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THE DOLAN COMPANY

Bankruptcy judges, lawyers frustrated by 'Stern' ruling

BY KIMBERLY ATKINS AND DAVID E. FRANK

U.S. Bankruptcy Court Judge Barbara J. Houser's job is a lot harder than it used to be, and she is not afraid to admit it.

The problem for Houser and her colleagues, as well as practitioners across the country, is the U.S. Supreme Court's 2011 *Stern v. Marshall* decision, which limited the ability of judges to hear and rule on claims that regularly arise outside the Bankruptcy Code.

"Many are debating the breadth of the Supreme Court's decision in *Stern*," Houser, a judge in the Northern District of Texas, recently wrote in *Soporex v. Reed*. "It is absurd to think … the bankruptcy courts can now do nothing with respect to these types of claims. … The arguments are interesting and, in some instances, mind-numbing."

Bankruptcy lawyers have been lamenting the confusion created by *Stern*, a case that stemmed from the long-running battle between the estate of the late model Anna Nicole Smith

Continued on page 4

Pending NLRB shutdown means more uncertainty for labor lawyers

BY KIMBERLY ATKIN | STAFF WRITER

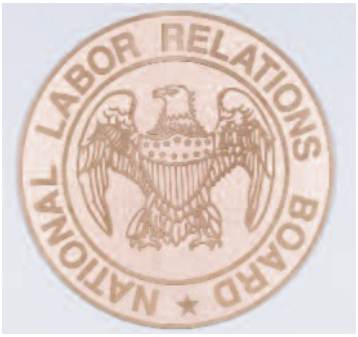
WASHINGTON – As one of the most contentious years in the National Labor Relations Board's history ends amid even more controversy, the new year brings new problems for the agency as well as labor lawyers.

Unless the Senate approves at least one of three nominees to fill vacancies on the Board – or President Barack Obama is able to make at least one recess appointment in the Senate's absence – the NLRB will fall below its statutory quorum in 2012, rendering it unable to issue opinions or engage in rulemaking.

For labor attorneys, that looming uncertainty is making the already difficult task of advising clients even tougher.

"Certainly, there are some areas where we really aren't certain how the Board may rule [in the future], and we can only guess where the Board will come down," said Howard M. Bloom, a partner in the Boston office of Jackson Lewis. "Right now we can tell an employer that a certain [workplace policy] is okay, but at some point that could change."

The new year brings the expiration of NLRB member Craig Becker's term, leaving the Board with only two members: Chairman Mark G. Pearce and Brian Hayes.



Earlier this month, Obama nominated two Democrats to the Board: Sharon Block, who is currently Deputy Assistant Secretary for Congressional Affairs at the U.S. Department of Labor, and Richard Griffin, general counsel for International Union of Operating Engineers. In January 2011, Obama nominated Republican Terence F. Flynn, who currently serves as Hayes' chief counsel at the NLRB, to the Board. The Senate has yet to act on Flynn's nomination.

But recent controversial actions by the Board, including the enactment of a new rule aimed at speeding up the process of unionizing, have angered business groups and Republican lawmakers, who are keeping both

Continued on page 3

FDA: Beware of gastric lap band advertisements

The Food and Drug Administration recently sent warning letters to eight surgical centers and a marketing company, cautioning recipients about misleading advertisements for gastric lap band procedures.

While gastric lap bands are approved by the agency, the surgical centers and 1-800-GET-THIN LLC all failed to properly warn consumers about the risks of the lap band, the agency said in its letters.

Instead, recipients' ads touted the lap band as an easy weight loss tool, the FDA said, using images of slim people and the potential for incredible weight loss – when it is in fact a serious surgical treatment.

The ad campaign included advertising inserts as well as billboards. The billboards read: "LOSE WEIGHT WITH THE LAP-BAND! SAFE 1 HOUR, FDA APPROVED 1-800-GET-THIN" while another proclaimed "MARCIANO LOST 125 POUNDS; LAP-BAND WEIGHT LOSS REVOLUTION! CALL 1-800-GET-THIN"

Advertising inserts made similar claims, like "LET YOUR NEW LIFE BEGIN!" with a purported client testimonial of a woman who lost 130 pounds.

"These advertisements fail to reveal material

Continued on page 8

Jury awards $1 million to victim of sexual assault at apartment building

BY CORREY E. STEPHENSON | STAFF WRITER

A woman who was sexually assaulted after being dragged through the lobby of her own apartment building while the desk attendant was watching TV has been awarded $1 million by an Illinois jury.

The Jane Doe plaintiff filed suit against the apartment building, its management and owner, alleging that the defendants failed to provide promised safety measures, resulting in her attack and subsequent post-traumatic stress disorder and anxiety, explained her attorney, Philip Harnett Corboy, Jr.

Because of an Illinois rule on homeowner liability favoring the defense, "these types of cases generally don't even get to trial," noted Corboy, a partner at Corboy & Demetrio in Chicago.

To win the case, the plaintiff had to prove that the defendants voluntarily undertook security measures that she relied upon to her detriment and that the actions of her assailant were not the sole proximate cause of her injuries.

Corboy said she took the stand to tell the jury about what happened to her while facing subtle arguments from the defense that she should have been more observant about her surroundings.

The verdict "validated for her that this was not her fault," he said.

Margaret C. Firnstein, a partner at SmithAmundsen in Chicago who represented all three defendants, did not respond to a call requesting comment on the case.

He 'literally did nothing'

The 24-year-old plaintiff worked as an ad executive in downtown Chicago. On the night of Oct. 8, 2008, she returned to her apartment building around 9 p.m. after having dinner with some friends.

The building itself is a 140-unit building minutes from the University of Chicago and just four blocks from President Barack Obama's Chicago home, Corboy noted. On the date of the incident, the election was just weeks away and there was a lot of activity in the neighborhood as a result.

The victim was on the phone with her boyfriend when she used her key to enter the lobby, but before the door could shut behind her the assailant grabbed it.

Videotape showed the man – who had apparently been following the plaintiff – grab her from behind, put his left arm around her waist and his right arm over her mouth.

The man pushed the plaintiff through the lobby, taking a direct path to the back of the building through the garbage room and shutting the door behind him. He then sexually assaulted the plaintiff in the alley behind the building.

Throughout the entire incident, a man sat at the front desk of the building.

While Corboy characterized him as a security guard, he said the defense described the man as a mere "desk attendant."

But the building advertised itself as having controlled access and a policy of requiring all non-tenants to sign in at a registry, present identification and sign out when they left.

That policy was clearly not followed as the man on duty "literally did nothing," Corboy said. At trial, he testified that he thought the plaintiff and her assailant were a romantic couple and that the screams he heard – which were so loud someone on the first floor heard the noise – were of delight, and not terror.

He also told the jury that the building had an unwritten rule that the front desk person was not supposed to stop couples.

The video evidence "really enhanced the testimony of [the plaintiff] about how the event took place and showed exactly how close to the desk she passed, where the man on duty was actually watching TV," Corboy said.

The experience of taking the stand was "horrible" for his client, Corboy said.

Both he and his co-counsel, Michael K. Demetrio, had tried rape cases as felony prosecutors, so "we knew that we had to really prepare her using baby steps."

Because the assailant had plead guilty to the criminal charges against him and was already in prison, the plaintiff had not testified at his criminal trial.

"We approached her preparation with a lot of delicacy and in many stages," Corboy said, working to get her as comfortable as possible talking about what happened to her in front of so many strangers.

Corboy and Demetrio also presented expert testimony on security and on damages.

State law posed challenges

The case faced major hurdles from the moment it was filed.

First, Illinois has a general rule that property owners are not liable for the actions of independent third parties absent a voluntary undertaking on the part of the owner.

Corboy argued that the defendants engaged in a voluntary undertaking by advertising the building as a secure facility,

Continued on page 5

Pending NLRB shutdown means more uncertainty for labor lawyers

Continued from page 1

chambers of Congress in pro forma session over the holidays to prevent Obama from making recess appointments to the NLRB or other agencies. Since Senate action on any of the three current nominees is unlikely, and because the U.S. Supreme Court ruled in the 2010 decision *New Process Steel v. NLRB* that the Board does not have the statutory authority to act with fewer than three members, the agency will begin the new year without the power to take up case appeals or engage in rulemaking. (The hearing officers and regional directors at the NLRB's regional offices will continue to adjudicate disputes.)

"That puts you in a deep freeze in terms of your ability to navigate [cases] that might be subject to scrutiny before the Board," said William P. Barrett, a partner in the Raleigh, N.C., office of Williams Mullen.

New election, posting rules fuel conflict

The prospect of a powerless NLRB has been on the radar for months, since Senate Republicans, angered by the Board's recent actions and rulemaking, have threatened to block any of Obama's nominees from confirmation, including GOP nominee Flynn.

Among the things that have angered GOP lawmakers and business groups is a newly minted rule that will, according to the Board, streamline the union election and appeal process. Opponents say the rule hurts employers by making it too easy for workers to unionize, and too difficult for employers to convince workers not to.

Under the new rule, the question of whether a particular election should be conducted will be decided by hearing officers at regional NLRB offices, who will have the authority to limit testimony to relevant issues and decide whether briefs will be submitted.

The rule also provides that appeals to the Board will be consolidated in a single post-election review request rather than in multiple interlocutory reviews, allowing the election process to conclude more quickly.

The rule adopted by the Board is a modified version of the original proposed rule, which spurred such division among NLRB members that the sole Republican, Hayes, threatened to quit before the Board's November meeting – a move that would have dropped the NLRB to only two active members, rendering it unable to act on the measure. Hayes ultimately stayed on and voted against the rule.

Still, the new rule immediately divided lawmakers along political lines, with Sen. Tom Harkin, D-Iowa, calling the measure a way to "restore workers' basic rights."

The rule is "an important step toward ensuring that every American worker has the same right that powerful CEOs take for granted – the right to negotiate the terms of their employment with an enforceable contract," said Harkin, who chairs the Senate Committee on Health, Education, Labor and Pensions, in a statement.

But Sen. Mike Enzi, R-Wyo., called the measure a "union election ambush."

"The rule issued today by the NLRB will allow union bosses to ambush employers with union elections before employers have a fair chance to learn their rights and explain their views to employees, as required by law," Enzi said in a statement.

Almost immediately, the U.S. Chamber of Commerce and other organizations sued to block implementation of the election rule, arguing that it would make it difficult for employers, particularly small businesses, to respond to union campaigns.

Randy Johnson, the Chamber's senior vice president of Labor, Immigration and Employee Benefits, called the rule an early holiday gift to unions.

"This rule has no conceivable purpose but to make it easier for unions to win elections," Johnson said in a statement announcing the lawsuit. "While couched in technicalities, the purpose of this regulation is to cut off free speech rights to educate employees about the effects of unionization. The elimination of these rights has long been on the wish list of organized labor and the Board has dutifully granted that wish today."

The Chamber also sued to block implementation of an NLRB rule requiring nearly every American employer to post rules in workplaces notifying employees of their rights under the National Labor Relations Act, including the right to form a union and collectively bargain. That rule was originally set to go into effect Nov. 14, but due to the pending legal challenge the Board postponed the effective date to April 30, 2012 – the same day the new union election rule is currently set to take effect.

For lawyers, limbo and unanswered questions

The drama at the NLRB has already taken lawyers on a topsy-turvy ride, and now they are left in limbo with more questions than answers.

Nelson D. Cary, a partner in the Columbus, Ohio, office of Vorys, Sater, Seymour and Pease, noted that the Board issued a flurry of rules and opinions in recent weeks in anticipation of the shutdown. "That has us pretty busy," Cary said.

Bloom said the recent flood of opinions and rulemaking has gotten the attention of his clients.

"Clients are more interested in what they can do [to avoid problems] and what we see coming down the road," said Bloom, adding that his clients are particularly concerned about the new election rules.

At the same time, the appeals process before the Board, which is already slow, will grind to a complete halt with the Board out of operation, causing a headache for lawyers and their clients.

"There is one case that has been pending for more than a year," Cary said. "Unless we get a decision in the next couple of days, it is not going to happen, potentially, until after the next presidential election, unless members of the Senate work out their differences" and confirm a nominee.

Bloom noted that while the uncertainty in Washington is problematic, the majority of labor law practice involves regional offices, and that won't change.

"On a day-to-day basis, I don't see it impacting my practice or my clients much," he said. "Charges are going to get filed, and they are going to get investigated. The process is the same."

Bankruptcy judges, lawyers frustrated by 'Stern' ruling

Continued from page 1

and the son of her late husband, J. Howard Marshall.

"Typically, the more cases that are decided, the more clarity you get," said George A. Zimmerman, a New York lawyer who heads the litigation practice at Skadden, Arps, Slate, Meagher & Flom. "After *Stern,* it is the opposite."

Mark G. DeGiacomo of Boston's Murtha Cullina said the biggest problem with the decision is that it calls into question the ability of bankruptcy judges to issue binding decisions on matters typically presented to them.

"*Stern* ends up throwing into doubt what a bankruptcy judge really can do in terms of issuing final rulings," he said. "The reason it's received so much attention is that the Supreme Court basically says that state-law issues can't be ruled on by non-Article III judges, which is not something a lot of people saw coming."

Court skipping

According to DeGiacomo, practitioners have interpreted *Stern* to mean that fraudulent conveyance matters, which are prevalent in bankruptcy proceedings, can no longer be decided in Bankruptcy Court. There is now a much larger class of cases in which all a judge can do is issue proposed findings of facts and rulings of law, which then must be reviewed on a de novo basis by a U.S. District Court judge, he said.

In an effort to avoid the time and cost of addressing the same issue in two different courts, many litigants are now opting to skip Bankruptcy Court altogether, DeGiacomo said.

"What you're seeing and are going to continue to see are defendants in adversary proceedings, which involve state-law issues, moving for withdrawal from Bankruptcy Court so their cases can be tried in the first instance in federal District Court," he said.

Justin H. Dion of Bacon Wilson in Springfield, Mass., said that such venue-shifting works to the disadvantage of the litigant with less money.

Dion, chairman of the Hampden County Bar Association's Bankruptcy Committee, said the *Stern* dissent accurately predicted the ruling would create a constitutionally required game of "jurisdictional ping pong" between the two courts.

"What it does is empower the party with more funds because they know they can drag the other party through two federal court proceedings, which is not cheap," he said. "The end result is going to be more settlements because some people are not going to be able to spend all that money litigating an issue in two different places."

Patricia Antonelli of Partridge, Snow & Hahn in Providence, R.I., said the case is still the topic of conversation at nearly every bankruptcy conference she attends.

Although the *Stern* majority wrote that the opinion was intended to be interpreted narrowly, Antonelli said some judges have clearly struggled with that notion.

"If I'm going to give advice to a client about whether a claims dispute can be decided by a bankruptcy judge, the idea that the case could be moved to another court where the calendar may be more bogged down, and it may take me longer to get to my resolution, is problematic," Antonelli said. "Lawyers want to be able to advise clients with certainty. The concern now is that we really don't know what's going to happen."

Anna Nicole's impact

Stern began as a battle over J. Howard Marshall's estate. Anna Nicole Smith subsequently filed for bankruptcy, and Marshall's son filed a proof of claim alleging he should recover damages for defamation.

Smith then filed a counterclaim for tortious interference with the gift she expected from her late husband. She won on her counterclaim in Bankruptcy Court, but a state court ruled against her on her claim for the inheritance.

The Supreme Court ultimately found that the Bankruptcy Court did not have the authority to rule in Smith's favor, because her claim was "a state law counterclaim that [was] not resolved in the process of ruling on a creditor's proof of claim."

Such claims could only be taken up by Article III federal courts, the court held.

Despite the court's declaration that *Stern* was narrow and limited to its facts, bankruptcy lawyers and judges are now trying to figure out just what the ruling means in cases that involve state-law-based claims and counterclaims.

"My frustration with *Stern* is that it offers virtually no insight … so that I can again proceed with at least some assurance that I will not be making the same constitutional blunder," wrote Bankruptcy Court Judge Jeffrey R. Hughes of the Western District of Michigan in *Meoli v. Huntington Nat'l Bank (In re Teleservices Group, Inc.).*

Complicated scheme

Before *Stern*, bankruptcy judges had the power to hear and rule on core proceedings. In non-core proceedings, they could only submit proposed findings of fact and conclusions of law to the District Court.

In the recently decided *Kirschner v. Agoglia*, Bankruptcy Court Judge Robert D. Drain noted that *Stern* seems to have complicated the scheme by creating "a new type of proceeding: a core proceeding in which the bankruptcy judge is constitutionally precluded from entering a final order or judgment."

"This, in turn, raises the issue whether there is a gap in the statutory scheme preventing the [Bankruptcy] court's submission of proposed conclusions of law to the district court if a matter falls into the new 'core but precluded' category," Drain wrote.

Drain, who sits in the Southern District of New York, ultimately ruled that he did have the authority to issue a final ruling on a claim of fraudulent transfer, or at the very least issue an opinion that could be treated as proposed conclusions of law and a rec-

Continued on page 5

Bankruptcy judges, lawyers frustrated by 'Stern' ruling

Continued from page 4

ommendation to the District Court.

But he noted that other bankruptcy judges have come to different conclusions, leaving the area of law far from settled.

Some judges wonder if they should err on the side of safety and work on the assumption that they do not have the ability to take up matters that do not fall squarely within the Bankruptcy Code.

"One alternative would be to play it safe and simply refer without reflection every future determination I make to a district judge for his or her final review," Hughes wrote in *Meoli*. "However, I do not see how I can do so in good faith given [federal law's] direction that I must decide even in instances when not requested whether I have the ability or not under that section to enter a final order. Moreover, I suspect that the Article III judges in my district would not be pleased with the extra workload such an approach would impose upon them."

Those judges who do decide to adjudicate claims are expressing trepidation.

In *Sanders v. Muhs,* Judge Marvin Isgur of the Southern District of Texas ruled that a fraudulent transfer claim was within the "public rights" exception to Article III's limitation on bankruptcy courts' jurisdiction, thereby allowing him to rule.

Still, he acknowledged that coming to that conclusion was not easy after *Stern*.

"The broader applicability of the … decision [in *Stern*] remains unclear," Isgur said. "The court's authority over matters involving state-law causes of action is particularly questionable."

Questions or comments can be directed to the writers at: kimberly.atkins@lawyersusaonline.com or david.frank@lawyersweekly.com

Jury awards $1 million to victim of sexual assault at apartment building

Continued from page 2

with controlled access, 32 security cameras located throughout the building and a sign-in policy for all non-tenants, enforced by a person at the front desk.

Further, the plaintiff relied upon the defendants' purported security measures, Corboy said. She made three trips to the building prior to signing the lease for her apartment, which was her first experience living on her own in the city, bringing both her father and boyfriend to talk about the safety and security of the building.

According to Corboy, the defendants countered by arguing that the security cameras were more for the protection of the building itself and less for the residents and that the person on duty was a mere desk attendant who functioned as the eyes and ears of the building, not a security guard.

The defense also attempted to distract jurors by trying to pin the blame on the assailant, Corboy said.

Another Illinois rule, the "sole proximate cause" rule, allows the defense to argue to a jury that if the sole proximate cause of the incident at issue was the actions of a party not in the lawsuit, then the jurors are required to find no liability for the named defendants.

"The defense made a big deal that we didn't bring [the assailant] into the case," Corboy said. "If they said it once, they said it 10 times during closing."

But Corboy countered by asking jurors: what's the purpose of including a guy sitting in prison? Including him in the civil suit was a waste of the jury's time, Corboy said, arguing that the assailant was not the sole proximate cause of the plaintiff's injuries.

After a two and a half week trial, the 12-person jury deliberated less than five hours before unanimously finding for the plaintiff.

Jurors awarded her $1 million in damages, which Corboy said the defendants have already paid in full.

Plaintiff's attorneys: Philip Harnett Corboy, Jr. and Michael K. Demetrio of Corboy & Demetrio in Chicago.

Defense attorney: Margaret C. Firnstein of SmithAmundsen in Chicago for all defendants.

The case: *Doe v. Shihadeh*; Nov. 21, 2011; Cook County Circuit Court; Judge Elizabeth M. Budzinski.

Pfizer settles nearly half of Prempro claims, adds to reserve fund

Drug maker Pfizer and its affiliates have settled nearly half of the product liability claims involving the hormone-replacement therapy drugs Prempro, Premarin and Provera, according to a regulatory filing.

In a filing with the Securities and Exchange Commission, the drug company reported that, as of Oct. 2, 2011, it had settled or "entered into definitive agreements or agreements-in-principle to settle" approximately 46 percent of hormone-replacement therapy claims.

"[W]e have recorded a charge of $260 million in the first nine months of 2011 that provides for the minimum expected costs to resolve all remaining hormone-replacement therapy actions against Pfizer and its affiliated companies," the company said in its Nov. 10 filing statement with the SEC.

According to Bloomberg News, Pfizer also said it added $68 million to the $772 million it had already reserved for the cases.

Pfizer said in its filing that approximately 10,000 actions have been filed in federal and state courts by women claiming injuries from the use of menopause drugs made by the drug company or its affiliates.

In December, a Philadelphia jury awarded $76 million in compensatory damages to three women who had sued Pfizer's Wyeth unit, alleging that hormone therapy drugs caused their breast cancer.

Days after the $76 million verdict, Wyeth settled the case for a confidential amount in order to avoid a trial on punitive damages.

– PAT MURPHY

Ariz. woman sues heartburn drug makers over bone fractures

An Arizona woman has filed a product liability lawsuit alleging that she suffered bone fractures in her feet as a result of taking popular heartburn drugs made by AstraZeneca, Pfizer and other pharmaceutical companies.

A complaint filed by Rebecca Smith-Lee in the U.S. District Court for the Northern of California on Dec. 1 alleges that the drug companies "have yet to adequately inform consumers and the prescribing medical community about the well-established risks of long-term Prilosec, Nexium, Protonix, Prevacid and Aciphex use."

Smith-Lee alleged that she used the heartburn drugs listed in her complaint between 2007 and 2010. She further alleged that she suffered multiple fractures in her right foot in 2009 and multiple fractures in her left foot in 2010. Despite corrective surgery, Smith-Lee claimed that she continues to experience severe pain in her feet.

Smith-Lee blamed her foot problems on her use of Prilosec, Nexium, Protonix, Prevacid and Aciphex. The heartburn drugs belong to a class of medications called proton pump inhibitors (PPIs). The drugs work by reducing the amount of acid in the stomach and are used to treat conditions such as gastroesophageal reflux disease, stomach ulcers and frequent heartburn.

In May 2010, the Food and Drug Administration issued a warning of a possible increased risk of bone fractures for those taking PPIs. The agency updated the warning in March 2011, advising that "[h]ealth care professionals should be aware of the risk for fracture if they are recommending use of [over-the-counter] PPIs at higher doses or for longer periods of time than in the … PPI label."

Smith-Lee's complaint cited six studies as having found that PPIs speed up bone loss and increase the risk of fracture for those over fifty who take the medication regularly for more than a year.

"Despite their knowledge of this dangerous side effect that can result from long-term Prilosec, Nexium, Protonix, Prevacid and Aciphex use, defendants refused to warn patients, physicians and the medical community about the risks," the complaint states. "Defendants continue to defend Prilosec, Nexium, Protonix, Prevacid and Aciphex, mislead the physicians and the public, and minimize unfavorable findings."

The first lawsuit against AstraZeneca over an increased risk of bone fractures allegedly caused by its acid reflux medication Nexium was filed last spring in a Texas federal court.

Smith-Lee's complaint includes claims for negligence, strict liability/defective design, manufacturing defect and failure to warn. Her attorneys are Clifford Lee Carter and Kirk J. Wolden of Clayeo C. Arnold, PLC, in Sacramento, Calif.

– PAT MURPHY

More federal drywall suits settle for $800 million

In another settlement over tainted drywall, German manufacturer Knauf agreed to a proposed settlement of between $800 million and $1 billion to resolve thousands of federal claims over contaminated drywall sourced from a subsidiary in China.

Property owners alleged in class action suits that the drywall contained impurities including a high sulfur content that in humid climates emitted harmful odors and fumes causing damage to property and health.

The settlement will cover approximately 4,500 properties. Relief includes remediation of the property, payment for personal injury claims and compensation for losses due to foreclosures and short sales. Properties that have a mixture of Knauf's drywall and other Chinese drywall will receive partial payments. The settlement also includes attorney fees and costs.

Russ Herman, liaison counsel for the plaintiffs, said in a press release that while the company is not admitting fault, it "really stepped up to the plate by participating in this settlement."

"[B]y being accountable, [Knauf] has agreed to provide thousands of families and resident owners the opportunity to recover losses caused by [its] drywall," said Herman, a partner at Herman, Herman, Katz & Cotlar in New Orleans.

The settlement is subject to court approval by U.S. District Court Judge Eldon E. Fallon in New Orleans who is overseeing between 10,000-12,000 drywall cases in multidistrict litigation.

– SYLVIA HSIEH

ATTORNEYS

Law firm not liable for collecting municipal fines

A law firm wasn't liable under federal debt collection law for actions taken to collect unpaid fines assessed by a municipality, the 7th Circuit has ruled in affirming a dismissal.

The city of Chicago retained the law firm to collect fines levied against the plaintiff with respect to his prior ownership of a parcel of real estate.

The plaintiff later sued under the Fair Debt Collections Practices Act, alleging that the firm violated the statute by misrepresenting the total amount he owed, failing to validate the alleged debts as requested and communicating with him after being told to stop.

But the court concluded that the fines levied by the city were not "debts" within the meaning of the Act.

"[T]he municipal fines levied against [the plaintiff] cannot reasonably be understood as 'debts' arising from consensual consumer transactions for goods and services. Accordingly, the allegations in his amended complaint state no claim under the FDCPA," the court said.

U.S. Court of Appeals, 7th Circuit. Gulley v. Markoff & Krasny, No. 20091087. Dec. 16, 2011. Lawyers USA No. 993-3448.

BANKRUPTCY

Automatic stay for bankrupt party doesn't apply to co-defendants

An insolvent asbestos defendant's bankruptcy filing does not stay all litigation involving solvent co-defendants, the Alabama Supreme Court has ruled.

The plaintiffs filed a wrongful death suit against a number of defendants based on their decedents' exposure to asbestos particles. They sought to hold the defendants jointly and severally liable.

One of the defendants filed for Chapter 11 bankruptcy protection. The other defendants moved for summary judgment, but the plaintiffs argued that the protections of §362, the automatic stay, meant that litigation was stayed as to all of the defendants. Therefore, they declined to file a response to the solvent defendants' summary judgment motion, arguing that to do so would violate the automatic stay.

The plaintiffs also contended that their wrongful death action was an indivisible claim and could not be severed to continue litigation against the remaining solvent defendants.

But the court disagreed, granting summary judgment for the solvent defendants.

"Section 362 specifically states that the filing of a bankruptcy petition operates as a stay of the continuation of a judicial action against a *debtor*. Section 362 makes no references to a stay of judicial actions against the debtor's solvent co-defendants," the court said.

It cited similar decisions from the 1st, 4th, 5th, 6th, 7th and 10th Circuits.

The court also declined to hold that the wrongful death suits could not be split into multiple actions, ruling that such suits may be prosecuted against joint tortfeasors either jointly or separately.

Alabama Supreme Court. Bradberry v. Carrier Corp. et al, No. 1100994. Dec. 16, 2011. Lawyers USA No. 993-3437.

Non-compliant plan may be exempt in bankruptcy

A retirement plan that was not technically "tax qualified" under federal law may still be exempt from the taxpayer's bankruptcy estate, the Utah Supreme Court has ruled in answering a certified question from a U.S. District Court.

State law provides that a "retirement plan or arrangement that is described in §401(a)" of the Internal Revenue Code is exempt from a debtor's bankruptcy estate.

In this case, the debtor established a Keogh retirement plan for himself in connection with his medical practice. He subsequently filed for Chapter 7 bankruptcy protection and claimed an exemption pursuant to the state law with respect to $306,000 held in the Keogh plan.

The bankruptcy trustee argued that, under the state exemption statute, a debtor can only claim an exemption for a retirement plan when it meets all the technical requirements for tax qualification under §401(a) of the Internal Revenue Code. According to the trustee, the debtor's Keogh plan was not tax qualified under §401(a) due to various defects, including the debtor's failure to properly allocate retirement contributions and add an eligible employee to the plan.

But the state supreme court adopted a "substantial compliance" test for the state's exemption statute, and held that mere technical defects in a retirement plan do not preclude a debtor from claiming an exemption in bankruptcy.

"Because we believe that the [state] legislature did not intend for a debtor to lose his entire retirement exemption because of technical violations of 401(a), we hold that a retirement plan is 'described in' §401(a) if it substantially complies with the requirements of that section. And an unqualified plan is in substantial compliance with the provisions of 401(a) if the defect does not violate the underlying purpose of 401(a). In other words, a plan substantially complies with 401(a) if the defect is not the result of an attempt to avoid tax," the court said.

Utah Supreme Court. Gladwell v. Reinhart, No. 20091087. Dec. 16, 2011. Lawyers USA No. 993-3447.

Continued on page 8

You can link to the full text of the opinions digested on this page by going to www.lawyersusaonline.com and searching the Lawyers USA website.

Continued from page 7

BUSINESS

Home borrowers' contract claim isn't preempted

Federal consumer protection law does not preempt a lawsuit alleging that a home lender's charging of a purported prepayment fee breached the terms of the plaintiffs' loan agreement, the 6th Circuit has ruled in reversing a dismissal.

The defendant charged a $30 "payoff statement fee" when the plaintiffs paid off their home mortgage early. The plaintiffs sued the defendant for breach of contract under state law, alleging that the defendant's payoff statement fee violated a term of their loan agreement that allowed them to "make a full prepayment or partial prepayments without paying a prepayment charge."

The defendant argued that the claim was preempted by the Home Owners' Loan Act and its implementing regulations. In particular, the lender contended that the plaintiff's contract claim was expressly preempted by 12 C.F.R. §560.2(b)(5) and (b)(12), regulations which address improper loan-related fees or prepayment charges.

But the court concluded that the plaintiffs' contract claim did not run afoul of the Act's regulatory scheme.

"Section 560.2(a) does generally provide for the preemption of 'state laws purporting to regulate or otherwise affect [federal savings association] credit activities,' but this broad preemption is explicitly limited by §560.2(c), which excepts 'contract and commercial law' from preemption 'to the extent that [such state laws] only incidentally affect the lending operations of federal savings associations or are otherwise consistent with the purposes of paragraph (a).'…

"To hold [the defendant] to the terms of its contract with the [the plaintiffs] is consistent with the purposes of the … regulation," the court said.

U.S. Court of Appeals, 6th Circuit. Molosky v. Washington Mutual, No. 08-1416. Dec. 22, 2011. Lawyers USA No. 993-3450.

CIVIL PRACTICE

Class conditions satisfied in $295M diamond settlement

Plaintiffs suing a worldwide distributor of diamonds for price-fixing were not required to show that each class member had a "viable" claim in order to satisfy the requirements for class certification, the en banc 3rd Circuit has ruled in affirming a $295 million settlement.

The settlement addressed seven individual class actions against De Beers S.A., a family of companies which dominates the world diamond trade. The plaintiffs in each of the cases generally alleged that De Beers engaged in price-fixing in violation of state and federal anti-trust, consumer protection and unfair trade practices laws.

The parties reached a settlement which allocated $272.5 million to indirect purchasers of diamonds and $22.5 million to direct purchasers.

Objectors to the settlement argued that class certification had been improperly granted. Specifically, the objectors argued that class certification was inconsistent with the predominance inquiry mandated by Federal Rule of Civil Procedure 23(b)(3) because the district court failed to ensure that each class member possessed a "viable" or "colorable" legal claim.

But the 3rd Circuit refused to recognize what it viewed to be an unwarranted, new requirement in the Rule 23 certification process.

"The question is not what valid claims can plaintiffs assert; rather, it is simply whether common issues of fact or law predominate. Contrary to what the dissent and objectors principally contend, there is no 'claims' or 'merits' litmus test incorporated into the predominance inquiry beyond what is necessary to determine preliminarily whether certain elements will necessitate individual or common proof. Such a view misreads

FDA: Beware of gastric lap band advertisements

Continued from page 1

facts, including relevant risk information regarding the use of the LapBand, age and other qualifying requirements for the LapBand procedure, and the need for ongoing modification of eating habits, as provided in the approved LapBand labeling," according to the letter. "In addition, while some of your advertisements make mention of risks and suggest a physician consultation, these advertisements do not adequately state the LapBand's relevant warnings, precautions, side effects and contraindications."

The FDA also expressed concern that the font size of information related to risks that was included in the ads was too small for consumers to read.

The agency requested that the marketing campaign halt use of the advertisements immediately and take "prompt action" to correct the violations, giving the recipients 15 days to inform the FDA how they intend to correct their misleading ads.

A failure to respond or make changes could lead to further action, the agency warned, including product seizure or fines.

– CORREY E. STEPHENSON

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Rule 23 and our jurisprudence as to the inquiry a district court must conduct at the class certification stage," the court said.

U.S. Court of Appeals, 3rd Circuit. Sullivan v. DB Investments, No. 08-2784. Dec. 20, 2011. Lawyers USA No. 993-3436.

CIVIL PRACTICE

Federal court must hear malpractice claim

A federal court has exclusive jurisdiction over a legal malpractice claim that requires the application of federal patent law, the Texas Supreme Court has ruled.

A man developed a software program to allow financial investors to open brokerage accounts and execute trades. He leased the program to a company for one year before patenting it.

The man later filed a patent infringement suit, which he lost. The defendants in that suit argued that his patent was invalid based on the "on-sale bar" rule because it had been sold prior to the date of the patent application.

In response, the plaintiff filed a malpractice suit in Texas state court against his lawyers, arguing that they should have relied upon the "experimental use" exception to the on-sale rule, where a patent retains its validity if the use was experimental rather than commercial.

A state trial court disagreed and the plaintiff sought to dismiss his state court suit to re-file in federal court. He argued that his malpractice suit arose under exclusive federal patent jurisdiction.

The court agreed.

The success of the plaintiff's malpractice claim is reliant upon the viability of the experimental use exception, making a question of federal law a substantial issue in the litigation, the court said.

"The federal patent issue presented here is necessary, disputed, and substantial within the context of the overlying state legal malpractice lawsuit. Additionally, the patent issue may be determined without creating a jurisdictional imbalance between state and federal courts," the court said, dismissing the state court suit.

It relied upon a pair of Federal Circuit cases for support.

Texas Supreme Court. Minton v. Gunn, No. 10-0141. Dec. 16, 2011. Lawyers USA Nos. 993-3442 (majority); 993-3443 (dissent).

Fax to employer didn't violate Fair Debt Act

A fax to a debtor's employer didn't constitute a "communication" under the Fair Debt Collection Practices Act, the 10th Circuit has ruled.

The plaintiff defaulted on her student loan. She filed suit against the collection agency hired by her loan guarantor, alleging that by sending a fax to her workplace it violated the Act's prohibition against debt collector communications with third parties.

The fax was the collection agency's standard employment verification form, with the company's information and an "ID" number that represented the plaintiff's account number.

Noting that a party may seek to verify employment status for a number of reasons (such as processing a mortgage or conducting a background check), the court affirmed judgment for the collection agency.

"The facsimile in question is not a 'communication' under the FDCPA. A third-party 'communication,' to be such, must indicate to the recipient that the message relates to the collection of a debt; this is simply built into the statutory definition of 'communication.' This fax cannot be construed as 'conveying' information 'regarding a debt.' Nowhere does it expressly reference debt; it speaks only of 'verify[ing] employment,'" the court said.

Continued on page 10

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Continued from page 9

Further, the court said the defendant was entitled to costs under Federal Rule of Civil Procedure 54(d). Although the FDCPA requires a showing of bad faith to award costs to a defendant, the court said an award of costs under Rule 54(d) is "presumptive" for the prevailing party and that nothing in the language of the FDCPA prevents the Rule's normal operation.

It noted a contrary holding from the 9th Circuit.

U.S. Court of Appeals, 10th Circuit. Marx v. General Revenue Corp., No. 10-1363. Dec. 21, 2011. Lawyers USA No. 993-3440.

CRIMINAL

Police could seize child porn suspect's computer

A child pornography suspect's open acknowledgement that he might destroy his computer justified the warrantless seizure of the device by police, the Utah Supreme Court has ruled in reversing a suppression order.

Police investigating Internet crimes discovered that child pornography had been downloaded through an IP address belonging to the defendant. When officers went to the defendant's home to conduct an interview, the defendant refused their request that he hand over his computer. Acknowledging that he might be in "trouble," the defendant suggested to officers that he would be better off if he simply destroyed the computer.

In response to the defendant's comments, police seized his computer and later obtained a warrant to search it. A search of the device's contents uncovered numerous video and still images of child pornography.

The defendant argued that the seizure of his computer without a warrant violated the Fourth Amendment.

But the court concluded that the warrantless seizure was justified by exigent circumstances.

"First, an exigent circumstance arose out of [the defendant's] open acknowledgement that he was thinking of destroying his computer. Second, the exigency was not improperly created by the police, as there was no threat to engage in conduct violating the Fourth Amendment. Finally, the decision to seize [the defendant's] computer was a reasonable method of preventing the destruction of evidence," the court explained.

Utah Supreme Court. State v. Maxwell, No. 20090906. Dec. 20, 2011. Lawyers USA No. 993-3445.

Backpack search may have exceeded scope of consent

Police may have violated the Fourth Amendment when they searched a passenger's backpacks in conjunction with the consent search of a motor vehicle, the Utah Supreme Court has ruled.

The defendant was one of three passengers in an SUV stopped by police. The driver consented to a search of the vehicle. During the search, an officer came across two backpacks in the rear cargo area of the SUV, directly behind the rear passenger seat. Both backpacks belonged to the defendant. Without first determining ownership, the officer opened the backpacks and discovered methamphetamine and drug paraphernalia.

The defendant subsequently pleaded guilty to a drug possession charge after a state judge denied her motion to suppress.

But the state supreme court decided that it was unreasonable for officers to believe that the driver's consent to search the SUV automatically extended to the defendant's backpacks.

"The probability that the backpacks did not belong to the driver was high because there were four occupants in the vehicle and the backpacks were located directly behind the seat in which [the defendant] was seated," the court said.

It remanded the matter for the trial judge to determine whether the defendant's conduct in relation to the search suggested that the driver had apparent authority to consent to a search of her backpacks.

Utah Supreme Court. State v. Harding, No. 20100291. Dec. 16, 2011. Lawyers USA No. 993-3444.

Plea deal prevents reduction of crack cocaine sentence

The terms of a drug defendant's plea deal prevented the reduction of his sentence under a retroactive application of amended guidelines for crack cocaine offenses, the 1st Circuit has ruled in affirming judgment.

In 2000, the defendant pleaded guilty to conspiring to possess with intent to distribute more than five kilograms of crack cocaine. His plea was entered pursuant to a so-called "C-type" plea agreement, which generally allows the parties to bind the court to a pre-agreed sentence. The court accepted the defendant's plea and imposed a sentence of 240 months in prison.

In 2007, the U.S. Sentencing Guidelines were retroactively amended to remedy the significant disparity between the penalties for cocaine base and powder cocaine offenses.

In light of the amended guidelines, the defendant sought a reduction in his sentence pursuant to 18 U.S.C. §3582(c)(2).

While his case was pending, the U.S. Supreme Court held in *Freeman v. U.S.* (131 S. Ct. 2685) that a plea agreement authorizing a particular sentence did not preclude a defendant from later seeking a reduction in his term of imprisonment pursuant to the amended guidelines. (See "Plea agreement doesn't preclude sentence reduction," Lawyers USA, June 23, 2011.

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Search terms for Lawyers USA's website: Freeman and cocaine)

Freeman was decided by a four-member plurality joined by Justice Sonia Sotomayor's concurrence. In this case, the 1st Circuit concluded that Justice Sotomayor best expressed the holding in *Freeman* and ruled that the defendant was ineligible for a reduction because his sentence was based on the agreement rather than the sentencing judge's assessment of the guidelines.

"The short of it is that we cannot identify a referenced sentencing range from the [defendant's plea] agreement alone. We would have to supplement the agreement with either the parties' background negotiations or the facts that informed the sentencing decision to accept the plea. Justice Sotomayor's concurrence forbids us from making such an archeological dig. We therefore conclude that the defendant is not eligible for a sentencing reduction under §3582(c)(2)," the court said.

U.S. Court of Appeals, 1st Circuit. U.S. v. Rivera-Martinez, No. 09-1766. Dec. 20, 2011. Lawyers USA No. 993-3435.

EMPLOYMENT

Choice-of-law clause applies to bar state wage claim

A New Jersey choice-of-law clause applied to bar a Maryland employee's lawsuit seeking payment for the value of unvested shares earned in a company profit-sharing plan, the 4th Circuit has ruled in affirming a dismissal.

The plaintiff is a Maryland resident who was hired as a sales representative by the defendant, a New Jersey corporation. After being terminated, the plaintiff filed a lawsuit under Maryland's wage and hour law, alleging that she was entitled to be paid for shares of company stock that she had earned through the defendant's profit-sharing plan.

The defendant argued that the claim was governed by a New Jersey choice-of law provision in the plaintiff's employment contract. According to the defendant, under New Jersey law the plaintiff was not entitled to be compensated for the shares because they had not vested as of the date of termination.

The court agreed that New Jersey law applied to bar the claim, rejecting the plaintiff's argument that the choice-of-law clause was unenforceable because rights guaranteed under Maryland's wage law were a matter of fundamental state public policy.

"[T]he fact that 42 other states, including New Jersey, have enacted similar wage payment laws undermines the notion that the [Maryland wage law] is a fundamental public policy. The availability of comparable, albeit different, legislation in different states demonstrates that protection under the [Maryland law] is unnecessary where there is a substitute, as there is here. …

"[The plaintiff] essentially asks us to apply Maryland law here, not because New Jersey law offers inadequate protection, but rather because Maryland law is more favorable. We decline to do so," the court said.

U.S. Court of Appeals, 4th Circuit. Kunda v. C.R. Bard, Inc., No. 09-1809. Dec. 23, 2011. Lawyers USA No. 993-3449.

FAMILY

Marriage void for bigamy despite voidable first union

Even though a woman did not have a marriage license for her first wedding ceremony and the ceremony failed to meet statutory requirements, she failed to take any action to terminate it and therefore committed bigamy when she later married her husband, the North Carolina Court of Appeals has ruled.

Prior to her marriage to her husband, the wife engaged in a wedding ceremony with another man. The parties did not obtain a marriage license as they only sought to comply with Islamic marriage requirements.

The wife divorced that husband in the manner required by Islamic law and never sought a judicial divorce or annulment.

When the wife and her second husband divorced after 12 years, he argued that their marriage was void based on the wife's bigamy and sought an annulment.

Reversing an order dismissing his complaint, the court agreed.

The wife's first marriage was merely voidable under North Carolina law because it would have been recognized as valid even though the parties did not have a marriage license and the ceremony failed to meet statutory requirements, the court said.

The wife and the first husband consented to take each other as husband and wife, voluntarily participated in the ceremony and publicly expressed their consent.

Because she never took any action to terminate that marriage, she was still married at the time of her marriage to her second husband.

"[T]hus any marriage between [the husband] and [the wife] was bigamous, and consequently void," the court said.

North Carolina Court of Appeals. Mussa v. Palmer-Mussa, No. COA11-209. Dec. 6, 2011. Lawyers USA No. 993-3441.

PERSONAL INJURY & TORT

Mother can sue for wrongful death of unborn child

A mother who gave birth to a stillborn

Continued on page 12

You can link to the full text of the opinions digested on this page by going to www.lawyersusaonline.com and searching the Lawyers USA website.

Continued from page 11

male could maintain a wrongful death action against her medical providers, the Utah Supreme Court has ruled in answering a certified question from a U.S. District Court.

In 2006, the plaintiff gave birth to a stillborn male after receiving prenatal care at a federal health clinic. She sued her medical providers for negligence in federal court, seeking damages for wrongful death.

During the relevant time, the state's wrongful death statute provided that "a parent or guardian may maintain an action for the death or injury of a minor child when the injury or death is caused by the wrongful act or neglect of another."

The federal government filed a motion to exclude all evidence regarding the plaintiff's damages for wrongful death, contending that the state law did not permit an action for the wrongful death of an unborn child.

A majority of the state supreme court concluded that the wrongful death statute did allow such an action, but could not agree on the reasoning for that conclusion.

In the lead opinion joined by one other member of the court, the court's chief justice reasoned that a claim for the wrongful death of an unborn child was authorized by the "plain language" of the statute.

"The statute does not itself define the term 'minor child,' but in general usage the term 'child' may refer to a young person, a baby, or a fetus. The adjective 'minor' is connected to the concept of legal minority: it modifies the term 'child' to include a child who has not yet reached the age of majority. Therefore, 'minor' sets an upper age limit on the term

'child' at majority, but does not set a lower limit. The term 'minor,' then, may refer to the period from conception to the age of majority, thereby encompassing an unborn child," the chief justice said.

Utah Supreme Court. Carranza v. U.S., No. 20090409. Dec. 20, 2011. Lawyers USA No. 993-3446.

'Known or obvious danger' defense not available in premises liability case

The "known or obvious danger" defense is no longer viable under state law as a complete bar to an injured plaintiff's premises liability claim, the Hawaii Supreme Court has ruled in vacating a defense verdict.

The plaintiff was injured when she slipped and fell on a wet lanai while staying at the defendant's hotel. At trial, the hotel argued that the wet lanai presented a known or obvious danger of being slippery because of a rainstorm and that the plaintiff chose to confront the danger.

A jury agreed, finding for the defendant.

The plaintiff appealed, arguing that the known or obvious danger doctrine fundamentally conflicts with Hawaii's comparative negligence statute.

The court agreed.

"We hold that the known or obvious danger defense is inconsistent with the legislative intent behind Hawaii's comparative negligence statute. The known or obvious danger defense yields inconsistent results and is incompatible with the policy values underlying Hawaii's tort law. Accordingly, we hold that the known or obvious danger defense is no longer viable in Hawaii. We reject the … retention of the doctrine as a factor in determining the landowner's duty, and instead hold that courts of this state may consider any known or obvious characteristics of the danger as factors in the larger comparative negligence analysis," the court said.

It noted that a majority of states have abolished the defense, including Idaho, Illinois, Kentucky, Michigan, Mississippi, Missouri, New Mexico, Oregon, Tennessee, Texas, Utah and Wyoming.

A minority of states, including Massachusetts, Nevada and Ohio, have retained the defense as a complete bar to recovery, the court said.

Hawaii Supreme Court. Steigman v. Outrigger Enterprises, Inc., No. SCWC-28473. Dec. 15, 2011. Lawyers USA No. 993-3439.