.D. Ill. 2010) (citing the EEOC’s proposed regulations that list HIV as an impairment that will consistently meet the definition of disability).

<sup>22</sup>No. 1:09-CV-251, 2010 WL 3940638, at \*1 (N.D. Ind. Oct. 6, 2010).

<sup>23</sup>No. 3:09CV498, 2010 WL 1495197, at \*7 & n.5 (N.D. Ohio April 14, 2010).

<sup>24</sup>No. 5:07-CV-204-FL, 2009 WL 6690943, at \*5 (E.D.N.C. March 31, 2009) (declining to decide whether the ADAAA applied retroactively because the plaintiff did not qualify as disabled under the revised standard).

<sup>25</sup>No. 1:10CV24-A-D, 2010 WL 5232523, at \*6-9 (N.D. Miss. Dec. 16, 2010).

*Augmented Reality continued from page 2*

*Negligence.* The term “attractive nuisance” could take on an entirely new meaning in an immersive AR world. And it seems only a matter of time before a plaintiff alleges that his injury was caused by AR content impairing his view of the physical world, or by an AR ad that startled the plaintiff and caused him to swerve. New technology will also bring new products liability allegations. How might devices that constantly beam data into our eyes affect our vision over the long-term?

*Privacy concerns will grow exponentially.* There is already alarm over the amount of data that governments and corporations collect on us. But what if all of that information was aggregated and visible, not in a file folder somewhere, but superimposed on our houses, or even our very persons, for all the world to see merely by looking at it? Less comprehensive invasions of privacy still raise serious concerns. An author writing in *The Atlantic*,<sup>2</sup> for example, linked AR with the political polarization over California’s Proposition 8, the gay marriage ban. What if we could program our AR glasses to flag every person who voted for a law we don’t like—or who is a registered member of the opposite political party? In its recent *Doe v. Reed* decision,<sup>3</sup> the Supreme Court held that states must disclose the names of those who sign political petitions. An app linking that data to particular individuals would be straightforward in an AR-immersed world. Of course, glasses that superimpose data onto our vision would likely be equally capable of recording everything we see and hear, raising the obvious potential for eavesdropping and intrusion upon seclusion. Indeed, wearable video cameras are already on the market today.<sup>4</sup> The Summer 2010 arrest (and exoneration) of Maryland resident Anthony Graber for “eavesdropping” on a policeman with his helmet-cam became emblematic of this hot-button issue. But as such devices become commonplace, how far will the breadth of our “reasonable expectations of privacy” diminish?

*The Courtroom Experience.* Why should tortfeasors have all the fun? As with previous iterations of digital technology, AR may transform not only the substance of litigation, but also the

procedures that govern it. Accident recreation, for example, becomes an entirely different tool when, instead of viewing a cartoonish, 2-D animation, jurors don AR glasses in the courtroom and are made to feel as if they are inside the doomed vehicle. Successive visual effects could be layered onto a witness as they sat in the courtroom, simulating injuries they received. Lawyers could physically manipulate for the jury all manner of virtual objects during their closing arguments.

But AR could also add to litigators’ burdens. It has not been long since the federal courts began to wrap their arms around the thorny issues inherent in preserving, producing, and reviewing electronic data. How much more complicated will this process become when the data is not only electronic, but also virtual? In “v-discovery,” it will not be enough to produce digital imagery; the party will also need to demonstrate how that image was projected onto the physical world and perceived by one or more individuals, each from their own unique vantage point. That process could have attorneys longing for the “old days” when their biggest challenge was preserving the metadata in an email.

How AR will manifest itself and shape society is yet to be seen. But any technology that enables individuals to alter their very perception of reality cannot help but affect an equally radical impact on human behavior and social norms. We whose job it is to help our clients and the courts navigate these shifting paradigms would do well to pay attention as these events unfold. **SB**

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**Endnotes**

<sup>1</sup>See, e.g., [www.lumus-optical.com](http://www.lumus-optical.com); [www.vuzix.com/consumer/products\\_wrap920ar.html](http://www.vuzix.com/consumer/products_wrap920ar.html).

<sup>2</sup>Jamais Cascio, *Filtering Reality*, THE ATLANTIC (Nov. 2009).

<sup>3</sup>130 S.Ct. 2811 (June 24, 2010).

<sup>4</sup>See, e.g., [www.hammacher.com/Product/77777](http://www.hammacher.com/Product/77777).

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