



# CERTWORTHY

THE NEWSLETTER OF THE APPELLATE ADVOCACY COMMITTEE

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WINTER 2002

## Dicta from the Chair

As the new chair of the Appellate Advocacy Committee, I confess to feeling daunted by the record of my predecessors. Under the leadership of Kelly Freeman and Mary Massaron Ross, we have presented three nationally acclaimed seminars, launched the widely (and deservedly) praised appellate newsletter *Certworthy*, and seen our membership grow from zero to nearly 300. Now, planning will soon get underway for our fourth seminar, tentatively scheduled for May 2003 in Chicago. And, most ambitious of all, work will begin on a DRI Defense Library Series appellate practice manual for defense lawyers—a manual that we hope will become the standard appellate practice reference work for defense lawyers across the country for years to come.

So, let me make the theme of my first chair's column simple and to the point:

don't just be a member of the Appellate Advocacy Committee. Instead, become an active member by participating in the activities of your committee. Sign up for a "Writer's Corner" column in *For The Defense*. It's easy—just contact our Publications Chair, Scott Stolley, and volunteer for the next available date. Or write an article for the next issue of this newsletter. Or let me know that you would like to work on our defense appellate practice manual. Or that you would like to help plan our next seminar. Or that you would like to do all of the above!! I look forward to working with you—all of you—building on a superb record of achievement.

**Michael B. King**  
*Lane Powell Spears Lubersky, L.L.P.*  
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## Editor's Footnotes

Many thanks to those who contributed to this issue of *Certworthy*. Jennifer Prozinski and John Bredehoff help us understand some of the implications of the U.S. Supreme Court's *Cooper Industries* decision. If you handle punitive damages appeals, it is a must that you know about this case. Katherine Eubank provides advice for appealing an insurance bad faith case. And Justice Nancy Becker of the Nevada Supreme Court provides some insider's advice on how best to pitch your case to a state supreme court. Having heard Justice Becker speak (at our seminar in October) about how busy her court is, I'm grateful that she found the time to write such a thorough paper.

In our columns, Melinda Kollross provides sage advice about preparing post-trial motions—a topic that usually gets short shrift. And Jose Sosa reviews *May It Please the Court...*, which is an edited compilation of U.S. Supreme Court cases and arguments.

Ray Ward, once again, did a superb job gathering and editing our circuit reports. He also contributed two short pieces about hot topics—unpublished opinions and the use of footnotes for case citations. These topics are sure to generate more publicity.

Our next issue of *Certworthy* will be published in July 2002. I have only one author committed, so plenty of space is available if you would like to contribute something. Please contact me at (214) 968-1678 or at [stolleys@tklaw.com](mailto:stolleys@tklaw.com).

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*Every legal writer is presumed to be  
a liar until he proves himself  
otherwise with a flock of footnotes.*

—Fred Rodell

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*Writing is an exploration. You start  
from nothing and learn as you go.*

—E.L. Doctorow

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# REVIEWING PUNITIVE DAMAGES AWARDS

## *Cooper Industries v. Leatherman Tool*

by Jennifer G. Prozinski and John M. Bredehoff

The Supreme Court, in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S.Ct. 1678 (2001), addressed the standard of review that appellate courts should apply in reviewing the constitutionality of punitive damages awards. The Court concluded that a *de novo* standard, rather than an abuse-of-discretion standard, is the proper standard of review.

### FACTS AND PROCEDURE

In *Leatherman Tool*, the parties were competitors in the tool manufacturing industry. Plaintiff Leatherman Tool produced a multifunction pocket tool called the Pocket Survival Tool ("PST"). Defendant Cooper Industries decided to produce a similar pocket tool that was based on the PST, but possessed some additional features.

The defendant first introduced its product, named the ToolZall, at a retail trade show. At the time of the trade show, the defendant had not yet manufactured its first ToolZall. To promote the ToolZall at the trade show, the defendant modified the plaintiff's PST to reflect the additional features of the ToolZall and took pictures of the modified tool. These pictures were then used in the defendant's advertising

materials, and the tool pictured was identified as a ToolZall.

The jury found Cooper Industries guilty of passing off, false advertising, and unfair competition, and awarded \$50,000 in compensatory damages and \$4.5 million in punitive damages. The district court rejected the defendant's argument that the punitive damages award was "grossly excessive."

On appeal, the Ninth Circuit applied an abuse-of-discretion standard in reviewing the district court's determination that the punitive damages award was constitutional, and held that the award "was proportional and fair, given the nature of the conduct, evidence of intentional passing off, and the size of an award necessary to create deterrence to an entity of Cooper's size." Because it found that the award was not grossly excessive, the court held that Cooper's due process rights were not violated.

### THE SUPREME COURT DECISION

In an 8-1 opinion, the Supreme Court held that the Ninth Circuit had erred in applying the abuse-of-discretion standard to the determination of the constitutionality of the punitive damages award. Because a federal appellate court must perform a "thorough, independent review" of punitive damage awards that are argued to be violative of constitutional rights, the Court held that a *de novo* standard of review should have been used.

Justice Stevens, writing for the majority, first recognized that state legislatures have broad discretion in setting the permissible size of punitive damages awards. Once a permissible range is set, it is the trial judge who has the responsibility to determine whether a jury's award falls within the range. If it does not, the trial judge may grant a new trial or order remittitur. As long as the constitutionality of the award is not challenged, the appellate court applies an abuse-of-discretion standard in its review of the trial court's determination.

The Court found, however, that this state discretion is limited by the Fourteenth Amendment Due Process Clause's

incorporation of the Eight Amendment prohibition against excessive fines and cruel and unusual punishments. In addition, the Court relied on an independent Due Process Clause prohibition against "grossly excessive" punishment. States are thus prohibited from imposing excessive punishment on tortfeasors.

Justice Stevens pointed out that in the criminal context, state discretion is limited in cases where a punishment is "grossly disproportional to the gravity of the offense." Although the point at which a punishment is grossly disproportional is "imprecise," the Court looks at the three criteria identified in *BMW of North America v. Gore*, 517 U.S. 559 (1996), in making such a determination: 1) the degree of the defendant's reprehensibility or culpability; 2) the relationship between the penalty and the harm to the victim caused by the defendant's actions; and 3) the sanction imposed in other cases for comparable misconduct.

The majority found that a *de novo* standard, as opposed to an abuse-of-discretion standard, is proper because the imposition and amount of punitive damages do not constitute a finding of fact. In contrast to compensatory damages, which present factual issues regarding the extent of the injury suffered by plaintiff, the Court held that the imposition of punitive damages is "an expression of moral condemnation." The Court acknowledged that the deterrent function of punitive damages might suggest that the amount of punitive damages is a fact found by the jury. But because juries do not usually engage in a "finely tuned exercise of deterrence calibration" when awarding punitive damages, and because punitive damages serve purposes other than deterrence, the Court gave little credence to this argument. Because the Seventh Amendment's mandate that in suits at common law "no fact tried to a jury shall be otherwise re-examined in any court of the United States" was not implicated, the Court held that the *de novo* standard was appropriate. The Court re-

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marked, however, that nothing in the decision suggests that the Seventh Amendment would permit a court, in reviewing a punitive damages award, to disregard a jury's specific findings of fact.

Although the Court acknowledged that a trial court often is better suited than an appellate court to determine the first *Gore* criterion, the Court found that appellate courts could apply the second criterion equally as well as juries, and that appellate courts had an advantage in applying the third criterion because it requires a "broad legal comparison." Because the Ninth Circuit applied an abuse-of-discretion standard, the Court did not determine whether the award was excessive in light of the *Gore* factors. Instead, the Court remanded the case to the Ninth Circuit for that evaluation.

Although Justices Scalia and Thomas concurred in the decision, both specifically noted that nothing in the Constitution limits the amount of punitive damages awards *per se*. The sole dissenter was Justice Ginsburg, who wrote that the Seventh Amendment mandates an abuse-of-discretion review of punitive damages awards.

### EFFECTS OF DECISION

While *Leatherman Tool* may be viewed as just another attempt by the Court to rein in runaway juries, the true effect of the decision may be more problematic, in at least two ways. First, the Court's explicit reliance on Eighth Amendment criminal precedent in the civil context may tend to conflate two very different areas of the law. Watch for criminal defendants to cite

*Leatherman Tool* at least as frequently as civil defense counsel—and woe to the civil defense lawyer who now fails to stay abreast of developments under the Cruel and Unusual Punishments Clause! Second, the Court's holding that a determination of punitive damages is not a "fact" within the meaning of the Re-Examination Clause of the Seventh Amendment may open the door to *de novo* review in a host of other contexts. What Justice Scalia refers to as "fact-bound constitutional issues" arise throughout the law, from evidence suppression hearings to discovery disputes to the field of qualified or absolute immunities. The determination that these "fact-bound constitutional issues" are not, after all, "factual" in nature may prove to be a pernicious progeny of *Leatherman Tool*.

## APPEALING BAD FAITH—MUCH MORE THAN AN OXYMORON

by Katherine Eubank

Imagine, if you will, the following scenario based on a real case (the names have been changed to protect the innocent):

You've just concluded a trial in which your client, Large Insurance Company, was sued by its insured, Mr. Small, because Large decided to try a third-party automobile accident case in which Mr. Small was the defendant, rather than settle for the policy limits of Mr. Small's insurance policy. Mr. Small asserts that Large's conduct constituted "bad faith" handling of the claim against him, and, apparently, the jury concurs: Small is awarded \$911.25 in out-of-pocket costs, \$802,582.48 in attorneys' fees and litigation expenses, \$2.6 million in compensatory damages, and \$145 million in punitive damages. See *Campbell v. State Farm Mut. Auto. Ins.*

*Co.*, No. 981564, 2001 Utah LEXIS 170 at \*\*2 (Utah Oct. 19, 2001). After you swallow (gulp!), and remember to breathe (better take a very deep breath), you start thinking about the appeal. What strategies might you use to attack such an onerous judgment?

Obviously, this article cannot provide a precise recipe for successful attacks on adverse bad faith judgments; each case must be determined on its own facts and in accordance with state law that varies from jurisdiction to jurisdiction. However, this article does contain concrete information from real appellate cases involving bad faith claims against insurance companies, as well as suggestions regarding appellate strategies that may work and appellate strategies that tend not to work. The issue of defending against attacks on favorable judgments is left for another day.

As a lawyer attacking an adverse judgment, you are usually wise to focus on your client's strongest arguments: issues that are governed by a *de novo* standard of review rather than a deferential standard of review; arguments that are supported by existing law or precedent or at least address an open issue of law, rather than seek-

ing to change existing law; and errors that clearly affect the outcome of the case, rather than being "harmless." If the appellate court has to slog through a lengthy brief detailing every conceivable trial court error and litigation grievance, it might not give sufficient credence to the one or two alleged errors that actually justify reversal of the judgment. So, when you are determining your strategy for attacking an adverse bad faith judgment, you may want to consider the following suggestions:

### THINK TWICE BEFORE YOU ATTEMPT TO CLIMB AN EVIDENTIARY "MOUNT EVEREST"

Some uphill battles may be worth the effort, but do you really want to wage a war on Mount Everest if you can reach the same objective by other means? As illustrated in the bad faith cases discussed below, this suggestion is rooted in three basic appellate principles common to all cases: 1) issues must be properly preserved in the trial court record; 2) factual issues determined by a jury (or by the trial court in a bench trial) are accorded a great deal of deference on appellate review; and 3) eviden-

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tiary rulings are also accorded deference and may be deemed harmless errors.

**Preservation of Error.** In *Howard v. State Farm Mut. Auto. Liability Ins. Co.*, 236 N.W.2d 643 (Wis. 1975), State Farm lost two of the three issues it raised when appealing a bad faith judgment because it had not properly preserved those issues in the trial court. State Farm first argued that its insured had failed to mitigate her damages because she did not attempt to raise money to settle the underlying case before trial. *Id.* at 645-46. Even though the record contained evidence regarding the relevant underlying facts, the Wisconsin Supreme Court held that State Farm waived this argument by not amending its pleadings to assert failure to mitigate as an affirmative defense. *Id.* at 646-47. The court similarly held that State Farm had waived an argument regarding erroneous jury instructions by failing to object to the form of the instructions actually given and failing to specify the alleged erroneous portions of the instructions. *Id.* at 648 (“The court ordinarily will not independently examine the instructions and determine whether there was any error. State Farm’s failure... precludes meaningful review.”). The lesson for trial counsel—object, object, and object again; the lesson for appellate counsel—make sure your argument is grounded in the record, and be specific.

**Deference Accorded to Fact-finder.** Whether an insurer’s actions in a specific case constitute a bad faith breach of its obligations is a fact-specific determination. Therefore, unless the facts are undisputed, this issue should go to the fact-finder. *E.g.*, *Occidental Life Ins. Co. of Cal. v. Bob Leroy’s Inc.*, 413 F.2d 819, 822 (5th Cir. 1969) (whether an act was done in good faith or bad faith is primarily a question of fact, involving issues of intent, credibility of witnesses, and inferences drawn on circumstantial evidence). The often circumstantial, fact-specific analysis of bad faith, combined with the usual deferential standard of review, makes it nearly impossible to reverse a finding of a bad faith made by a fact-finder after a full trial.

The problem is this: A plaintiff in a bad faith case must prove the absence of a reasonable basis to deny the claim, a negative proposition. Yet, under our no-evidence standard of review, an appellate court must resolve all conflicts in the evidence and draw all inferences in favor

of a bad-faith finding. It has been argued, then that if the reviewing court must give no weight to the insurer’s evidence of a reasonable basis for the denial or delay in payment of a claim, no judgment can be reversed for want of evidence because there will never be any evidence of a reasonable basis. A review of the cases applying the traditional no-evidence standard to bad-faith findings suggests that this argument has some merit.

*Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 51 (Tex. 1997) (citing numerous cases); see also *id.* at 54-55 (discussing standards used in other jurisdictions). Talk about Mount Everest!

If the adverse judgment you are attacking was entered after a full trial, verify the standard of review that would apply to the finding of bad faith conduct. If the standard of review is highly deferential to the fact-finder, you are much more likely to have success by focusing on legal issues that come with a *de novo* standard of review, rather than asking the appellate court to second-guess the fact-finder’s analysis of the evidence.

**Deference Accorded to Evidentiary Rulings.** Evidentiary ruling are usually reviewed under an abuse of discretion standard, and, unless the appellant can demonstrate actual prejudice, even erroneous rulings may be deemed harmless errors that do not justify reversal. In the context of bad faith actions, evidentiary issues often involve sensitive claims files and materials that insurance companies claim are confidential and not relevant to preliminary coverage issues. Appellate courts are not likely to reverse bad faith judgments based on such evidentiary rulings without a clear showing of error and prejudice. See, *e.g.*, *Athey v. Farmers Ins. Exchange*, 234 F.3d 357, 362 (8th Cir. 2000) (although evidence regarding insurer’s conduct during settlement negotiations would be inadmissible to prove liability for underlying breach of contract claim, it was admissible as evidence of bad faith); *Kirchoff v. American Cas. Co.*, 997 F.2d 401, 405 (8th Cir. 1993) (claim adjuster’s estimate that third-party claimant’s case was worth \$300,000 was admissible to show bad faith where insurer offered only \$8,000 to settle); *Evans v. United Servs. Auto. Ass’n*, 541 S.E.2d 782, 787-92 (N.C.App. 2001) (affirming discovery

order granting insured access to “claims diary,” report by outside investigator, internal memoranda, and internal policy manuals).

Note, however, that appellate courts may find error and prejudice where the finding of bad faith is tainted by improper reference to the insurer’s lawful use of the judicial system to protect its interests. See *State Farm Mut. Auto. Ins. Co. v. Bass*, 201 S.E.2d 444, 445 (Ga. 1973) (as a matter of law, insurer could not be liable for bad faith where it litigated an issue of first impression); *Howard v. State Farm Mut. Auto. Ins. Co.*, 450 S.E.2d 582, 584-85 (S.C. 1994) (reversing judgment for insured due to improper and irrelevant cross-examination of claims adjuster regarding handling of claim after bad faith litigation was filed); *Cable Communs. Network, Inc. v. Aetna Cas. & Surety Co.*, 838 S.W.2d 947, 949-50 (Tex.App. 1992) (affirming summary judgment in insurance company’s favor where claim of bad faith was based entirely on insurance company’s use of interpleader to determine who should receive insurance funds).

One final thought regarding evidentiary rulings: if you believe you can demonstrate both error and prejudice, get out your climbing gear! You may have found an uphill battle worth fighting.

#### ASK FOR A SECOND LEGAL OPINION

In sharp contrast to their reluctance to sift through disputed issues of fact or to alter evidentiary rulings, appellate courts love to opine on issues of law. In fact, they love it so much, they do it under a *de novo* standard of review, *i.e.*, without giving deference to the trial court. This standard of review gives appellate judges the opportunity to prove how smart they are, and it puts appellants and appellees on a level playing field. Therefore, if you want the appeal to be an outright victory (reversal and judgment in your client’s favor, rather than a reversal leading to new trial court proceedings), argue that the facts are undisputed and ask the appellate court for a second legal opinion. The bad faith cases discussed below illustrate this strategy in two circumstances: 1) where the trial court misapplies the relevant standard for proving bad faith and allows insufficient claims to go to the jury; 2) where the relevant state

law creates a higher standard of proof for imposing punitive damages or attorneys' fees than for compensatory bad faith damages (and that standard is misapplied).

#### **Misapplication of Relevant Standard.**

In some cases, the trial court commits reversible error by failing to direct a verdict because the acts of the insurer do not amount to bad faith as a matter of law. One situation where this might occur has already been discussed, *i.e.*, the cases where a finding of bad faith is based on the insurance company's lawful exercise of its right to have disputes resolved by a court. See, *e.g.*, *Conti v. Republic Underwriters Ins. Co.*, 782 P.2d 1357, 1359-60 (Okla. 1989) ("We recognize the general rule that it is not bad faith for an insurer to resort to a judicial forum to settle legitimate disputes as to the validity or amount of an insurance claim.").

In other cases, the trial court might be confused regarding the application of the state law standard for finding bad faith. Such confusion is understandable: in most tort cases, the existence of a reasonable dispute over the propriety of the defendant's actions requires the case to go to the jury, but, in bad faith cases, some states require proof of *the absence* of any reasonable basis for the insurance company's actions. Therefore, the existence of a reasonable dispute actually precludes submission of the bad faith claim to the jury. See, *e.g.*, *Winningham v. Centennial Ins. Co.*, 708 F.2d 658, 660-61 (11th Cir. 1983) (insurance company actions were consistent with policy language, and settlement offers before trial were reasonable); *Pearl Assur. Co. v. Southern Wood Prod. Co.*, 200 F.2d 898, 900-01 (5th Cir. 1952) (bad faith judgment could not stand where issue of waiver of policy condition by insurance company was improperly submitted to jury); *Insurance Co. of N. Am. v. Citizens-bank of Thomasville*, 491 So.2d 880, 885 (Ala. 1986) (insurer had arguable basis for denial of claims); *Conti*, 782 P.2d at 1361-62 (trial court should have directed verdict where insurance company's denial of claim was supported by polygraph results implicating insured in arson); and *United States Fire Ins. Co. v. Williams*, 955 S.W.2d 267, 268-69 (Tex. 1997) (insurer's misinterpretation of rule did not constitute bad faith where the interpretation was not legally groundless).

Another legal error that would support

reversal of an adverse bad faith judgment is an erroneous jury instruction with the potential to prejudice the insurance company. See, *e.g.*, *Hart v. Republic Mut. Ins. Co.*, 87 N.E.2d 347, 350 (Ohio 1949) (instruction that plaintiff could recover if insurer acted either negligently or in bad faith required reversal); *Farmers Ins. Exchange v. Shirley*, 958 P.2d 1040, 1049-52 (Wyo. 1998) (instructions failed to comport with Wyoming law regarding standard of proof for award of punitive damages). Lesson: familiarize yourself with the relevant state law standards for establishing bad faith; they may be tough enough to take the fact-finder out of the picture altogether.

#### **Higher Standards for Punitive Damages.**

Often, a reversal of punitive damages or attorneys' fees may be enough to count as a victory for your client, even if the judgment for compensatory damages is affirmed. This tactic works well in states that apply a higher standard for the imposition of punitive damages or attorneys' fees than for compensatory damages under a bad faith theory. See *Kirchoff*, 997 F.2d at 406 (reversing judgment for punitive damages because insured failed to introduce evidence of "malice" as required under South Dakota law; affirming denial of insured's claim for attorneys' fees because no provision in South Dakota law provided for such recovery); *Shade Foods, Inc. v. Innovative Prod. Sales & Marketing, Inc.*, 93 Cal.Rptr.2d 364, 394-97 (Ct.App. 2000) (reversing \$13 million in punitive damages because insured failed to establish "malice" by clear and convincing evidence as required by California law); and *Universe Life Ins. Co.*, 950 S.W.2d at 57 (reversing punitive damages because insured failed to introduce evidence that the insurer was actually aware that its actions involved "an extreme risk," such as death, grievous bodily injury, or financial ruin, as required by Texas law). Even if the appellate courts in your state have not previously required a higher standard of proof for punitive damages in bad faith cases, they may be sympathetic to an argument that the law should require stricter proof of bad intent before punitive damages, which are often tens or hundreds of times larger than compensatory awards, are justified:

"The new tort remedy, although necessary in some form, now shows signs of being too oppressive on an industry

whose financial vitality and efficiency are essential to social well-being. Multimillion dollar awards for wrongfully denying claims not only are unnecessary to correct the situation, but such awards, which often have a windfall nature, may raise the cost of insurance for the vast numbers of insureds who are not mistreated and may do great harm to the risk-transfer-and-distribution mechanism in our society by making insurance so expensive that it can no longer be purchased like a household commodity."

*Universe Life Ins. Co.*, 950 S.W.2d at 53 (quoting Henderson, *The Tort of Bad Faith in First-Party Insurance Transactions: Refining the Standard of Culpability and Reformulating the Remedies by Statute*, 26 U. Mich.J.L.Ref. 1, 32 (1992)). Particularly where the evidence of bad faith is weak or does not show willful disregard for the insured, this is a public policy argument worth making.

#### **DEMAND A "DO-OVER" BASED ON POTENTIALLY PREJUDICIAL PROCEDURAL ERRORS**

You know how, when you play golf and another golfer coughs or says something to distract you just as you take your swing, you demand a "do-over"? You have no guarantee that your second shot will be better than the first or that you will beat your competitors in the end, but at least you will get a fair opportunity. The same principle applies to appeals: even if you do not have an outright winning legal argument, procedural errors in the trial court may justify reversal and a new trial (*i.e.*, a new opportunity for success). A variety of potentially reversible procedural defects have shown up in the context of bad faith actions. For example, prejudicial remarks made by the insured's counsel justified reversal in *Erie Ins. Co. v. Ragland*, 394 So.2d 228, 229 (Fla. Dist. Ct. App. 1981), because the trial court failed to give any clarifying admonition or warning to the jury and refused to declare a mistrial.

Also, the judgment may be reversed where there is an appearance of bias against the insurance company on the part of the decision maker. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820-25 (1986) (participation in decision by state supreme court justice who had personal lawsuits against

the insurance company violated due process and required reversal due to justice's influence on other justices); *International Ins. Co. v. Schrager*, 593 So.2d 1196, 1196-97 (Fla. Dist. Ct. App. 1992) (reversing order approving arbitration award due to appearance of bias on the part of an arbitrator who represented other clients in actions against insurance carrier).

Another possible procedural error occurs when the trial court fails to bifurcate the trial between the standard breach of contract claim and the bad faith tort claim. The argument for bifurcation relates to the evidentiary issues discussed above: if claim files and other internal insurance company documents are admissible as evidence of bad faith, should the case be bifurcated so that the breach of contract claim is not tainted by such irrelevant evidence? The courts seem to be split on this issue, but, generally, the trial court has discretion over both procedure and evidentiary rulings, so a clear showing of prejudice must be made to justify reversal. See, e.g., *Athey*, 234 F.3d at 362 (failure to bifurcate was not error where appellant did not demonstrate how access to claim files prejudiced its case); *State of West Virginia ex rel. Allstate Ins. Co. v. Bedell*, 506 S.E.2d 74, 76-77 (W.Va. 1998) (trial court did not err in refusing to bifurcate case or stay bad faith proceedings). But see *Evans*, 541 S.E.2d at 786-87 (discussing reasons for bifurcation, but refusing to address issue

because not properly before appellate court); *Boone v. Vanliner Ins. Co.*, 744 N.E.2d 154, 158 (Ohio 2001) (affirming in part and reversing in part trial court's discovery order; noting that stay of bad faith claim and discovery may be appropriate pending outcome of underlying claim).

Finally, at least one state high court (the Wyoming Supreme Court) has reversed an award of punitive damages, suggesting that the failure to properly instruct the jury regarding punitive damages may not comply with due process requirements and may lead to grossly excessive and unconstitutional punitive damages. See *Farmers Ins. Exchange*, 958 P.2d at 1050-53 (majority opinion); *id.* at 1053-55 (discussing *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996)). Of course, on the other side is the *Campbell* case (see the opening scenario, above), where the Utah Supreme Court reversed a remittitur order and reinstated a judgment that included a punitive damages award of \$145 million. Bottom line: whether a particular punitive damages award is so excessive as to violate due process must be determined on a case-specific basis, but as long as the issue remains open for argument, it is worth pursuing in extreme cases.

One final word of warning regarding procedural "do-overs": keep your eye on the insureds and the trial court on remand! This point is well illustrated by *Ex parte Insurance Co. of N. Am.*, 523 So.2d 1064

(Ala. 1988). In that case, the insurance company had already succeeded in its appeal of a bad faith judgment, obtaining an appellate court ruling that it was entitled to a directed verdict. *Id.* at 1065-66. After remand to the trial court without specific instructions, the insured sought to amend its complaint so as to reassert the bad faith claim. *Id.* at 1066-67. The Alabama Supreme Court granted the insurance company's petition for writ of mandamus, noting that "[w]hen a case is reversed upon the ground of insufficiency of the evidence to sustain the verdict, that decision constitutes a final adjudication, and cannot be relitigated in the court below." *Id.* at 1067 (cites omitted). A lot of time and resources could have been saved if the court had specifically ordered that judgment be entered for the insurance company on remand. The lesson to be learned: if you tell the appellate court exactly what type of relief you seek, you are much more likely to receive it, and the order will be much less likely to provide "wiggle room" for the insureds and plaintiff-minded trial courts.

## CONCLUSION

Adverse bad faith judgments may be inherently unappealing, but appealing bad faith judgments is much more than an oxymoron. If you do not win at trial, it is the next step in protecting the interests of your insurance company client.

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*Language was given to man to  
conceal his thoughts.*

—Stendahl

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*Language was not given to man:  
he seized it.*

—Louis Aragon

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# ADVOCACY BEFORE STATE SUPREME COURTS

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by Justice Nancy A. Becker

Editor's Note: Justice Becker prepared this paper for the DRI's Third Appellate Advocacy Seminar, held in San Francisco in October 2001. We thank her for permission to reprint the paper.

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## COURTS' CONSIDERATIONS— RESOURCE ALLOCATION

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*The concerns of others are not the concerns of the Raisuli.*

—Sean Connery to Candice Bergen, *The Wind and the Lion* (MGM 1975)

Although every case is important to the litigants and attorneys, supreme courts usually do not see the cases in the same light. Every state, even one that does not have an intermediate court of appeals, has internal procedures, rules, or statutes that govern which type of issue should be originally reviewed by the justices of the highest court of that state. The rationale for limiting the number of cases addressed directly by a high court is identical: lack of judicial resources.

When our nation was created, the founding individuals tried to anticipate the needs of the future. But correctly predicting future trends is difficult under the best of conditions and impossible without a baseline of experience. The development of an open door policy in the American judicial system (anyone can file anything) led to a growth in litigation unanticipated when the Constitution was approved. Consequently, the courts were not prepared for the volume of cases being appealed. On the national level, the increase in caseloads led Congress to create the federal courts of appeal. See *Forsyth v. Hammond*, 17 S.Ct. 665, 165 U.S. 506 (1897) (discussing Everts Act of 1891). The need to limit access to the highest appellate court in a

state mirrors the federal concerns regarding effective use of limited judicial resources. Committee Notes, Florida Rules of Appellate Procedure, Rule 9.030 (March 11, 1980).

With the continued growth in caseloads, effective appellate advocacy requires attorneys to market their appeals. You must convince the courts that you are worthy of their time. In developing your marketing plan, you need to recognize the needs and makeup of your target audience. This holds true even when you do not wish to get discretionary review by the highest court, but simply want to ensure that the justices, not a staff attorney, will handle your appeal. This article is designed to give you a glimpse into the operations of an appellate court, to offer a better understanding of your target audience, and to adjust your marketing plan accordingly. Think of it as the results of a marketing survey.

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## STAFF SCREENING AND THE FLAPPER SYNDROME

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*Well, sir, here's to plain speaking and clear understanding.*

—Sydney Greenstreet to Humphrey Bogart, *The Maltese Falcon* (Warner Bros. 1941)

First and foremost, never forget that you are going through a chain of command. Jonathon Swift referred to people in a chain of command as “flappers.” In *Gulliver's Travels*, Swift stated that in the land of Lepiota, no person of importance spoke or listened without the help of a “flapper.” A “flapper” was the employee whose duty it was to flap the employer on the ears and mouth with a bladder whenever, in the opinion of the employee, that employer needed to listen or speak.

Of course, Mr. Swift was exaggerating and wallowing in sarcasm, but large organizations, including courts, do work on variations of this syndrome. Cases are given a series of reviews by staff members (usually attorneys, but sometimes it will be court clerks). Keeping the respect of these people is critical to your success. Think of them as the junior executives in your target cli-

ent's business. If you fail to impress them, their recommendations to the boss will be less than enthusiastic.

Moreover, with the volume of requests for discretionary review, there is a possibility that a justice may never see what you have prepared before making a decision to deny discretionary review. Satisfying staff screening usually involves two levels of review. The first involves procedural or technical requirements, while the second deals with the substance of the appeal.

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## PROCEDURAL SCREENING

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*Here's another nice mess you've gotten me into.*

—Oliver Hardy to Stan Laurel (1930)

Courts have constitutional provisions, statutes, or rules that govern their proceedings. Read them. Make them your sacred text. Failure to abide by them will cause you to lose face with staff and may result in a summary denial of your pleading or the dismissal of your case. Repeated failures to comply with these provisions will assure you a place in the staff's hall of fame, usually a dartboard with counsel replacing the point designations.

*They hate him... they're trying to drive him off this ranch. They've put manure in his well and they've made him talk to lawyers.*

—Jane Fonda, *Cat Ballou* (Columbia Pictures 1965)

While a court may give you an opportunity to correct your errors before acting upon your appeal (notices to counsel, orders to show cause, etc.), these are courtesy measures. They are generally not required and are usually employed to avoid punishing the litigant for counsel's mistakes. Generating such documents consumes court resources. You need to recognize that attorneys who are problem children create a psychological profile with staff. Human nature being what it is, these subtle impressions can have an unconscious impact on a recommendation to grant or deny

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discretionary review. The most common errors include:

- 1) Untimely filing of documents
- 2) Failure to include or properly complete court forms such as docketing statements or cover sheets
- 3) Failure to attach required documents (orders, judgment, summaries of issues, transcripts, etc.)
- 4) Improper format of documents (wrong paper size, caption, exceeding page limits for briefs, etc.)
- 5) Payment of fees (filing fees, reporters' fees, etc.)
- 6) Incomplete designations on notices or petitions (failure to include all parties, failure to note nature of the disposition below, etc.)

The rules are intended to make it easier for staff to quickly review the initial pleadings and dispose of cases that have clear jurisdictional problems, such as an untimely petition or appeal, or attempts to appeal interlocutory orders or other non-final judgments. Complying with them ensures that your pleading is more likely to be reviewed on the merits of your claim.

### **SUBSTANCE SCREENING**

Once staff has all the appropriate documents and there are no jurisdictional problems, they will start reviewing an appeal for the substance of the claim. At this point, the review will be by a staff attorney. The attorney will do a preliminary review of the pleadings to determine which additional resources will be devoted to this case. Courts frequently triage in accordance with their internal operating procedures. This involves determining whether a given case needs extensive record review or additional research on the issues presented. Cases with these requirements are more likely to be designated for a full work-up by a staff attorney or a justice's chambers. The remaining cases are handled in a more summary fashion. This may involve a short staff memorandum with a proposed disposition attached or an oral presentation to the justices accompanied with a proposed disposition.

Because of their caseloads, many supreme courts dispose of a majority of the petitions for extraordinary writs or discretionary review upon the recommendations of staff without a full work-up. The courts are reserving their resources for those

cases that will require significant research and debate. These cases will then be assigned to chambers for extensive work by the justices and their law clerks or to staff attorneys specializing in the particular area of law involved in the case.

### **BOTTOM LINE**

If you think your case is worth the personal attention of the justices or specialized central staff attorneys, you'd better package that case to get their attention. Getting past the screening mechanisms requires diligence, creativity, and hard work. It also requires integrity. Never market a bad product. If your case really doesn't involve issues normally reserved for this type of intensive effort on the part of a supreme court, do not try to dazzle your way into the justices' hearts. It may work once, but, thereafter, your pleadings may be looked upon with a more jaundiced eye.

### **MARKET CONSIDERATIONS— POLICY MATTERS VERSUS ERROR CORRECTIONS**

*Judges are, in many respects, like parents. You have to give them a good enough reason to do what you want.*

—Darlene Ricker, lawyer and journalist

Appeals and extraordinary writs involve two basic categories of issues. Appellate courts often refer to these categories under the general headings of policy concerns and error correction. The difference between the two is simple enough in theory: cases that set precedent are policy cases while those that require imposition of existing law to the facts are error correction cases. For example, determining whether to adopt a new exception to the hearsay rule is a policy consideration. Determining whether a trial court's ruling on excited utterance was correct under the facts of a given case is error correction.

Error correction cases are not accepted for discretionary review by supreme courts. Such cases are the province of the intermediate courts of appeal. Supreme courts reserve their resources for policy cases. If you want a supreme court to hear your case, you must first convince it that your case presents policy considerations that warrant the review of the highest court in a state.

The distinction between error correc-

tion and policy cases is usually reflected in the jurisdictional body of laws governing the practice before a particular court. The state constitutions, statutes, or court rules set general guidelines for what is considered to be a policy case. See Massachusetts Rules of Appellate Procedure, Rule 11. Although the phrasing differs from state to state, these guidelines frequently include the following:

- 1) Cases of first impression
- 2) Cases involving issues of public interest
- 3) Cases seeking resolution of conflicting authority within the lower courts
- 4) Cases construing state statutes or constitutional provisions
- 5) Cases seeking to overrule or clarify previous precedent

Thus, your first step in analyzing whether your case warrants the attention of the supreme court is to determine if any part of your appeal or extraordinary writ falls within the policy category of cases in that jurisdiction. If it does not, your client deserves to know that discretionary review is not likely to be granted. Whether to proceed is, of course, the client's decision, but at least he or she will be making an informed decision.

*I don't bite, you know—unless it's called for.*

—Audrey Hepburn to Cary Grant, *Charade* (Universal Pictures 1963)

Appellate court rules normally provide for monetary sanctions for frivolous filings. As caseloads climb, it is quite likely that appellate courts will impose such sanctions on parties who are perceived to be filing marginal or improper requests for discretionary review solely for the purpose of posturing a settlement.

Even when you meet one of the preliminary categories for discretionary review, the court may still decline to hear your case. The Pennsylvania appellate rules note that an appeal is "not a matter of right, but of sound judicial discretion..." Pa. R.A.P. Rule 1114. Some general factors will affect whether a court accepts discretionary review or how the court treats the case internally. These include:

- 1) *Time to Construct an Opinion.* Opinions require considerably more time to create a final disposition. Appellate courts work by consensus and having three, five, seven, or nine individuals

agree on the language in a given opinion can sometimes be a monumental task. It has frequently been said that building consensus among appellate judges is like herding cats. Supreme Court Justice Blackmun once commented that “We’re all eccentrics. We’re nine prima donnas.” Thus, a court may simply decide it will accept so many cases per year or per session so that it can focus on the consensus building or the quality of the written opinions.

- 2) *Repetitious Issues*. This concept involves how many times the same problem is likely to present itself or how much trouble it may be causing in the trial courts. If the issue rarely comes up and it appears it isn’t likely to affect anyone but the current litigants, a court may be more reluctant to accept review. However, it is also true that if it is a frequent problem, the court may not accept review in your case because it has another case that it thinks would be a better vehicle for resolving the legal issue.
- 3) *Quality of Representation*. There is no pleasant way to make this point. Quite simply, the court may not feel that the parties are capable of presenting the issue. It may decide to wait until it sees the same issue in another case where the attorneys are more likely to—no pun intended—do justice to the issue.
- 4) *Factual Nightmares*. The issue that the court might want to address is mixed in with other facts and issues that would need to be addressed, and the additional baggage would require too much time and attention. It is also true that the holding on the important issue that warrants discretionary review might be lost in the myriad of other issues. Further, the opinion may appear to be tied to the facts of that case. In a situation where the facts are unique, this may obscure the precedential affect of the ruling.

In addition to the general factors, other considerations may affect a court’s decision to accept discretionary review in each of the five categories.

### FIRST IMPRESSION

Although your case may involve an issue that has not been previously decided in a published opinion, and is technically therefore an issue of first impression, it may not be an issue over which there is a

controversy. There may be overwhelming national authority or perhaps the trial courts have been following the rule for years and you just happen to be up against the one maverick in the trial court. Under such circumstances, the matter may be viewed more as an issue of error correction that can be addressed by the court of appeals (or, in a court that has no intermediate court of appeals, by a simple staff disposition).

### PUBLIC INTEREST

This term is misleading because it really refers to any issue that a supreme court thinks needs to be resolved, rather than just issues that may have some public or media attention. For example, an issue regarding how attorney fees should be calculated or awarded probably wouldn’t constitute headline news, but it is a matter of great importance to the justice system and one that can generate a great deal of controversy within the legal profession. However, it is true that public interest cases usually involve matters of high public visibility.

*Sometimes the only thing more dangerous than a question, is an answer.*

—Zek to Quark, *Star Trek: Deep Space 9*, Ferengi Love Songs, (Paramount Pictures 1999)

In high profile cases, the political atmosphere may be a factor that a court will consider when deciding to grant discretionary review. Is this an issue that is best left to the legislative or executive branches of the government? Is it an issue that may have serious economic impacts on the government or an industry that cannot be ascertained from the record in this particular case? Will our precedent in this case have an impact on other states through full faith and credit? When a court has this many unknowns, the justices may be reluctant to tackle the issue at that particular moment in time, deciding that it is better not to accept a case that may require them to rule in a void with the potential for unintended consequences.

### CONFLICTING AUTHORITY

*Much waste of words, and of thought too, would be avoided if disputants would always begin with a clear statement of the question, and not proceed to argue till*

*they had agreed upon what it was that they were arguing about.*

—Sara Coleridge, *Memoir and Letters*, vol. 2 (1873)

The problem that you face in this instance is a tendency to assume that because two different courts reached a different result, this necessarily means they are conflicting. A supreme court will look to the rationale behind the result and may determine that there is, in fact, no conflict. For example, one court may have ruled on an issue while the other simply mentioned it in *dictum* or in a footnote. The supreme court may decide to wait until it’s clear there are two conflicting lines of authority, not just the possibility that the *dictum* will become the holding at some future point in time. After all, the intermediate court of appeals with the *dictum* may read the opinion of the sister court and, when asked to actually decide the issue, could agree with the other courts holding. Or, the supreme court might determine that both courts are interpreting the law in the same way, but applied it differently in accordance with the facts of the individual cases, so that no conflict exists.

Thus, it is important when using this as a basis for discretionary review that you have thoroughly analyzed the cases and can demonstrate that an actual and significant conflict exists. Finally, a court may refuse discretionary review if it feels that the conflict is only a side issue in the current case or is being used solely as a mechanism for seeking discretionary review and the main issues in the case are really error correction.

### STATE STATUTES AND CONSTITUTIONAL PROVISIONS

Courts are frequently called upon to clarify or interpret statutes, ordinances, administrative regulations, and constitutional provisions. Because of the number of times this occurs, supreme courts may be forced to enact rules or internal policies regarding when discretionary review will be granted on this basis. Some courts have indicated that review will only be granted when a provision is invalidated, rather than accepting review in a case that upholds or clarifies a law. See Fla. R. App. P. Rule 9.030. This is also an area where a supreme court may decide to defer any action be-

cause the legislative or executive branch is currently discussing revisions to the provision in question. Another factor may be that the statute has already been revised, and the court is not convinced that a sufficient number of cases are affected by the old statute to warrant granting discretionary review. You must convince the court that a resolution to this issue is necessary because it will have continuing impact on the trial courts and that it is not being addressed in any other forum.

### OVERRULING OR CLARIFYING PRECEDENT

*Who is to say that five men ten years ago were right whereas five men looking the other direction today are wrong.*

—Harry A. Blackmun, Supreme Court Justice

*Our Constitution was not written in the sands to be washed away by each wave of new judges blown in by each successive political wind.*

—Hugo L. Black, Supreme Court Justice

Although supreme courts are dedicated to maintaining the continuity provided by the doctrine of *stare decisis*, they are willing to depart from the past when convinced that a previous holding should be abandoned. However, you must confront the position, “if it ain’t broke...” It is your goal as an advocate to demonstrate what is broken. It may be a change in society’s values. The recent decision of the United States Supreme Court to accept *certiorari* on the propriety of executing mentally retarded individuals is an excellent example. Regardless of the outcome, discretionary review was granted because of the perception by the high court that society’s views on the death penalty have undergone a significant change in the last decade. The abandonment of the doctrine of separate but equal is another.

You must be able to identify, clearly and concisely, what has changed since the court last ruled upon an issue. For example, if your state supreme court ruling is based on a series of federal cases that have now been distinguished or overruled, the state court sees a logical reason for revisiting its own rulings. Was the ruling based on a statute that has undergone significant changes that would warrant a different re-

sult? Are the trial courts reading more into the language of a previous ruling than you believe was intended by the supreme court so that a clarification is necessary to fulfill the court’s original intent?

The key to this factor is to convince the supreme court that for reasons not related to their previous actions, a new approach should be taken. You must avoid any language that tends to criticize the previous ruling or that implies that somehow the justices just didn’t get it right the first time. Like most human beings, justices react poorly to implications that they were wrong, but if you give them a logical reason for a change, they will generally put aside institutional bias and consider the matter objectively.

### AUDIENCE PROFILE

When business entities are considering the development of a new product, the first item on their agenda is to conduct a market survey. Who would be likely to use this product? They gather demographic information that is used not only to determine whether to go forward with the product, but also how to market the product to a given sector of the population. Although discussed in business terms, this strategy really originates from understanding basic human nature. Give people what they want or at least make it appear to be something that they want.

Asking a supreme court to grant discretionary review involves many of the same psychological factors as marketing a product. Your presentation must convince a potential buyer, the court, that it wants your case. You have already determined that your product meets certain criteria for review as discussed above. Now you must decide how to package that product to get the court’s attention. To do this you need to know about your audience.

### JUSTICE SELECTION

State appellate judges, with one exception, are not appointed for life. They are selected by a variety of methods, all of which require that at some point in time justices must convince someone that they should be retained in office. This process involves reappointment, a retention election, an open nonpartisan election, or an open partisan election. While in the best of all

possible worlds this should not be a factor, history has unfortunately demonstrated that on occasion a justice has been susceptible to popular influences because of the nature of the selection method.

You need to evaluate whether you think the appellate court is going to be concerned about negative feedback if it accepts review of your case, let alone if it eventually rules in your favor on the merits. I do not believe this is an issue with the majority of courts, but if you perceive this to be an issue you need to address it. Try to phrase your pleadings to give the court the most coverage possible. As an example, the issue is a person’s right to refuse medical treatment, resulting in death. The use of the phrase “right to die” versus “allowing nature to take its course” or “allowing a person to die with dignity” may make a difference in a community that believes “right to die” is synonymous with suicide, a concept that carries enormous religious implications.

### JUDICIAL PERSONALITIES

Hundreds of law review articles and several books analyze the justices of the United States Supreme Court. Obviously, legal experts believe that the background and personalities of justices affect how one presents a case. Because appellate courts work on a committee basis, you have to find a method of resolving issues in your favor that a majority of the court can accept. That means understanding the justices. A justice’s background, experiences, and outlook on the law are likely to have a much greater impact on whether to grant review than they will on the merits. Most justices strive to be objective in their review of a case. But, there is a difference between deciding whether you want to dedicate resources to an issue by accepting discretionary review and deciding a case on the merits. Personality may unconsciously play a role in the decision to grant review. Knowing your justices may never make a difference, but it couldn’t hurt.

Gaining an insight into the justices on a particular court takes a bit of research, but it is generally not a difficult task. First rule: do not make decisions on the basis of attorney anecdotes. Your client does not pay for advice founded upon rumor and innuendo. You have no way of determining if a particular story told by an attor-

ney is accurate. Is it based solely on one encounter with a justice? Was the justice's action precipitated by some improper conduct on the part of the attorney? "Garbage in, garbage out" is not just a computer maxim.

If the court is located in a jurisdiction with a law school, check to see if the school publications have ever written about the justices and their views on subjects based upon an analysis of the decisions they have authored or of their participation in split decisions. Look for such decisions on your own. It does not matter whether a justice is in the majority or the minority—you are just attempting to gain information on how they view an issue, and split decisions give that type of insight. Concurrences and dissents should also be viewed. This information is useful in trying to determine if there is a pattern in the types of cases where review has been granted or if there is a type of case where review has never been granted.

Another source of information may be available from the administrative office of the court or the clerk of the court. This

would be public relations material. It will usually give you some biographical material about the justices. Moreover, justices may provide a lengthy resume if requested. Check the court's web site and, where judges are subject to election, their campaign materials.

All of this material will help you to develop a profile of the justices. How active were they on bar committees before taking the bench? Do they participate in church or youth activities? Were they active in partisan politics before becoming judges? What areas of law did their practices involve? Have they served on any community, civic, or charitable boards? Do they play sports? Did they have a career before law? Are they married? Do they have children? (Be careful here; if the information does not include family data, do not ask. Judges may withhold such information to protect their families.)

A profile based upon background information does not ensure that you can market your case successfully, but it will probably help. A justice who has no civil experience may not be as interested in tak-

ing a UCC case as she is in clarifying the court's law on double jeopardy. Likewise, a justice whose practice involved trusts and estates law may have no interest in child custody. A judge whose only civic or community work consisted of serving on bar association rules committees may have been so sheltered that he or she needs to see how failure to grant review could have a significant impact. A justice with a more diverse background might see the impact without any emphasis.

## CONCLUSION

*Yes, well, everybody in Casablanca has problems. Yours may work out.*  
—Humphrey Bogart as Rick Blaine,  
*Casablanca* (Warner Bros. 1942)

However much a supreme court may care about the issues and the cases, lack of judges and staff mandates a decision process that embodies the above philosophy. Everybody has a problem, only so many can be accepted at a time, and the rest, we hope, work out.

## SUBCOMMITTEE REPORTS

### Seminar

With the last seminar just completed, the Seminar Committee already has begun planning for the next Appellate Advocacy Committee Seminar, which is tentatively scheduled for May 2003 in Chicago. Dan Lindahl and Mike Wallace will serve as program chairs for that seminar. Committee members interested in participating in planning should contact Dan Lindahl at dan.lindahl@bullivant.com or at (503) 499-4614.

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### Publications

As our want ad describes, we need a lot of writing help for the many projects that the Appellate Advocacy Committee has undertaken. First, we can always use additional writers for *Certworthy*. Submissions for the July 2002 issue will be due on May 1, 2002. Second, our committee continues to provide writers for the monthly Writers' Corner in *For The Defense*. Right now, we need a volunteer for the rest of 2002, so if you would like to be published in a

*Words after all are symbols, and the  
significance of the symbol varies  
with the knowledge and experience  
of the mind receiving them.*

—Benjamin N. Cardozo

magazine with a circulation of 30,000+, please contact me.

Finally, our biggest project is to prepare a defense lawyers' appellate manual for the DRI Defense Library Series. We envision a thorough "how to" manual, with 20 or more chapters. This project will take most of 2002 to complete, with the aim to publish the book before our May 2003 seminar. We are still in the preliminary, organizational stages of this project. If you would like to help with planning, editing, or writing, please contact me. It would be helpful if you would send me a resume.

I can be reached at Thompson & Knight, L.L.P., 1700 Pacific Avenue, Suite 3300, Dallas, Texas 75201-4693, phone (214) 969-1678, fax (214) 969-1751, and at [stolleys@tklaw.com](mailto:stolleys@tklaw.com).

#### Scott Patrick Stolley

*Thompson & Knight L.L.P.*  
Dallas, TX

## BROWSING THE BOOKSHELF

### May It Please the Court...

Appellate attorneys spend hours upon countless hours reviewing and researching the trial court record, researching all of the pertinent and potentially important legal issues (even in some cases inventing their own), and researching the historical perspective of the particular court where they will appear, in order to best prepare their brief on behalf of their client. For the lucky few, the research may include trying to determine the historical significance of their particular case or issue. However, something seems to be missing. Wouldn't it be great if we had the ability to actually know what the justices were thinking after having read the briefs but before deciding the case? Without direct comment from the justices involved, it is impossible to know what they are thinking, but we can now know a little bit more about the circumstances surrounding some important United States Supreme Court decisions, thanks to *May It Please the Court...*, edited by Peter Irons and Stephanie Guitton.

*May It Please the Court...* compiles portions of the oral argument transcripts from several important cases before the Court, along with portions of the actual opinions. Some of the more recognizable cases in this book are *United States v. Nixon*, *Terry v. Ohio*, *Miranda v. Arizona*, *Heart of Atlanta Motel v. United States*, *Regents of the University of California v. Bakke*, *Roe v. Wade*, and *Bowers v. Hardwick*. The book also contains a brief introduction of each case and a "dialogue" between three of the attorneys who participated in some of these cases. Although this description may make this book seem like a law school casebook, *May It Please the Court...* is much more than that.

We have all been taught that appeals are won or lost on the briefs, and, for the most part, that would seem to be correct. But *May It Please the Court...* does an excellent job of juxtaposing portions of the oral argument with the corresponding parts of the opinion that reference the issues brought out by the Justices and attorneys during oral argument. For example, in *Baker v. Carr*, 369 U.S. 186 (1962), some

urban voters brought suit against the State of Tennessee for the state's dilution of the urban voting population by failing to reapportion the state legislature based on population. The plaintiffs sued in federal court, alleging a violation of the Fourteenth Amendment. One of Tennessee's defenses was that the issues were solely state issues, and, more particularly, issues for the Tennessee legislature. Chief Justice Earl Warren asked pointedly whether, if this truly was a state issue and not one for the federal courts, there was any remedy in Tennessee courts on the issue. The response of Tennessee Assistant Attorney General Jack Wilson was negative. That answer must have been important for the Supreme Court's determination of this case. The reader can almost picture some of the Justices deciding the case immediately after Wilson's answer.

The strength of this book in combining edited portions of the transcripts with corresponding parts of the opinion is also a weakness. Because the arguments are edited, it is hard to picture the entire ebb and flow of the question-and-answer period that is oral argument. Even if some of the Justices' questions are merely perfunctory, they establish or destroy the current rhythm of the oral argument, each serving a purpose to either create a baseline for a follow-up question or to halt a particular's attorney's diatribe, thus moving the case in a different direction. In some instances, only a mere paragraph or two of the argument is dedicated to one side of the case, thereby forcing the readers to come to the same conclusion as the Court because we are without benefit of the full legal debate. Although this organization may make the book more favorable and responsive to the average reader, to the appellate lawyer it seems that something is missing.

*May It Please the Court...* is organized by topic. The editors separate the cases

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*Writing is a way of thinking without  
being interrupted.*

—Jules Renard

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into groups such as criminal cases, equal protection cases, privacy cases, and cases involving statutes. This categorization of cases works well, as it allows the readers to be in a particular frame of mind as they read each section. Within each section, however, there appears to be no particular organization of the cases presented. A simple chronological organization within each section would allow the reader to understand not only the particular cases presented, but also the evolution of the law within that area. Because the Supreme Court is not static, it would have been more educational to present the law as it changes, from decade to decade and Court to Court, so that we not only have a better understanding of what a particular opinion means, but also where it came from and possibly where that body of law may be moving.

For readers interested in both law and history (or legal history), *May It Please the Court...* is a good book to learn a little about both of these topics. For those readers interested only in the law, this book is an excellent tool to place these legally significant cases into their historical perspective, and, for those who are only interested in social history, this book shows that legal opinions were important in the social development of this country.

*May It Please the Court...* also teaches an important lesson to appellate lawyers—that oral argument does count. There are several instances of great opening statements that quickly identify the legal issues and pertinent law for the Court without a lot of grandstanding and improvisation. Also, there are several instances where the Justices wanted to clarify a specific legal position, by asking difficult, pointed questions of the attorney. When the oral argument is combined with the actual written opinion, it is clear that the answers to these questions provided the basis for the Court's decision.

Besides, isn't any book worth reading when it reminds us of important legal lessons or teaches us new lessons? If you think so, *May It Please the Court...* is well worth the time spent reading.

Jose D. Sosa  
Arnstein & Lehr  
West Palm Beach, FL

## RECENT DEVELOPMENTS

### *Ledet v. Seasafe, Inc.:*

#### To Footnote or Not to Footnote?

The Louisiana Third Circuit's decision in *Ledet v. Seasafe, Inc.*, 783 So.2d 611 (La.App. 2001), has drawn considerable attention, both locally (in the *New Orleans Times-Picayune*) and nationally (in the *New York Times*), on an arcane issue unrelated to the decision itself: the use of footnotes in judicial opinions.

The *Ledet* case concerned whether a workers' compensation carrier could seek reimbursement from the injured worker's statutory employer, when the injured worker alleged that he was injured by the employer's intentional act. The Third Circuit panel unanimously agreed that under these facts, the comp carrier could seek reimbursement from the statutory employer.

Rather than joining the majority opinion, Chief Judge Doucet concurred, because the majority's author (Judge Woodard) put all citations in footnotes. Judge Doucet opined that putting citations in footnotes is contrary to the "Blue Book," the citation manual used by most law reviews, lawyers, and judges. Judge Doucet believed that the court rules require that all citations be put in the main text.

Judge Woodard begged to differ. She opined that the Blue Book does not require that citations go in the main text; it simply observes that judges and lawyers often put them there. Judge Woodard advocated using citational footnotes, for a number of reasons:

- Moving the citations to footnotes leaves the main text uncluttered and therefore easier to read.
- Some of the most highly respected jurists in Louisiana have used citational footnotes, including Judges Alvin Rubin and John Minor Wisdom of the U.S. Fifth Circuit and Judge Melvin Shortess of the Louisiana First Circuit.
- Advanced legal writing scholars such as Bryan Garner recommend putting citations in footnotes.
- Putting citations in footnotes is the nationwide trend in both state and federal courts.
- The original reason for putting citations in main text was "the mechanical limitations of typewriters...." Modern word processing software has no such limita-

tions. Because the reason for putting citations in main text no longer exists, the practice itself should cease.

On the other hand, Judge Woodard joined the many writers who abhor substantive or talking footnotes: footnotes with arguments, explanations, or anything more than bare citations. She cited Axel Lute, who has called talking footnotes "excrement in the corridors of academe." She also cited Noel Coward, who said that coming across a talking footnote "is like going downstairs to answer the doorbell while making love." Finally, she cited Judge Abner J. Mikva, who lambasted talking footnotes as "phony excrescences" and "an abomination."

Judge Woodard defended judicial independence in writing style and her own exercise of that independence by using citational footnotes. "[M]y objective for using *citational* footnotes, as opposed to placing a string of citations in the middle of a sentence, is to write my opinions in an uncluttered, flowing, writing style in order to make them accessible and understandable, not only to lawyers and judges, but also to litigants and to the people whom I was elected to serve, without depriving the legal community of necessary references." Judge Woodard recommended that other judges adopt this writing style because "using *citational* footnotes yields stronger, clearer opinions...."

Judge Woodard also pointed out—twice—that Judge Doucet himself had written several opinions in which he put the citations in footnotes. Of course, Judge Woodard used footnotes to list the citations to those opinions by Judge Doucet.

#### Raymond P. Ward

*Sessions, Fishman & Nathan, L.L.P.*  
New Orleans, LA

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*The most beautiful things  
are those that madness prompts  
and reason writes.*

—André Gide

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### *Williams v. Dallas Area Rapid Transit: Rule Denying Precedential Status to Unpublished Decisions Changes Case Outcome*

Federal appellate courts and Louisiana appellate courts publish some, but not all, of their decisions. Published opinions—the ones that literally go into the books—are treated as legal precedents by both trial court judges and the appellate court that issued the opinion. Lawyers routinely cite published opinions in their briefs, and courts routinely cite them in subsequent opinions and decisions.

Unpublished decisions, on the other hand, are generally not treated as legal precedent. Fifth Circuit Rule 47.5.4 states that unpublished decisions "are not precedent." Rule 2-16.3 of the Uniform Rules of Louisiana Courts of Appeal prohibits lawyers from citing any court of appeals decision that is designated "not for publication," except in the same or related litigation.

The practice of denying precedential status to unpublished decisions is coming under increasing attack. One of the latest salvos was fired by Fifth Circuit Judge Smith, who, joined by Judges Jones and DeMoss, dissented from the denial of rehearing *en banc* in *Williams v. Dallas Area Rapid Transit*, No. 00-10361 (5th Cir. June 25, 2001) (panel opinion: 2/22/01, 242 F.3d 315). The controversy over citing unpublished decisions is not merely an arcane, academic question for appellate specialists. In *Williams v. DART*, it changed the outcome.

In 1999, the Fifth Circuit, in *Anderson v. DART*, held that DART is a political subdivision of the State of Texas, and hence immune from suit under the Eleventh Amendment. But the *Anderson* decision was unpublished. In 2001, the Fifth Circuit was faced with the same question in *Williams v. DART*: whether DART enjoys Eleventh Amendment immunity from civil suits. If *Anderson* had been published (or if unpublished decisions were given precedential effect), it would have bound the *Williams* court. But because *Anderson* was unpublished, the *Williams* court was free to depart from it. And depart it did, holding that DART is not a political subdivision and is not immune from suit under the Eleventh Amendment.

So, the same court that gave DART Eleventh Amendment immunity in 1999 took it away in 2001. The same litigant (DART) who appeared twice before the

same court on the same issue received opposite results—because of the rule denying precedential value to unpublished decisions. Had the *Williams* court given the unpublished *Anderson* decision precedential value, the result would have been different.

Judge Smith, joined by Judges Jones and DeMoss, dissented from the denial of rehearing *en banc*, because rehearing would have allowed the court to revisit the “questionable practice of denying precedential status to unpublished opinions.” Judge Smith questioned some of the justifications for not giving unpublished opinions precedential value. One such justification may have been the relative unavailability of unpublished decisions. But the Internet, Lexis, and Westlaw have made unpublished decisions readily available to anyone.

Another justification has been the notion that unpublished decisions are supposed to be straightforward applications of existing law to plain-vanilla facts. Theoretically,

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*Nothing is so easy as to  
be wise after the event.*

—Chief Justice Jervis

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unpublished decisions should do nothing new. But that theory doesn't always work. For example, in the first half of 2001, the Fifth Circuit issued four unpublished decisions in which a judge dissented. This would seem to indicate that those decisions were not easy applications of existing law to plain-vanilla facts. Judge Smith offers this question for consideration: “If [an unpublished] opinion is a mere restatement of existing law (as it must be, if it is accorded unpublished status), what is the harm in viewing it as precedent?”

Judge Smith cited the recent Eighth Circuit decision holding that the Eighth

Circuit's rule restricting the precedential value of unpublished decisions is unconstitutional, *Anastasoff v. United States*, 223 F.3d 898 (8th Cir.), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000). He acknowledged that *Anastasoff* has been criticized, and that there are “powerful arguments both for and against the policy of giving precedential effect to unpublished opinions.” But the “issue is close enough for this court to give it *en banc* consideration.”

This seemingly arcane issue is important to both lawyers and their clients. The refusal to accord precedential status to an unpublished decision was decisive in *Williams*. And the Eighth Circuit's decision in *Anastasoff* holding such a rule unconstitutional calls into question all similar rules in both state and federal appellate courts.

**Raymond P. Ward**

*Sessions, Fishman & Nathan, L.L.P.*

New Orleans, LA

## WRITER'S CORNER

### THE ART OF THE POST-TRIAL MOTION

Although a written post-trial motion is required in many jurisdictions to obtain judgment notwithstanding the verdict, a new trial, or other post-trial relief, the art of preparing winning post-trial motions has received relatively little scholarly attention or practical commentary compared to appellate brief writing. Indeed, many trial attorneys (and perhaps even a few appellate practitioners) consider the post-trial motion a mere technical formality to be quickly dispatched before the real work of the appeal begins. This article suggests a different approach to preparation of this critical pleading.

#### **View the Post-Trial Motion Strategically**

In addition to seeking relief directly from the trial court, the post-trial motion can and should be used to posture your case most favorably for settlement or appeal. A thorough, well-researched, and skillfully written post-trial motion shows your opponent that you are willing to do what it takes to obtain the relief requested. When

confronted with a compelling post-trial motion—and the specter of the lengthy and expensive appellate battle that it raises—many previously “uninterested” parties will approach settlement discussions with newfound enthusiasm and flexibility. Settlement leverage is further enhanced if the trial court takes the post-trial motion “under advisement” or otherwise indicates that it may seriously be considering awarding some relief.

Even if settlement is not desired or achieved, a well-drafted post-trial motion will lay much of the groundwork for your appeal, from identification and preservation of error to articulation of supporting legal arguments. These essential functions should not be overlooked; in many jurisdictions, failure to raise an alleged error in the post-trial motion waives the issue on appeal.

#### **Consider Retaining an Appellate Specialist**

So how does one produce a “compelling”

post-trial motion? The first step may be to retain an appellate specialist. The appellate specialist brings a fresh set of eyes to the case and is trained to identify errors that the trial attorney might overlook. An appellate specialist may also be more inclined to conduct a thorough review of the trial court record and transcripts, rather than relying on personal memory of the trial proceedings, again increasing the likelihood of spotting and preserving error for review.

#### **Know the Rules**

Although this seems self-evident, it bears repeating that if you are contemplating preparation of a post-trial motion, you must ascertain at the outset the rules for post-trial motions in your jurisdiction. Must all requests for relief be contained in a single, “global” post-trial motion or are separate motions required for judgment notwithstanding the verdict, new trial, remittitur, etc.? Do all or only certain types of error have to be raised in the post-trial motion to be preserved for review? Are there applicable page limitations on the motion or any part thereof, such as a memorandum in support? Does the court require legal argument to be presented in a separate memorandum, or can it be in-

cluded in the motion? When is the motion due? Do you need to bond the judgment to stay execution during the post-trial period, or does the timely filing of the post-trial motion automatically stay the judgment? These are just some of the pressing questions that must be answered in preparing an effective post-trial motion.

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### Interview the Jurors

Once you have addressed the foregoing items, it is time to start working on the real meat of the post-trial motion: the identification and explication of grounds for judgment notwithstanding the verdict, new trial, remittitur, or other relief sought. Although some jurisdictions preclude or restrict the practice (check your local rules), an excellent place to begin your hunt for error is with interviews of the jurors. These interviews may yield evidence of juror misconduct, such as failure to answer *voir dire* questions truthfully or improper consideration of extraneous evidence (for example, an unauthorized visit to an accident site or review of outside materials not presented at trial) and entitle you to a new trial if the misconduct is prejudicial.

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### Review the Record Thoroughly

Your hunt for error should include a thorough review of all pertinent trial pleadings and motions (including motions *in limine* and motions for directed verdict), all jury instructions tendered, submitted, or rejected (yours and all other parties'), any special interrogatories tendered, submitted, or rejected, and the verdict form returned by the jury, along with any other tendered and rejected forms. You should also obtain and review the entirety of the trial transcripts, from *voir dire* through return of the jury's verdict, as well as all demonstrative and evidentiary exhibits introduced during the trial. Do not rely exclusively on memory, as even a relatively short trial will have far too much information for you to recall completely, and you will undoubtedly miss potential errors. In the event certain proceedings were not reported or trial transcripts cannot be obtained in time to meet filing deadlines, use whatever written records are available (such as trial notes taken by an associate or paralegal) and ask others who attended the trial for their recollections as soon as possible so you can piece a record to-

gether before memories fade and potential issues are lost.

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### Research the Law

As you wade through the record, you will likely spot at least a few "good" errors warranting in-depth legal research. Less significant errors may warrant considerably less research. If you are unsure whether a particular piece of testimony, evidence, or comment of counsel is objectionable, mark the item for quick research. Most states have a well-developed body of law regarding evidence and trial practice matters, and a brief focused look at the specific issue will often answer any questions as to its propriety.

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### Identify All Potential Errors

The post-trial motion should be a comprehensive document identifying *all* potential issues and errors for review, regardless of whether an objection was raised during trial. Many potential objections are missed in the heat of battle (or deliberately withheld for strategic reasons), but by raising the issue in your post-trial motion, you can afford the trial court at least one chance to review the issue, even if only for "plain error." In the same vein, do not limit your post-trial motion to only those errors that you think have the best chance of success on appeal; you will have plenty of time to cull the wheat from the chaff when preparing your appellate brief. Also, you do not want to lose the impact of presenting your opponent with a thick post-trial motion identifying 70 or 80 errors, instead of one addressing only a handful.

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### Highlight the Most Egregious Errors "Up Front"

In many instances, the post-trial motion may be structured for maximum impact by highlighting the most egregious issues and errors "up front" in a preliminary section or statement. The benefit of this approach is three-fold: 1) it grabs the trial

court's attention and focuses on your most compelling points at the outset; 2) the court may review subsequently enumerated errors more closely if it has an indication that serious error has occurred; and 3) you get to argue your most persuasive points twice, once in the preliminary section and again in the main body of the motion.

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### Present Supporting Legal Argument

In addition to identifying all alleged issues and errors, an effective post-trial motion must also explain why the challenged ruling or other matter is in fact an issue or error and why it entitles the movant to the relief sought. This is the function of supporting legal argument, and no post-trial motion is complete without it. An attorney may typically say this about the exclusion of certain evidence: "The trial court erred in excluding all evidence of plaintiff's settlement with former co-defendant A on the grounds of relevance, because the evidence was relevant to show bias." By contrast, the appellate specialist may frame the point this way:

The trial court erred in excluding evidence of plaintiff's settlement with former co-defendant A, because such evidence was relevant to establish bias and attack the credibility of plaintiff's expert witness B, who changed his opinions about the accident forces shortly after the settlement. See *Ellis v. Ellis*, 747 S.W.2d 711, 716 (Mo.App. 1988) (general rule against admissibility of settlement evidence "does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness"); *Joice v. Missouri K.T.R. Co.*, 354 Mo. 439, 189 S.W.2d 568, 575 (1945) (evidence of settlement admissible to show bias and attack credibility of adverse witness). The court's ruling precluded defendant from establishing bias and attacking the credibility of plaintiff's key expert witness on liability, severely prejudicing its defense and entitling defendant to a new trial.

Although the first example might arguably be sufficient to preserve the court's challenged evidentiary ruling for appellate review, it does little to advance the defendant's cause before the trial court or in the settlement arena. The second version not only presents and preserves a more persuasive assertion of error, thereby increasing

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*Equity speaks softly  
and wins in the end.*

—Caroline Bird

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the chances of success at this stage, but also could also easily be inserted in an appellate brief should the case reach that point.

### Make Your Record

Discussion of the issues and errors set forth in the post-trial motion should include cites to the specific trial pleading, motion, testimony, exhibit, jury instruction, verdict form, or other item involved (e.g., Plaintiff's Motion *in limine* No. 8, Deposition of John Doe at page 5, Defendant's Ex. 12). Encourage the trial court to review the referenced items—and help ensure that they are ultimately included as part of the record on appeal—by attaching copies of all cited materials to the post-

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*Some circumstantial evidence is very strong, as when you find a trout in the milk.*

—Henry David Thoreau

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trial motion itself or filing a separately bound volume of exhibits together with the motion. In many instances, items tendered to the court during the actual course of trial, such as transcripts of evidence depositions or proposed jury instructions, never find their way into the official court

file. Including these items with your post-trial motion greatly increases the likelihood that they will be available to both the trial and appellate court.

### Conclusion

Expect the best. Do not treat the post-trial motion as a foregone conclusion, but, rather, a unique opportunity to “pry victory from the jaws of defeat” by obtaining requested relief from the trial court, leveraging an advantageous settlement from your opponent, or posturing the case for a favorable result on appeal.

**Melinda Kollross**  
*Clausen Miller P.C.*  
Chicago, IL

## CIRCUIT REPORTS

### First Circuit

#### TIMELY FILING

In *Hospital Del Maestro v. N.L.R.B.*, 263 F.3d 173 (1st Cir. 2001), an administrative law judge found that the petitioner, Hospital Del Maestro, had violated §8(a)(1) of the National Labor Relations Act and recommended that the N.L.R.B. enter a remedial order. The Board issued an order transferring the case to itself, stating that exceptions to the decision of the administrative law judge were to be received by the Board on or before March 3, 2000. The order attached excerpts from the Board's rules and regulations relating to the filing of exceptions, which provided, in relevant part, that:

[T]he Board will accept as timely filed any document which is hand delivered to the Board on or before the official closing time of the receiving office on the due date or post-marked on the day before (or earlier than) the due date; documents which are post-marked on or after the due date are untimely. “Post-marking” shall include timely depositing the document with a delivery service that will provide a record showing that the document was tendered to the delivery service in sufficient time for delivery by the due date, but in no event later than the day before the due date....

The rules further provide that untimely filed documents may be accepted “only upon good cause shown based on excusable neglect and when no undue prejudice would result.” The Hospital requested and received two extensions of time, up to March 14, 2000. The second request was granted with a notice to the hospital stating the “[d]ate for receipt of exceptions and brief in Washington, D.C. is extended to March 14, 2000.” On March 14, the Hospital sent to the Board, by Federal Express overnight delivery, its exceptions to the judge's decision and recommended order. When the documents were received on March 15, the Board sent a letter advising the Hospital that the exceptions were untimely. The Hospital filed a motion to the Board to accept its exceptions out of time, stating that it had “misunderstood that the effective date of filing corresponded to the date that the exceptions were notified by mail [sic].” The Board denied the motion, and the Hospital appealed. The Hospital spent much time briefing the “apparent paradox that a mailing post-marked before March 14 but received *more* than one day late would be considered timely, while a mailing post-marked on the due date and received the next day would not.” (emphasis by the court). The court ruled that this hypothetical outcome did not render the rule unclear or ambiguous and that no basis existed for

finding that the Hospital's neglect was excusable because it did not “even plausibly explain its misreading of the rules.”

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### Third Circuit

#### CIVIL RIGHTS

*Brown v. Muhlenberg Township*, No. 00-1846, 2001 U.S.App.LEXIS 21754 (3d Cir. Oct. 11, 2001), involved questions of first impression arising from a police officer's shooting of the plaintiffs' pet Rottweiler, which strayed from the plaintiffs' back yard. The plaintiffs sued the police officer, two of his supervisors, and the employer township, claiming violations of their civil rights under the Fourth and Fourteenth Amendments and intentional infliction of emotional distress. The district court granted summary judgment in favor of all defendants.

On appeal, the panel affirmed as to the substantive due process claim and the husband's emotional distress claim as to all of the defendants, and with respect to all of the other claims as to the township and the supervisors. But, with respect to the police officer, the panel was sharply divided. The majority held that the evidence showed that the police officer deliberately shot the dog when it posed no threat and after the officer knew that the dog's owner was nearby and ready to reclaim the dog. The majority ruled that a state anti-theft

statute had established that the dog was personal property, and that prior Fourth Amendment cases had established that civil rights could be infringed by the destruction of personal property. The majority also rejected the officer's claim of immunity as a matter of law, and held that the decisions of two other circuits should have informed the officer that shooting the dog violated clearly established rights.

#### STANDARD OF REVIEW

*Skretvedt v. E.I. DuPont De Nemours and Company*, No. 00-2918, 2001 U.S.App. LEXIS 21610 (3d Cir. Oct. 5, 2001), involved an employee's claim for job stress-induced disability. The court of appeals rejected the contention that the involvement of the employer's associate medical director in evaluating the employee's claim, both during the initial determination and on appeal, created a procedural impropriety that heightens the standard of review above the "arbitrary and capricious standard prevalent in ERISA cases." But even under that standard, the court concluded that the medical evidence of job-related stress clearly demonstrated that the employee was eligible for disability benefits, and that the employer's decision to deny that claim was arbitrary and capricious because it was "without reason" and "unsupported by substantial evidence."

#### INTERLOCUTORY REVIEW

In *Comuso v. National Railroad Passenger Corp.*, No. 00-1491, 2001 U.S.App. LEXIS 21375 (3d Cir. Oct. 3, 2001), the district court declared a mistrial and later disqualified and fined the plaintiff's attorney for heatedly threatening defense counsel at trial. The court's order also referred the matter to the state disciplinary board. The plaintiff's attorney appealed, and another attorney in his office then took over the case, which remained in limbo pending the outcome of the appeal.

The court of appeals noted that final judgment had not been entered, and thus questioned whether it could consider the case under the *Cohen* doctrine. Under that doctrine, "collateral orders" must: 1) "conclusively determine the disputed question"; 2) "resolve an important issue completely separate from the merits of the action"; and 3) "be effectively unreviewable on appeal from a final judgment." Although the court had found appellate jurisdiction

in prior cases involving similar facts, the court ultimately held that the *Cohen* doctrine could not be applied in light of the Supreme Court's decisions in *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985), and *Cunningham v. Hamilton County, Ohio*, 527 U.S. 198 (1999). From those decisions, the court of appeals perceived that the Supreme Court "has consistently rejected a case-by-case approach in deciding whether an order was separate from the merits of the litigation in favor of a *per se* rule that sanctions orders are inextricably intertwined with the merits of the case."

The court of appeals also rejected the attorney's alternative request for review by mandamus. The court noted that petitioners must show an abuse of discretion or of judicial power, "that they lack adequate alternative means to obtain the relief they seek," and that their right to issuance of the writ is "clear and indisputable." The court declared that, in light of the attorney's outrageous conduct and the district court's inherent power to discipline attorneys appearing before it, "we cannot hold that the District Court's sanction in this case exceeded the boundaries of appropriate judicial response warranting issuance of a writ of mandamus."

#### PREJUDGMENT INTEREST

In *Francisco v. United States*, No. 00-1802, 2001 U.S.App. LEXIS 21236 (3d Cir. Oct. 1, 2001), the Third Circuit addressed whether prejudgment interest on a personal injury award is taxable income. In the underlying personal injury litigation, the plaintiffs won a verdict of \$1.91 million in compensatory damages. According to Pennsylvania law, the trial court added delay damages in the amount of \$1,615,662, for a total judgment of \$3,525,662, with the delay damages accounting for roughly 46 percent of this total. While the case was on appeal, the plaintiffs settled for a payment of \$3.4 million.

The plaintiffs did not report any of the

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Man does not live by words alone,  
despite the fact that sometimes  
he has to eat them.

—Adlai Stevenson

settlement funds as income on their tax return. After an audit, the IRS assessed a tax deficiency of \$402,646, claiming that 46 percent of the settlement was for delay damages and that those damages were not exempt from federal income taxation as damages "received on account of" a personal injury under 26 U.S.C. §104(a)(2). The taxpayers paid the assessment, and the district court rejected the plaintiffs' suit for a refund. On appeal, the Third Circuit joined three other courts of appeals that found similar awards of prejudgment interest to be taxable: *Rozpad v. Commissioner*, 154 F.3d 1, 6 (1st Cir. 1998); *Brabson v. United States*, 73 F.3d 1040, 1047 (10th Cir. 1996); *Kovacs v. Commissioner*, 100 T.C. 124, 130 (1993), *aff'd without opin.*, 25 F.3d 1048 (6th Cir.). The court also affirmed the IRS's determination that 46 percent of the settlement was taxable income.

#### CONTRACTUAL INDEMNITY

In *Jacobs Constructors, Inc. v. NPS Energy Servs., Inc.*, 264 F.3d 365 (3d Cir. 2001), the Third Circuit resolved three issues of indemnity and insurance coverage among a refinery owner, a contractor, a subcontractor, and the subcontractor's CGL insurer. Pennzoil hired a contractor, Jacobs Constructors, to do some work at a refinery. Jacobs, in turn, subcontracted part of the job to NPS Energy. The contract between Pennzoil and Jacobs required Jacobs to indemnify Pennzoil for liability and defense costs for claims arising from personal injury or death of subcontractor employees, regardless of cause, unless the injuries were caused by Pennzoil's gross negligence or willful misconduct. The subcontract between Jacobs and NPS likewise contained an indemnity provision, requiring NPS to defend and indemnify Jacobs. The subcontract also required NPS to obtain CGL coverage of \$5 million, naming both Jacobs and Pennzoil as additional insureds. NPS obtained the CGL coverage from National Union.

A fire and explosion occurred near the area where Jacobs and NPS were working. Injured NPS employees and representatives of deceased NPS employees sued Pennzoil, which sought to enforce the indemnity obligations owed by Jacobs and NPS. Pennzoil also brought claims against National Union for indemnity and defense. National Union declined coverage,

contending that the accident was caused by Pennzoil's negligence. Jacobs and NPS likewise denied liability to Pennzoil under the indemnity contracts.

Pennzoil sued Jacobs in the district court of Harris County, Texas, seeking a declaratory judgment that Jacobs was obligated to defend Pennzoil against the NPS employees' suits. While the Texas action was pending, Pennzoil settled with NPS and National Union. Under the settlement, National Union tendered its policy limits to Pennzoil for Pennzoil to settle the personal injury claims. Pennzoil released NPS and National Union from any further liability, but reserved its rights against Jacobs.

Jacobs then filed two declaratory judgment actions in a Pennsylvania federal court, one against NPS and the other against National Union. The district court consolidated the two declaratory judgment actions, and, as a result of motions for summary judgment and a motion to dismiss, issued rulings that NPS and Jacobs appealed.

On appeal, the court first considered whether NPS was obligated to defend Jacobs in the Texas declaratory judgment suit. NPS argued that no such obligation existed because it was not stated clearly and unequivocally in the contract with Jacobs. NPS cited well-established Pennsylvania law that indemnification against claims arising from the indemnitee's own negligence will not be inferred, but must be stated expressly, clearly, and unequivocally in an indemnity clause. The court agreed that this principle applies not only to claims brought against the indemnitee by personal injury plaintiffs, but also to claims arising from the indemnitee's contractual liability. Applying this rule to the contract between Jacobs and NPS, the Third Circuit found no clause requiring NPS to indemnify Jacobs against the claims brought by Pennzoil in the Texas action. NPS's obligation to defend Jacobs extended only to suits brought by NPS's own employees or their survivors.

On its appeal, Jacobs argued that the district court's rulings were mutually exclusive. Jacobs argued that if NPS fulfilled its obligation to have Jacobs named as an additional insured on the National Union policy, National Union was obligated to defend Jacobs in the Texas action. Conversely, argued Jacobs, if National Union was not obligated to defend Jacobs in the Texas action, NPS failed to satisfy its obligation to have Jacobs listed as an additional

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*To be brief is almost a condition  
of being inspired.*

—George Santayana

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insured on the National Union policy. The Third Circuit rejected Jacobs' argument, finding that NPS was obligated to have Jacobs named as an additional insured on the National Union policy, but that the contract required only that Jacobs be insured for personal injury claims brought by the injured persons themselves (or their survivors). The contract did not require NPS to procure insurance for Jacobs against contractual liability. For similar reasons, the court held that National Union was not obligated to defend Jacobs in the Texas action. Jacobs argued that its contract with Pennzoil was an "Insured Contract" under the policy. The court, however, found that, under the policy, an "Insured Contract" was on which the named insured—NPS—was a party. A contract made by an additional insured like Jacobs was not an "Insured Contract" under the National Union policy.

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## Fifth Circuit

### DIVERSITY JURISDICTION

28 U.S.C §1441(a) provides that the citizenship of defendants sued under fictitious names is disregarded for removal purposes. In *Doleac v. Michalson*, the Fifth Circuit held that this statute applies only to fictitious defendants and not to subsequently named parties identifying one of those defendants. 264 F.3d 470 (5th Cir. 2001). Doleac, a resident of Mississippi, brought a wrongful-death action based on medical malpractice against Dr. Michalson, a resident of Idaho. Doleac also named four John Doe defendants, described as health care providers who might be liable. Michalson removed the action to federal court based on diversity. Six months later, Doleac moved to amend to add a Mississippi medical corporation as a defendant. In a single order, the district

court allowed the amendment and remanded the case to state court because the new defendant destroyed diversity. In this case of first impression, the Fifth Circuit held that the amended complaint adding a non-diverse defendant destroyed diversity and defeated federal subject matter jurisdiction, regardless of whether the new defendant had been added as a party or substituted for one of John Doe defendants named in original complaint. Section 1441(a) applies only to John Doe defendants and not to subsequently named parties identifying one of the fictitious defendants.

### PRESERVATION OF ERROR

In *Logan v. Burgers Ozark Country Cured Hams, Inc.*, the Fifth Circuit recently held that a Rule 50 motion addressing only issues of liability is sufficient to preserve error on damages. 263 F.3d 447 (5th Cir. 2001). Under Rule 50, to preserve the right to assert a post-verdict motion for judgment as a matter of law, the moving party must first request judgment as a matter of law before the case is submitted to the jury. During this patent infringement suit, the defendant moved for a directed verdict by specifically attacking questions of liability. After the jury returned a verdict for the plaintiff and the district court entered a final judgment, the defendant renewed its motion for judgment as a matter of law. This time, however, the plaintiff specifically attacked the damages awarded to the plaintiffs. The district court granted the motion and set aside all damages. On appeal, the plaintiff argued that the defendant failed to preserve error because it had not mentioned the fraud damages in its pre-verdict motion for judgment as a matter of law. The Fifth Circuit disagreed, holding that a Rule 50 motion on questions of liability inherently included all forms of damages.

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## Sixth Circuit

### REMAND

The Sixth Circuit recently held that a remand motion is a dispositive motion and, as such, can be entered only by a district judge. In *Vogel v. U.S. Office Prod. Co.*, 258 F.3d 509 (6th Cir. 2001), shareholders

brought suit in Michigan state court, alleging violations of Michigan law in connection with the sales of businesses to U.S. Office Products. The defendants removed the action to federal court, alleging diversity jurisdiction. A magistrate judge purported to remand the action, finding that one of the defendants failed to timely join in the removal. The defendants sought the district court's review of the magistrate's remand order, contending that the "tardy" defendant had in fact timely joined in the removal. Construing 28 U.S.C. §636(b)(1), the district court held that a remand order is not dispositive because it simply sends the case back to a state court without terminating any aspect of the litigation. Because the remand order was deemed not dispositive, the magistrate judge had the power to order remand. And once the magistrate did so, the district court reasoned that 28 U.S.C. §1447(d) deprived the district court of authority to review the magistrate's order.

The Sixth Circuit reversed, joining the Third and Tenth Circuits in holding that a remand order is dispositive. The court reasoned that a remand motion, much like the motions expressly listed in 28 U.S.C. §636(b)(1)(A), finally and preclusively resolves the important issue of whether the litigants can proceed in a federal forum. *Id.* at 514-15. The magistrate, therefore, lacked the authority to remand to state court. The Sixth Circuit instructed the district court (on remand) to treat the magistrate's prior order as the equivalent of "proposed findings and recommendations," which require *de novo* review under 28 U.S.C. §636(b)(1)(C).

### TRADEMARK DILUTION

The question whether a plaintiff must prove an actual and present injury to its trademark to state a claim under the Federal Trademark Dilution Act ("FTDA") continues to divide the circuits. In *V Secret Catalogue, Inc. v. Moseley*, 259 F.3d 464 (6th Cir. 2001), the Sixth Circuit answered "no."

The case concerned an allegation by Victoria's Secret that Victor Moseley's use of the name "Victor's Little Secret" for his Kentucky-based lingerie and adult product business constituted impermissible trademark dilution under the federal statute. The district court rendered summary judgment for Victoria's Secret, holding

that both marks ("Victoria's Secret" and "Victor's Little Secret") were sufficiently similar to result in dilution by blurring. The district court added that Moseley's mark tarnished Victoria's Secret's mark because Moseley's mark was related to unsavory adult novelties.

On appeal, Moseley argued that the district court erred in not requiring Victoria's Secret to show proof of actual economic loss because of the alleged dilution. Section 1125(c)(1) of the FTDA entitles a mark's owner to an injunction if another's mark "causes dilution." The statute defines "dilution" as "the lessening of the capacity of a famous mark to distinguish goods or services, regardless of the presence or absence of (1) competition between the owner of the famous mark and other parties, or (2) likelihood of confusion, mistake, or deception." 15 U.S.C. §1127. The statute is silent on whether injury is required to state a claim.

Adhering closely to the Second Circuit's reasoning in *Nabisco, Inc. v. PF Brands, Inc.*, 191 F.3d 208 (2d Cir. 1999), the Sixth Circuit refused to require a threshold showing of injury. The court canvassed the statute's legislative history and concluded that Congress enacted the FTDA to provide a broad and preventative remedy for trademark dilution, one that should issue before dilution has in fact caused harm to the senior mark. Only then, the Sixth Circuit reasoned, would the federal law operate to protect the holder's property right in the potency of the mark. Waiting for injury to occur, the court added, renders the statute's injunctive remedy meaningless and ineffective. The Sixth Circuit also stated that the contrary position of the Fourth and Fifth Circuits imposes an unreasonably high burden of proof upon the senior mark holder.

### DUE PROCESS

In *Michigan Bell Tel. Co. v. Engler*, 257 F.3d 587 (6th Cir. 2001), the Sixth Circuit issued an important ruling concerning governmental authority under the 14th Amendment to regulate telephone rates.

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*Most of the disputes in the world  
arise from words.*

—William Murray, Earl of Mansfield

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Michigan Bell (d.b.a. Ameritech Michigan) and Verizon sought to enjoin the enforcement of two features of a Michigan law impacting rates of return realized by large telecommunications providers within the state. The Michigan Telecommunications Act of 2000 aimed to ensure that all Michigan residents had access to affordable and fair telecommunications services and to encourage competition within local markets. It did so, among other ways, by abolishing a certain fee that telephone service providers imposed on consumers, and by freezing regulated rates at their present levels for three years. Ameritech and Verizon asserted that these provisions, by failing to provide any mechanism through which the companies could receive a just and reasonable rate of return on their investments, offended the Due Process Clause of the Fourteenth Amendment. Agreeing with half of the companies' contentions, the district court granted a preliminary injunction against enforcement of the statute's rate-freezing provision.

The Sixth Circuit affirmed in part and reserved in part, holding that the district court erred in not granting a preliminary injunction against enforcement of both statutory features. Relying on guidance from the Supreme Court's regulatory rate cases, the Sixth Circuit explained that state-imposed price controls pass constitutional muster if they protect the regulated entity against confiscatory rates by assuring a reasonable return on investment. The Michigan statute fell short of this standard because it contained no such safeguards. Because the statute lacked these safeguards, the plaintiffs demonstrated a substantial likelihood that they would win on the merits of their Due Process attack on the statute. Because of their likelihood of success and the prospect of irreparable harm, the plaintiffs were entitled to a preliminary injunction against enforcement of the statute.

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### Seventh Circuit

#### BRIEFING

The Seventh Circuit has recently handed down a decision on the practicalities of filing an appellate brief when one party is

represented by two sets of attorneys on two claims. The Seventh Circuit's rule: a party sued in two capacities is still only one party for briefing purposes. *Licari v. City of Chicago*, 262 F.3d 646 (7th Cir. 2001). Judge Richard Posner authored the court's opinion.

Plaintiff sued four City of Chicago council members in their individual capacities and also in their official capacities as members of a retirement board. The district court dismissed the claims, and, on appeal, the defendants were represented by two sets of attorneys—government lawyers for the official capacity claims and private attorneys for the individual capacity claims. The defendants filed a joint appellate brief, limited to the official capacity claim. Shortly thereafter, they filed a motion to authorize the filing of a second joint appellees' brief, which would address the individual capacity claims. Judge Posner denied this request, and the defendants filed a motion to reconsider.

On reconsideration, the court upheld its previous ruling that an individual sued in different capacities does not have the right to present separate briefs as if he were two parties. The sole fact that the defendant could present separate defenses against each claim does not confer a right to file a brief twice as long as the plaintiff's. The court likened the situation to the consolidation of separate claims of a plaintiff, which does not automatically increase the number of pages allotted on appeal.

The court went on to discuss the practicalities of filing briefs when one party is represented by two sets of attorneys for two separate claims. Judge Posner advised the litigants that attorneys for both claims should jointly participate in the same brief. In the unlikely event that either set of attorneys refused to cooperate with the other, the defendant could then ask for leave to file a separate brief. Barring that, defendants sued in two capacities should not automatically be given the right to file twice as many pages as the plaintiff.

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## **Eighth Circuit**

### **REMAND**

In *Bauer v. Transitional Sch. Dist. of the City*

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*A book is like a quarrel: one word leads to another, and may erupt in blood or print, irrevocably.*

—Will and Ariel Durant

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*of St. Louis*, No. 00-3831 (8th Cir. July 2, 2001), a taxpayer petitioned in state court for a writ of mandamus ordering a school district and its board of education to compel placement of a student bill of rights on the city election ballot. The school board removed the case under 28 U.S.C. §1331 (federal question jurisdiction). Shortly before trial, the district court, on its own motion, decided that it did not have subject matter jurisdiction and remanded the case to state court.

The school board appealed. The Eighth Circuit noted that the appeal presented two questions—was there subject matter jurisdiction in the federal court, and was there appellate jurisdiction to entertain that question? The court concluded that it lacked appellate jurisdiction and, thus, did not reach the underlying federal subject matter jurisdiction question.

Section 1443(2) permits removal of suits initiated in state court against a party “[f]or any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.” This statute has been interpreted by the United States Supreme Court, in *City of Greenwood v. Peacock*, 384 U.S. 808 (1966), as conferring a privilege of removal only upon federal officers or agents. The Eighth Circuit rejected the assertion that the school board, allegedly acting in violation of federal law, was entitled to exercise removal rights under this section. “Because the Board is not a federal officer or agent ‘authorized to act with or for them in affirmatively executing duties under any federal law providing for equal civil rights,’ as required by *Greenwood*, it cannot take advantage of removal under Section 1443(2).”

### **POST-TRIAL MOTIONS**

In *Day v. Toman*, No. 00-3237 (8th Cir. Sept. 17, 2001), plaintiff sued an insurance agent, alleging that the agent was negligent

in failing to procure commercial liability insurance. The jury returned a verdict for the plaintiff, and the district court denied the agent's motion for judgment notwithstanding the verdict or a new trial. On appeal, the agent sought to challenge the damages award, and raise as an additional issue whether a release barred the plaintiff's claim. The appellate court refused to consider the issues.

The court held that the agent waived release as a defense. The agent did not raise release as a defense in his pre-verdict, Rule 50(a) motion for judgment as a matter of law. The agent also failed in his Rule 50(a) motion to challenge the sufficiency of the evidence on damages. Thus, the agent waived that issue too. It was too late to assert lack of evidence in the post-trial motion. “Even if [defendant's] post-trial 50(b) motion encompasses an argument on failure of proof of damages, which is questionable due to a lack of specificity, his failure to raise it in his 50(a) motion waived the opportunity to assert it after trial.”

### **NOTICE OF APPEAL**

In *Greer v. St. Louis Reg'l Med. Ctr.*, No. 00-1757 (8th Cir. July 31, 2001), Patricia Greer sued the St. Louis Regional Medical Center, her former employer, asserting several different discrimination claims. Her employer filed and won three separate motions for summary judgment. The first concerned claims of harassment and constructive discharge; the second concerned claims of disparate treatment; the third concerned the remaining claims of constructive discharge and racial harassment under 42 U.S.C. §1981. Final judgment was entered on March 1, 2000. Greer appealed. The notice of appeal, filed March 7, 2000, referred only to the final judgment and third summary judgment order. It was silent as to the first two summary judgment orders. The employer argued that the appeal was procedurally deficient, and that the first two summary judgment orders were not subject to review. The Eighth Circuit rejected this argument.

Noting that ordinarily a notice of appeal that specifies the final judgment in a case “should be understood to bring up for review all the previous rulings and orders that led up to and served as a predicate for that final judgment,” and that orders granting summary judgment on fewer

than all claims are not immediately appealable, the court observed that review “must await a final judgment disposing of all claims and, normally, attended by the formality specified in Fed. R. Civ. P. 58.” There was no question that the notice of appeal was timely; the only question was whether it brought up for review the first two summary judgment orders. “We do not think that the rule specifying the contents of notices of appeal should be interpreted *strictissimi juris*, especially in dealing with pro se litigants, where the appellee shows no prejudice.” Quoting the statement in the advisory committee note to the 1979 Amendments to Fed. R. App. P. 3(c), that it “is important that the right to appeal not be lost by mistakes of mere form,” the court held that the entire case was properly before it for review.

### REMOVAL

In *Marano Enters. of Kansas v. Z-Teca Restaurants, L.P.*, No. 00-3361 (8th Cir. June 25, 2001), franchisees sued their four franchisors in state court, asserting claims for fraud, constructive termination, and breach of contract. Thirty-one days after two defendants were served, but 29 days after the other two were served, the franchisors removed the action, and then moved to dismiss. One of the franchisees moved to remand, arguing that the removal was untimely. The district court denied the remand motion and dismissed the action. On appeal, the Eighth Circuit examined the majority and minority positions followed by other circuits, and held that later-served defendants have 30 days from the date of service on them to file a notice of removal with the unanimous consent of their co-defendants.

The court first noted different approaches taken by other circuits, *i.e.*, the “first-served rule” followed in the Fifth Circuit, which holds that service upon the first of multiple defendants starts the 30-day time period running for all defendants, *Getty Oil Corp. v. Insurance Co. of N. Am.*, 841 F.2d 1254 (5th Cir. 1988), and the minority rule, which holds that a later-served defendant has 30 days from the date of service to remove a case to federal court with the consent of the remaining defendants, *Brierly v. Aluisse Flexible Packaging, Inc.*, 184 F.3d 527 (6th Cir. 1999). Relying upon the recent decision of the United States Supreme Court

in *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999), in which the Supreme Court held that formal service of process commenced the removal period, not mere notice of the suit, the court of appeals articulated this rule: “We hold that the later-served defendants in this case had 30 days from the date of service on them to file a Notice of Removal with the unanimous consent of their co-defendants, even though the first-served co-defendants did not file a Notice of Removal within 30 days of service on them.”

### NOTICE OF APPEAL

Columbus Miles was injured in an automobile accident, and sued the car manufacturer. *Miles v. General Motors Corp.*, No. 00-2602 (8th Cir. Aug. 17, 2001). The jury found in favor of the manufacturer. Miles filed a motion for a new trial, asserting as grounds for relief newly discovered evidence, discovery abuse by GM, and the district court’s erroneous admission of expert testimony. Miles filed a notice of appeal before the district court’s disposition of the motion. After the appeal was filed, the district court denied the motion for a new trial.

The Eighth Circuit first noted that because of the pendency of the post-trial motions, the notice of appeal filed while the post-trial motions were pending did not ripen, and the appellate court did not gain jurisdiction until the post-trial motions were decided. “Under Federal Rule of Appellate Procedure for (a)(4), Miles’ notice of appeal is treated as merely dormant until the date the post-judgment motion is denied.” The court then observed that Miles had failed to file an amended notice of appeal to include the denial of his motion for a new trial, as specifically required by FRAP 4(a)(4)(B)(i-ii): “A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file... an amended notice of appeal...” Accordingly, the court concluded that it lacked jurisdiction

There is no surer way to misread any document than to read it literally.

—Learned Hand

tion to hear Miles’ claims associated with the denied motion.

### INTERLOCUTORY APPEAL

In a pair of civil rights cases where the defendant appealed the district court’s denial of summary judgment based on qualified immunity, the Eighth Circuit has held that it lacked appellate jurisdiction.

In *Moore v. Duffy*, No. 00-2222 (8th Cir. July 6, 2001), an inmate in federal prison filed a complaint under 42 U.S.C. §1983, alleging that the prison doctor was deliberately indifferent to his serious medical needs. The doctor moved for summary judgment based on qualified immunity. The district court denied the motion, concluding that there was a material fact issue regarding deliberate indifference and that qualified immunity was unavailable because, viewing the evidence in a light most favorable to the plaintiff, the doctor’s conduct was not objectively reasonable under clearly established law. The doctor appealed.

The Eighth Circuit held that it lacked appellate jurisdiction. Noting that normally the denial of summary judgment is not appealable, the court recognized the availability of an interlocutory appeal when such orders resolve a dispute concerning an “abstract issue of law” relating to qualified immunity. Typically, this involves the issue whether the federal right allegedly infringed was clearly established. The court noted, however, that a district court’s determination of evidentiary sufficiency is not subject to interlocutory appeal simply because that determination occurs in a qualified immunity case, citing *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996). “Although medical negligence does not violate the Eighth Amendment... [the doctor] does not dispute that it was ‘clearly established’ when he treated [the plaintiff] that medical treatment may so deviate from the applicable standard of care as to evidence a physician’s deliberate indifference...” Here, conflicting expert opinions regarding the doctor’s treatment of the plaintiff created a fact question not reviewable by interlocutory appeal.

In *Thomas v. Talley*, No. 00-2450 (8th Cir. May 25, 2001), Thomas, a state trooper, sued Talley, his captain and supervisor, claiming that Talley violated Title VII of the Civil Rights Act of 1964 in recommending that Thomas be discharged. Talley moved for summary judgment

based on qualified immunity, but the district court denied the motion, finding a genuine issue of material fact. Talley appealed, asserting that Thomas “offered insufficient evidence... to substantiate” his claim of intentional discrimination.

Although the case made it through the appellate process past oral argument, the Eighth Circuit ultimately dismissed the appeal. Although Thomas had not raised the question of jurisdiction, “we have an independent duty to consider it nonetheless.” The court observed that it has jurisdiction over an order denying summary judgment based on qualified immunity only when the issue on appeal turns on a legal determination of whether certain facts show a violation of clearly established law. Following the Supreme Court precedent in *Johnson v. Jones*, 515 U.S. 304, 317 (1995), the court of appeals held that by challenging the district court’s finding of the sufficiency of the evidence, Talley was asking the court to engage in reviewing a factual controversy about intent. “This is precisely the type of controversy that the Court concluded should not be subject to interlocutory appeal because such an issue ‘may seem nebulous’ before trial, and because an appellate court’s determination of whether there is a ‘triable issue of fact about such a matter—may require reading a vast pre-trial record’...” (citation omitted).

#### DEFAULT JUDGMENT

In *Union Pacific R.R. Co. v. Progress Rail Servs. Corp.*, No. 00-3033 (8th Cir. July 10, 2001), Union Pacific Railroad Company sued Progress Rail Services Corporation in federal court. Progress Rail failed to timely answer because of a recording error by its legal department. As soon as Progress Rail had notice that a default judgment had been entered against, it began efforts to have the judgment set aside. It filed a motion to vacate the judgment only three weeks after it had notice of the default, and less than six months after Union Pacific had filed its complaint. The district court denied Progress Rail’s motion to vacate. The district court focused exclusively on the proffered reason for the mistake (a clerical error), which the court found to be inadequate and unsatisfactory.

On appeal, the Eighth Circuit reversed, finding that the trial court had abused its discretion. The appellate court first noted

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*The writer’s only responsibility  
is to his art.*

—William Faulkner

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that, in deciding whether to set aside a default judgment for “excusable neglect,” the trial court should take into account all relevant circumstances surrounding the omission, under the test laid out by the United States Supreme Court in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Limited Partnership*, 507 U.S. 380, 394 (1993). “The inquiry is essentially an equitable one, and the district court is required to engage in a careful balancing of multiple considerations...,” including the danger of prejudice to the non-moving party, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was in the reasonable control of the movant, and whether the movant acted in good faith. The court concluded that in this case the district court erred in focusing exclusively on Progress Rail’s proffered reason for the mistake.

Although we have indicated in past cases that the reason for a party’s delay is a key consideration in determining whether the party’s negligence is excusable, this principle does not provide *carte blanche* to a district court to disregard the other considerations... In this case Progress Rail committed a single, simple error that left it unaware of Union Pacific’s lawsuit. The error did not result from a mistake of law, nor did Progress Rail act negligently over a long period of time despite receiving warnings about its omission.

The Eighth Circuit concluded that because Progress Rail’s negligence involved only a minor mistake, the other equitable considerations that *Pioneer Investment* identified were entitled to significant weight. Considering these factors, the court concluded that the district court should have granted Progress Rail’s motion to set aside the default judgment.

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## Ninth Circuit

### UNPUBLISHED OPINIONS

As the debate gains volume among the courts, the bar, legislators, and legal scholars over the issuance and the precedential value of unpublished opinions, a Ninth Circuit panel headed by an ardent spokesman on the subject raised the issue *sua sponte* twice in the last six months, once briefly to clarify a circuit rule barring the citation of such opinions and once in great detail to declare the rule constitutional.

The rule in question is Ninth Circuit Rule 36-3, which provides that opinions and orders not designated for publication are not binding precedent, and may not be cited to or by any courts of the circuit “except when relevant under the doctrines or law of the case, *res judicata* or collateral estoppel.” In both *Sorchini v. City of Covina*, 250 F.3d 706 (9th Cir. 2001), and *Hart v. Massanari*, 2001 WL 1111647 (9th Cir. 2001), the panel of Circuit Judges Alex Kozinski and Richard Tallman and District Judge Frank Zapata ordered counsel to show cause why sanctions should not be imposed for citing an unpublished disposition in violation of this rule. In both cases, the panel took the opportunity to expound on the rule and found it had been violated, but then used its discretion not to sanction either offending attorney.

In *Sorchini*, counsel argued that the unpublished decision was cited under the exception to Rule 36-3 as notice to the court of the “fact” that there was no legal precedent for a certain argument. The panel quickly rejected this, stating: “If precedent were a ‘fact’ for purposes of the exception, then the exception would swallow up the rule. It would permit an argument such as this: ‘I am not citing this unpublished disposition as precedent, but only to inform the court of the fact that a prior panel held precisely what I would like the court to hold in my case.’ Obviously, this is not what the exception was meant to permit.” *Id.* at 708.

In *Hart*, there was no claim of “misunderstanding”; counsel argued that Rule 36-3 was unconstitutional, relying on *Anastasoff v. United States*, 233 F.3d 898, *vacated as moot en banc*, 235 F.3d 1054 (8th Cir. 2000). *Anastasoff* held that an Eighth Circuit rule that unpublished dispositions are not binding precedent violated Article III of the United States

Constitution, and found that the exercise of “judicial power” precludes federal courts from making rulings that are not binding in future cases. *Id.* at 899, 904. Noting that *Anastasoff*, although vacated, “continues to have persuasive force,” the *Hart* court then issued its lengthy opinion to dispel “speculations” among counsel and to assert that rules holding unpublished dispositions to be nonbinding do not violate the Constitution.

In asserting precedent for this decision, Justice Kozinski, who has spoken and written widely on the subject, roamed through legal history from Sir Edward Coke’s reporting of a case decided in 1584 through Blackstone’s Commentaries and the Framing of the Constitution to the latest statistics on cases decided and published by the federal courts. *Id.* concluded first that neither common law tradition nor the Founding Fathers’ intent required every judicial decision to have binding precedent, noting: “If an 18th-century judge believed that a prior case was wrongly decided, he could say the prior judge had erred in his attempt to discern the law.” He then observed that the principle of strict binding authority is itself not derived from the Constitution, but is instead a matter of judicial policy. Why else would only the courts of a particular circuit (a creature born solely of judicial administration) be bound?

Kozinski explained that writing an opinion is an “exacting and extremely time-consuming task,” and today’s courts simply do not have the resources to write opinions in every case because of the sheer magnitude of current caseloads. He stressed that the fact that a case is decided without a precedential opinion “does not mean that it is not fully considered, or that the disposition does not reflect a reasoned analysis of the issues presented,” and pointed out that unpublished decisions generally involve facts that are materially indistinguishable from those seen in prior published decisions. Adding more opinions on roughly the same set of facts “will, at best, clutter up the law books and databases with redundant and thus unhelpful authority,” yet they must be read and analyzed by lawyers researching the issue, materially increasing the costs to the client for “absolutely no legitimate reason,” Kozinski stated.

Persuasive though it may seem, the *Hart* opinion has not silenced the debate and may, in fact, generate more discus-

sion. Boalt Hall School of Law Professor Stephen Barnett, speaking with a local legal newspaper, *The Recorder*, remarked, “It’s a fine, scholarly opinion,” but he added, “Judge Kozinski doesn’t address the possible constitutional problems with a rule that bars even citing a prior court opinion. A litigant has the right to tell the court how an earlier litigant was treated.” Hastings College of the Law Professor Rory Little told the same newspaper that unpublished opinions are often a “judicial cop-out,” occurring when panel members disagree about the law, but won’t admit it. His suggestion? The court should issue one-word opinions.

Another solution was proposed in an address at the DRI Appellate Advocacy Defense Practice Seminar in San Francisco on October 25, 2001. Attorney Richard Neumeier of Boston conceded that unpublished opinions may be necessary because of the quantity of appellate litigation, but asserted that blanket prohibitions on citing such cases are “unworkable, unwise and unconstitutional.” Neumeier proposed a compromise that would allow citation, but limit it to situations in which counsel can certify that no controlling published authority could be found, and that the unpublished opinion is persuasive on the point directly at hand. “Until this is accomplished by rule,” Neumeier concluded, “competent counsel in appropriate cases should cite unpublished opinions because they have the First Amendment right to make truthful statements and ethical obligations to represent their clients zealously within the bounds of the law.”

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## D.C. Circuit

### AMICUS CURIAE

A split opinion by the D.C. Circuit reveals disagreement on the circumstances in

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*A writer is somebody for whom  
writing is more difficult  
than it is for other people.*

—Thomas Mann

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which appellate courts should consider an argument raised solely by an *amicus curiae*. In *Eldred v. Ashcroft*, 255 F.3d 849 (D.C. Cir. 2001), a divided panel held that it need not consider such an argument. The issue arose in the context of a petition for rehearing and suggestion for rehearing *en banc* filed by the plaintiffs-appellants in *Eldred v. Ashcroft*, 239 F.3d 372, 378 (2001), in which appellants renewed their contentions that the Copyright Term Extension Act of 1998 (“CTEA”) violates both the First Amendment and the Copyright Clause of the United States Constitution. As a primary basis for rehearing, appellants pointed to the appellate panel’s failure to address certain contentions advanced by one *amicus* submission.

The trial court had rejected the plaintiffs-appellants’ constitutional attack on the CTEA based in part on that court’s conclusion that the introductory language of the Copyright Clause places no limitation on congressional power. On appeal, appellants did not challenge that determination; rather, they maintained only that the substantive grant of power in the Copyright Clause—authorizing the Congress to grant copyrights for “limited times”—does not authorize Congress to extend the terms of copyrights as it did in the CTEA. In contrast, one *amicus* contended that the CTEA violates the preamble to the Copyright Clause because extending the term of a subsisting copyright does not “promote the Progress of Science and useful Arts.”

The panel deemed it “particularly inappropriate” in this case to reach the merits of the *amicus*’ position, for two reasons. First, appellants took the position, diametrically opposed to that of the *amicus*, “that the preamble of the Copyright Clause is not a substantive limit on Congress’ legislative power,” and when offered the opportunity at oral argument to adopt the position of the *amicus*, appellants declined to do so. The panel concluded that even if appellants’ brief was broadly read as raising the issue whether the Copyright Clause as a whole—including both the preamble and the grant of authority—renders the CTEA unconstitutional, the panel still would not reach supporting arguments raised solely by the *amicus*. In so ruling, the court relied on the Supreme Court’s decision in *New Jersey v. New York*, 523 U.S. 761, 781 n.3 (1998), for the proposition that the court “must pass over

the arguments of the named *amici* for the reason that... the party to the case[] has in effect renounced them, or at least any benefit they might provide.”

Second, the panel noted that the key point advanced by the *amicus*—that the preamble of the Copyright Clause is a substantive limitation on Congress’ power—poses an additional constitutional question that, under the “rule of avoidance,” should not be reached. The majority added that the concern with avoiding unnecessary or premature constitutional rulings was heightened in this case by the absence of meaningful argument by the parties on the import of the preamble.

Circuit Judge Sentelle, joined by Circuit Judge Tatel, dissented from the denial of rehearing *en banc*. In Judge Sentelle’s view, the decision of the panel was not only incorrect, but also worthy of *en banc* review on procedural grounds concerning the appropriate role of *amicus curiae* in appellate proceedings. According to Judge Sentelle, the panel’s decision not to consider an argument raised by an *amicus* effectively eliminates any role for *amicus curiae* in the practice of the D.C. Circuit. Although accepting the settled proposition that an *amicus curiae* may not raise new issues in an appeal, Judge Sentelle emphasized that the very purpose of an *amicus* filing is to assist the court in addressing the issues already raised with new arguments and perspectives.

In this case, the issue before the court was, in the panel’s words, “whether... the Copyright Clause of the Constitution of the United States constrains the Congress from extending for a period of years the duration of copyrights, both those already extant and those yet to come.” *Eldred*, 239 F.3d at 373. In Judge Sentelle’s view, although the *amicus* brief submitted on behalf of Eagle Forum addressed this issue more persuasively than did appellants, the *amicus* did not “expand the scope” of the appeal by “implicat[ing] issues” not raised by the appellant, but rather, *amicus* adopted a different “argument.” *Eldred*, 239 F.3d at 378. Noting that a new “argument” is not a new “issue,” Judge Sentelle reasoned that *amicus* Eagle Forum simply complied with D.C. Circuit Rule 29, which states that an *amicus* brief “must avoid repetition of facts or legal arguments made in the principal (appellant/petitioner or appellee/respondent) brief and focus on

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*Literature is the art of writing  
something that will be read twice.*

—Cyril Connolly

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points not made or adequately elaborated upon in the principal brief, although relevant to the issues before this court.” Judge Sentelle stated that merely because the parties fail to advance the proper legal theory underlying their claim does not—indeed cannot—prevent a court from arriving at the proper legal disposition.

Judge Sentelle rejected as unsupported by the record the majority’s conclusion that appellants renounced the key argument raised by Eagle Forum. Although Judge Sentelle acknowledged that the language of *New Jersey v. New York* might be taken to suggest that a court must “pass over... arguments” raised only by an *amicus*, he explained his view that *New Jersey* was not controlling because in that case the *amici*, and only the *amici*, sought to overturn Supreme Court precedent, and thus raised issues (as opposed to arguments) not otherwise at issue. Judge Sentelle concluded that if the court was inclined to adopt a rule that will effectively bar future *amici* from adding anything except possibly rhetorical flourish to arguments already outlined and embraced by the parties, the court should do so sitting *en banc*, not by a divided panel.

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## Federal Circuit

### STANDARD OF REVIEW

Which standard of appellate review applies to a lower tribunal’s determination of the scope of waiver of a privilege? In *Winbond Elecs. Corp. v. International Trade Comm’n.*, 262 F.3d 1363 (Fed. Cir. 2001), the court held that the abuse-of-discretion standard applies.

In *Winbond*, the United States International Trade Commission (“ITC”) undertook enforcement of a patent relating to silicon signatures, and the infringers appealed. The court held that the alleged infringers failed to establish invalidity of

patent by clear and convincing evidence. The court also applied the abuse-of-discretion standard to affirm the ITC’s finding that the patentee’s waiver of its attorney-client privilege began when the patentee’s attorney first advised the co-inventor of patent inventorship law, and continued until the time of hearing for determining inventorship issue.

In adopting an abuse-of-discretion standard, the Federal Circuit joined the Second, Third, and Tenth Circuits, which also review such decisions for abuse of discretion. The court acknowledged that the Fourth, Sixth, and Ninth Circuits review trial court determinations regarding attorney-client privilege without deference. Nonetheless, the Federal Circuit reasoned that deferring to a lower tribunal’s determination of the temporal scope of the attorney-client privilege and work product protection would be consistent with the Federal Circuit’s view of the discretion of the ITC to make evidentiary determinations. The court also noted its consistent practice of reviewing a trial court’s determination of waivers of various procedural and evidentiary matters for an abuse of discretion.

### FRIVOLOUS APPEALS

In *Abbs v. Principipi*, 273 F.3d 1342 (Fed Cir. 2001), the court on its own motion awarded sanctions for the filing of a frivolous appeal. In doing so, the court reiterated the standards it follows to impose sanctions for frivolous appeal, when the appellee does not seek such an award. The appellant in *Abbs* had contended that the Court of Appeals for Veterans Claims was an “agency” of the United States, under the Equal Access to Justice Act, a contention the court found completely unsupported by authority and contradicted by the clear and explicit language and legislative history of the statute.

As reiterated by the court, the purpose of awarding costs under Fed. R.App. P. 38 is “to deter frivolous appeals and thus preserve the appellate calendar for cases worthy of consideration.” The court stated that under Fed. R.App. P. 38, examples of actions deemed sanctionable include, but are not limited to: relitigating issues already finally adjudicated; failing to explain how the trial court erred or to present cogent or clear arguments for reversal; failing to cite authority and ignoring opponent’s

contrary cited authority; citing irrelevant or inapplicable authority; distorting cited authority by omitting language from quotations; making irrelevant and illogical arguments; misrepresenting facts or law to the court; failing to reference or discuss controlling precedents; and raising an appeal when the issue is moot. Where, as here, a party's argument flies in the teeth of the plain meaning of the statute and raises arguments with utterly no foundation in law or logic, and indeed is contradicted by clear statutory language, the judicial process is abused and the funds provided by Congress via the taxpayers to the Justice Department are wasted.

The 1994 amendments to Fed. R.App. P. 38 provide that before sanctions may be imposed, either the opposing litigant must file a motion for sanctions, or the court must notify the party that it is considering imposing sanctions and provide that party a reasonable opportunity to respond. Although the court in *Abbs* gave appellant the opportunity to show cause why the appeal was not sanctionable under Fed. R.App. P. 38, the appellant's response merely reiterated its previous unpersuasive arguments, an approach the court found frivolous in its own right.

The court noted that although the

United States had not requested sanctions in this appeal, the Department of Justice traditionally does not move for sanctions under Fed. R.App. P. 38, no matter what the provocation. The court ordered sanctions to be imposed on appellant's attorney, in the form of requiring payment by appellant's counsel personally to the United States for reasonable costs such as printing and copying incurred in defending the appeal.

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## WRITERS WANTED

For

- the July 2002 issue of *Certworthy*
- the monthly Writers' Corner in DRI's magazine, *For The Defense*
- a "how to" appellate manual for defense lawyers—to be published as part of DRI's Defense Library Series

Please see the Publications Subcommittee report (p. 13) for further details.