Certworthy

Winter 2003

The newsletter of the DRI Appellate Advocacy Committee

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A Word About the Last Word in Briefing

Brian J. Paul
Ice Miller
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The best appellate practitioners have taught us how important it is to formulate a convincing issue statement, craft a persuasive fact section, and write a well-reasoned argument. Those points of appellate practice deserve all the attention that has been given to them. Much less attention, however, has been paid to the reply brief, which is an equally important component of any effective appeal.

A reply brief is more than a sequel to your first brief as an appellant. It is a unique opportunity to take to task your opponent's flabby reasoning and mischaracterization of the facts, to recast the debate, to reinforce your themes, and to narrow the issues. Some judges believe reply briefs to be so important that they read them even before reading the appellant's opening brief. Reply briefs therefore are not only the last word at the briefing stage, but for some judges they may be the first word as well.

Presume the Court Has Heard Enough

The first, and perhaps most important, step in writing a good reply brief is determining whether one should be written at all. *See* Fed.R.App.P. 28(c) (stating that a reply brief "may" be filed—they are not required). After digesting the appellee's response brief and determining your counter-arguments, give measured consideration to whether the court needs to hear from you again. Presume it does not. Here are some questions to ask in determining whether a reply is necessary:

- Does the appellee misstate or misconstrue the law, the facts, or your arguments in a way that may not be readily apparent to the court?
- Did the appellee make an argument or raise an issue that your principal brief does not adequately address and that is worth answering?
- Has a new opinion been issued or a new law been passed since you filed your opening brief that you need to discuss?

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Convince yourself that you are working in clay not marble…. [L]et that first sentence be as stupid as it wishes.
— Jacques Barzun

To be fond of learning is to be near to knowledge.
— Tze-sze

FROM THE CHAIR

Michael B. King

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Challenges of Appellate Practice— "Defense Side"

In prior messages, I have limited myself to a couple of terse paragraphs concerning Committee projects. This time, I thought I would borrow from the (better) practice of past chairs, and offer a few more substantive comments about the challenges of appellate practice, "defense side." In particular, several recent trips to Olympia, Washington, to argue before our state's supreme court prompt me to offer the following musings about rules for defense advocacy before a state high court with fairly pronounced—if not hopelessly prejudiced—plaintiff leanings.

First rule—don't give up! If you figure the cause is hopeless simply because the court has granted your opponent's petition for review, you virtually assure your own defeat. To be sure (and to take some recent examples from my own practice), an employer charged with age discrimination, or a retailer accused of trumping up shoplifting charges against patrons of color, will almost certainly be presumed "guilty" by prototypical liberal jurists. But that presumption can be overcome, as my own experiences demonstrate. See *Hill v. BCTI Income Fund-I*, 144 Wash.2d 172, 33 P.3d 440 (2001) (upholding reversal by court of appeals of judgment on jury verdict in favor of claimant in employment age discrimination case); *Guijosa v. Wal-Mart Stores*, 144 Wash.2d 907, 32 P.3d 250 (2001) (affirming judgment n.o.v. in favor of Wal-Mart on consumer fraud claim brought by several Hispanic patrons alleging race discrimination).

Second rule—seize the reasonable middle ground. Too often, contending counsel before our state supreme court frame an issue such that the court is forced to choose between one of two "purist" positions. Faced with that choice, your prototypical liberal (even centrist) jurist will almost invariably rule against the defense side.

I like to think that a good example of finding the reasonable middle ground is *Hill v. BCTI, supra*. There, the Washington Supreme Court was asked to resolve, under our state's Law Against Discrimination, the "pretext" issue that had roiled the federal courts of appeals for several years, until resolved—sort of—in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 L.Ed.2d 105, 120 S.Ct. 2097 (2000). Instead of trying to get the court to embrace the undeniably pro-employer "pretext plus" approach, we opted for the middle-ground "hybrid pretext" approach that had been embraced by a handful of courts. First and foremost, our record was just good enough that we didn't have to be hard-nosed. Second, given that flexibility, we decided that, because allowing the choice to be framed as one between "pretext only" (favored by the plaintiff bar) and "pretext plus" (perceived as the preference of employers) was bound to lose us the case, we should surprise the court and ask for the proverbial half-a-loaf.

And that is what we got. The court affirmed the court of appeals' grant of a j.n.o.v., rejecting the court of appeals' embrace of "pretext plus," but holding that we should still prevail under the "hybrid pretext" approach. At oral argument, we were able to play the plaintiff and defense amicus briefs off against each other, and emerge with a victory for our client, which has also produced oodles of summary judgments in favor of employer defendants—although I very much doubt that the majority intended that last effect when they vacated the perceived "pro-employer" opinion of the court of appeals!

Third rule—be willing to concede the limit of a ruling in your favor. Too many times counsel for the defense side insists on fighting battles that don't need to be fought. In *Guijosa v. Wal-Mart, supra*, I needed to persuade the court that it could rule in our favor without gutting what the majority clearly perceived as the needed availability of a remedy under the state Consumer Protection Act against certain kinds of wrongful conduct by retailers. With my opponent all-too-effectively beating the drum of "Wal-Mart! Wal-Mart! Wal-Mart!" for all it was worth, I would have risked outright defeat had I seemed to be resisting conceding on hypothetical facts that really didn't come within hailing distance of our case. So I took the opposite tack, answering a very pointed question from our chief justice as bluntly as possible: "If that were this case, we would lose; but those are not the facts of this case, and that is why we should prevail." And we did, with the chief signing on to what ended up being a 9–0 ruling in favor of Wal-Mart.

In sum, when you get the bad news that one of those "liberal" state supreme courts has granted your plaintiff opponent's petition for review: Don't give up heart! Victory can still be won. Just be sure that you, and not your opponent, manage to claim the reasonable middle ground (or as close as you can manage to come to it). And don't make it seem as if, in ruling for you in this case, the court has to endorse what it likely perceives as an overreaching interpretation of the law by your side of the great plaintiff-defendant divide.

- Have circumstances changed (whether factually, socially, politically, or otherwise) since you filed your opening brief, thus necessitating an explanation of their impact (or lack thereof) on your position?
- Did you make an error in your opening brief that you need to correct?

Some would argue that if an appellant cannot answer "yes" to any of the above questions, the appellant should not file a reply brief. That view is too inflexible. There may well be other circumstances in which filing a reply brief is warranted. Whatever criteria are considered, the point remains the same: Intensely contemplate not only the arguments you could make in a reply brief, but whether a reply brief is even needed.

Seriously—Presume the Court Has Heard Enough

If you and your client have decided to forge ahead, it is imperative to be concise. As with your principal brief, there must be a balance between thoroughness and brevity. Reply briefs are almost never the place to make law review length arguments. Rather, they require writers to make their points with pinprick accuracy. Good reply briefs resemble good responses to questions at oral argument: short, direct, and accurate. As in oral argument, this approach is intended to instill confidence in the court that questions about your position are easily answered. It also arms sympathetic judges with easy-to-understand, bite-sized arguments that they can use to convince their colleagues to adopt your position.

Brevity is assisted by judicious selection of arguments for the reply brief. Reply briefs are similar to rebuttal arguments in that there is usually less time within which to make your point. For federal appeals, you typically have 14 days to research, plan, write, rewrite, and file a reply brief. Fed.R.App.P. 31(a)(1). There is also less space within which to make your point; reply briefs can only be half of the size of a principal brief under the Federal Rules of Appellate Procedure. Fed.R.App.P. 32(a)(7)(A). Accordingly, it is best to choose the one or two, maybe three, points that need to be made and focus on those as opposed to rearguing the entire appeal.

Reinforce—Do Not Rehash

Reinforcing the themes of your principal brief can be, and probably should be, a key part of your reply. The temptation, however, is to restate the arguments in the principal brief to ensure the court has not lost sight of why your position should prevail. When appellants blatantly restate the arguments they made in their principal brief, they are cannibalizing their position. Crucial credibility points are lost. It is as though the court has been prompted to answer a telephone call it thinks may be important only to find a telemarketer on the other end of the line. Some judges on the panel will be polite, albeit grudgingly, and hear the caller out. Others, however, will hang up in disgust or worse, yell at the caller for disturbing them. At the reply stage of the briefing process, you must justify your brief's existence by showing the court that what you have to say indeed needs to be said and is not just a rehash of what you have said before.

While it is important to say something new with your reply brief, it is never a good idea to say something too new. Arguments or issues raised for the first time in a reply brief are typically waived. See *Help At Home Inc. v. Medical Capital, L.L.C.*, 260 F.3d 748, 753 n.2 (7th Cir. 2001); *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir.1999); *Thomas v. Roach*, 165 F.3d 137, 146 (2d Cir. 1999). But see *Fraternal Order of Police v. U.S.*, 173 F.3d 898, 902 (D.C.Cir. 1999) (finding appellee to have waived appellant's waiver).

Equally bad, offending portions of a reply brief run the risk of being stricken. See, *e.g., Multi-Ad Servs., Inc. v. N.L.R.B.*, 255 F.3d 363, 370 (7th Cir. 2001); *Knipe v. Skinner*, 999 F.2d 708, 711 (2d Cir. 1993); *Tallahassee Mem'l Reg'l Med. Ctr. v. Bowen*, 815 F.2d 1435, 1446 n.16 (11th Cir. 1987). Raising completely new issues and arguments frustrates an appellee's right to prepare an appropriate response. See *Herbert v. National Acad. of Sciences,* 974 F.2d 192, 195 (D.C.Cir. 1992) ("To consider an argument for the first time in reply would be manifestly unfair to the appellee who, under our rules, has no opportunity for a written response."); see also *Playboy Enters. v. Public Serv. Comm'n,* 906 F.2d 25, 40 (1st Cir. 1990) ("An appellant waives any issue which it does not adequately raise in its initial brief, because in 'preparing briefs and arguments, an appellee is entitled to rely on the content of an appellant's brief for the scope of the issues appealed.'") (quoting *Pignons S.A. de Mecanique v. Polaroid Corp.,* 701 F.2d 1, 3 (1st Cir.1983)) (citations omitted).

There is often a fine line between sandbagging and putting a new twist on an issue already presented. Only experience and careful thought can

discern the difference. However, the basic rule of thumb that applies in negotiating this line is that if the argument in question is truly answering or contesting a point made by the appellee, the argument is more than likely appropriate.

Capture Control

As is true of response briefs, reply briefs require the writer not just to respond but to advance and advocate. Line-by-line refutations are not effective because they relinquish control of the debate to the opposition. Ideally, a reply brief should grapple with the appellee's key arguments within the context of advancing the appellant's position by reinforcing the themes developed in the opening brief. This means that an effective reply brief will not necessarily track the appellee's response; the order of argumentation frequently will be different and, thus, the emphasis will necessarily diverge. This approach is more likely than a point-counterpoint approach to reestablish in the court's mind the primacy of your arguments.

Conclusion

The unique character of reply briefs requires appellate lawyers to ply their skills in unique ways. The capacity to be concise and selective takes priority at the reply stage of the briefing process. Most critical is the ability to determine when a reply is warranted. Conscious development and application of these skills could make the difference in your next appeal.

FROM THE EDITOR

Thanks to Authors

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I want to thank the authors who contributed to this issue of *Certworthy*. Brian Paul offers insightful tips for drafting reply briefs. Michelle Buford educates us about the intricacies of ERISA preemption. And Ray Ward has written a sensitive piece about humility in writing.

Believe it or not, now is the time to volunteer to write for the next issue of *Certworthy*. Please contact me at scott.stolley@tklaw.com if you would like to be part of the next *Certworthy*.

Lawyers are inclined to act too quickly and to think too little, if they ever think at all.
— Jean Appleman

Humility

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If there is one virtue that makes a good legal writer, it is humility.

True humility should not be confused with groveling. Humility does not deprecate self while flattering the court. That kind of groveling is usually phony. And when it's not phony, it's embarrassing.

True humility is to see yourself as you are. Flannery O'Connor described humility as self-knowledge: "[T]o know oneself is, above all, to know what one lacks. It is to measure oneself against Truth and not the other way around. The first product of self-knowledge is humility…."

But how does this virtue manifest itself in legal writing? In many ways.

Humble writers understand the need to learn how to write. They work hard to learn the rules of grammar and syntax, of composition and exposition, and of rhetoric. They know that the rules have to be learned before they can be effectively broken. Steven Stark put it well: "Picasso couldn't have become Picasso without learning to sketch a simple still life first." Those who are too proud to learn the rules probably aren't artists, geniuses, or pioneers; more likely they're just lazy and undisciplined.

Humble writers rank the reader's convenience ahead of their own. They work hard so the reader doesn't have to.

Humble writers respect their opponents and their opponents' arguments, understanding that demeaning the opponents' arguments as being "frivolous" or "without merit" does nothing to persuade the reader–judge. Instead, before dismantling the opponent's argument, humble writers state it fairly and respectfully.

Humble writers understand that the message is what's important. So humble writing is transparent. The words express their intended meaning; they don't call attention to themselves. Humble writers naturally avoid purple prose and anything else that is overwrought or overdone.

For the same reason, humble writers are plainspoken, always favoring the 10¢ word over the $20 word, always favoring plain English over Latin or French.

Humble writers never inject their own opinions into the writing but understand E.B. White's words: "To air one's views gratuitously… is to imply that the demand for them is brisk, which may not be the case, and which, in any event, may not be relevant to the discussion. Opinions scattered indiscriminately about leave the mark of egotism on a work."

Humble writers are economical with words, with quotes, and with citations. Valuing the reader's time and energy, they write concisely—using the fewest words possible to get the point across. They understand that the purpose of quotes and citations is to support the argument, not to show off how much legal research they have done. So they work hard to figure out which authorities are necessary and which aren't, and use only the necessary ones.

Humble writers realize that their writing is not the product of genius, and so are willing to revise, and revise some more. Being realists, they can look at their own writing with a critical, objective eye, and see its flaws. Rheta Childe Dorr's description of an artist's "true humility" applies to such writers: "His reach forever exceeds his grasp. He can never be satisfied with his work." And humble writers, realizing that they don't know everything, can submit their work to others and accept constructive criticism.

In the end, humble writing is more persuasive than proud writing. Readers—including judges—find genuine humility both engaging and persuasive. Perhaps that is because humility, as Kafka observed, provides us with our strongest relationship to others.

"Humility helped me to triumph," said Albert Camus, and humility can help the legal writer do the same.

You can usually blame a bad essay on a bad beginning.
— Sheridan Baker

ERISA Preemption of Claims against Managed Care Organizations based on State Law

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Congress enacted the Employee Retirement Income Security Act ("ERISA") of 1974, 29 U.S.C. §1101 *et seq.*, to create and preserve national uniformity and consistency in the administration, funding, and enforcement of pension and welfare plans. See *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990). "The statute imposes participation, funding, and vesting requirements on pension plans, [and] sets various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility, for both pension and welfare plans." *Shaw v. Delta Air Lines, Inc.* 463 U.S. 85, 90, 91, 103 S.Ct. 2890, 2896, 77 L.Ed.2d 490 (1983). Congress included various safeguards to prevent abuse and to "secure the rights and expectations brought into being by this landmark reform legislation." S. Rep. No. 93-127, at 36 (1973). These safeguards include ERISA's broad preemption provision (the "Preemption Clause"), contained in section 514(a) of the Act, 29 U.S.C. §1144(a); section 510, 29 U.S.C. §1140, which proscribes interference with rights protected by ERISA; and section 502, 29 U.S.C. §1132, which sets forth a carefully integrated civil enforcement scheme that "is one of the essential tools for accomplishing the stated purposes of ERISA." *Ingersoll-Rand Co.,* 498 U.S. at 137, 111 S.Ct. at 482.

The Preemption Language

ERISA's express preemption clause provides that ERISA "'shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan….' §1144(a). A saving clause then reclaims a substantial amount of ground with its provision that 'nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State *which regulates insurance*, banking, or securities.' §1144(b)(2)(A)." *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. ___, 122 S.Ct. 2151, 2159,153 L.Ed.2d 375 (2002). Additionally, where a state law claim duplicates a claim available under ERISA section 502(a), 29 U.S.C. §1132(a), that claim is completely preempted. This "complete preemption" doctrine is jurisdictional. It forces a claimant to bring the claim in federal district court under ERISA's civil enforcement provisions, §502(a), or face remand to state court or dismissal of the state law claim.

The United States Supreme Court has described the language of the Preemption and Saving Clauses as "unhelpful," resulting in the Court's spending a substantial amount of time trying to divine Congress' intent. The "congressional language seems simultaneously to preempt everything and hardly anything…." *Moran,* 122 S.Ct. at 1259 (citations omitted). In a span of 20-plus years, from the time ERISA was enacted through the late 1990s, the U.S. Supreme Court considered no less than 14 cases involving the proper scope and interpretation of the Act's Preemption and Saving Clauses. This number is steadily climbing. Prominent among these cases are those involving claims against managed care organizations, especially health maintenance organizations ("HMOs"). Instead of creating uniformity, the Act's preemption language has spawned conflicting standards and confusion among state and federal courts, all striving to make sense of ERISA's preemption language, while maintaining uniformity where effectively none exists. With increasing frequency, the Supreme Court urges Congress to clarify ERISA's vague and confusing language in the area of preemption, but Congress remains silent on the issue.

ERISA Plans

An employee welfare benefit plan, or "Welfare Plan," is defined under ERISA as "one which provides to employees 'medical, surgical, or hospital care or benefits, or benefits in the event of sick-

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ness, accident, disability [or] death,' whether those benefits are provided 'through the purchase of insurance or otherwise.' §3(1), 29 U.S.C. §1002(1). Plans may self-insure or they may purchase insurance for their participants. Plans that purchase insurance, ['insured plans,'] are directly affected by state laws that regulate the insurance industry," under ERISA's Saving Clause cited above. *Metropolitan Life Ins. Co. v. Massachusetts Travelers Ins. Co.,* 471 U.S. 724, 733, 105 S.Ct. 2380, 2386, 85 L.Ed.2d 728 (1985). Self-insured plans are not affected by such laws.

ERISA imposes a variety of substantive requirements relating to participation, funding and vesting on Pension Plans, and various uniform procedural standards regarding reporting, disclosure, and fiduciary responsibility on both Pension and Welfare Plans. "[However, i]t does not regulate the substantive content of welfare-benefit plans. See *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 91, 103 S.Ct. 2890, 2896-97, 77 L.Ed.2d 490 (1983)." *Id.* As a result, there is a growing body of case law that leaves us with a hodgepodge of varying, confusing, and often conflicting standards as to whether a state law affecting a Welfare Plan will be preempted by ERISA or, instead, governed by state law. Correspondingly, many Welfare Plan participants and beneficiaries have been left with essentially no remedy, and Welfare Plans are faced with the specter of more and more litigation.

Available Remedies

The civil enforcement provisions of ERISA §502(a), 29 U.S.C. §1132(a)(1)(B), permit Plan participants and beneficiaries to bring suits to recover Plan benefits, enforce rights under an ERISA Plan, or clarify rights to future benefits under the Plan. Ostensibly, these provisions are the exclusive vehicle for actions by ERISA Plan participants and beneficiaries under the Act. See *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 52, 107 S.Ct. 1549, 1555, 95 L.Ed.2d 39 (1987); 29 U.S.C. §1132; *Ingersoll-Rand Co.,* 498 U.S. 133, 111 S.Ct. 478. However, the Act does not allow a claimant to recover extracontractual damages such as physical pain and suffering, emotional distress, and punitive damages. See, *e.g., Massachusetts Mut. Life Ins. Co. v. Russell,* 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985) (fiduciary of employee benefit plan could not be held personally liable to plan participant and beneficiary for extracontractual, compensatory, or punitive damages caused by improper or untimely processing of beneficiary's claims). It is a perceived "shortfall" in available remedies that has spurred claimants to challenge ERISA and attempt to secure additional remedies under state law that are not available under the Act.

Since ERISA's enactment, a steady stream of litigation has been instituted by Welfare Plan participants and beneficiaries attempting to erode the protective stronghold of ERISA's civil enforcement provisions and evade the broad preemptive scope of the Act. Utilizing artful pleading and relying on various state statutes and common law, claimants continually attempt to reshape the contours of ERISA's statutory scheme and the limited forms of relief available to Plan participants and beneficiaries under the Act. One fertile source of challenges to ERISA's preemptive scheme and available remedies has been in the area of managed care. Welfare Plan participants and beneficiaries bring claims against managed care entities such as HMOs for extracontractual compensatory damages based on state law. The Supreme Court, Circuit Courts of Appeals, and federal district courts have managed to preserve the remedies and protections of ERISA to some degree. However, Plan claimants, with the help of the courts, have also carved out a niche for certain types of claims that will not be preempted by ERISA and, therefore, may be governed by state law.

Quality vs. Quantity

One distinction drawn by the courts and utilized by Welfare Plan participants and beneficiaries to avoid preemption of claims against HMOs is the "quality of care or treatment rendered *versus* quantity of benefits" distinction. For instance, in *Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350 (3d Cir. 1995), and *In re U.S. Healthcare, Inc.,* 193 F.3d 151 (3d Cir. 1999), the HMOs had assumed a dual role of administrator of the Welfare Plan and provider of medical services. In *U.S. Healthcare,* the Third Circuit held that the HMO's policy of discharging newborn infants within 24 hours was, in essence, a "medical determination of the appropriate level of care." 193 F.3d at 163. The court also held that the claimant's allegations of negligence based on the HMO's alleged failure to provide an in-home visit by a pediatric nurse, in spite of its giving assurances that this service would be provided, was aimed at the HMO's role as a medical provider. *Id.* at 164.

In *Dukes,* the plaintiff's claims focused on the low quality of medical treatment actually received. The plaintiff argued that the HMO was vicariously liable for the actions of Plan physicians under an agency theory, and directly liable for its own negligence in selecting, retaining, screening, monitor-

ing, and evaluating the personnel who actually provided the medical services. The Third Circuit held that those claims did not involve failure to provide benefits due under the ERISA Plan and therefore were not completely preempted.

Financial Disincentives

Similarly, in *Lazorko v. Pennsylvania Hosp.,* 237 F.3d 242 (3d Cir. 2000), the Third Circuit reviewed a claim brought by the surviving husband of a mental patient who committed suicide after receiving treatment for depression and schizophrenia. The plaintiff challenged, among other things, the financial disincentives imposed by the HMO on its treating physicians, which allegedly discouraged them from recommending additional treatment. The plaintiff's wife had been hospitalized for six months after attempting suicide. Following her discharge from the hospital, she began contemplating suicide again and sought rehospitalization. Her treating physician denied the request, and shortly thereafter, Mrs. Lazorko successfully committed suicide.

Her husband brought suit in state court, alleging that the HMO was directly and vicariously liable for his wife's death because the HMO imposed financial disincentives on Mrs. Lazorko's physician that discouraged him from recommending her for additional treatment. The HMO argued that the plaintiff's claims were completely preempted by ERISA under section 502(a)(1)(B), which gives a member of an ERISA plan an exclusive federal remedy for claims arising from the denial of benefits guaranteed by the plan. *Id.* at 246. The court of appeals commented that "drawing the line between the denial of benefits under a plan and the provision of substandard care is difficult." *Id.* at 250. The court then concluded that the plaintiff's claim, as pleaded, fell on the standard-of-care side of the line, not on the denial-of-benefits side. *Id.*

Further, the court stated:

> We note, moreover, that since our decision in *In re U.S. Healthcare,* our district courts have consistently applied its reasoning to determine whether it is the *quality of care provided* or the *denial of a plan benefit* that is implicated when treatment is refused. *See, e.g.*, *Tiemann v. U.S. Healthcare,* 93 F.Supp.2d 585 (E.D. Pa. 2000) (classifying failure to diagnose and treat disease properly as a question of benefit quality not quantity) (citation omitted).

Id. at 250 (emphasis added). The *Lazorko* court held that the claim against the HMO was not completely preempted by ERISA section 502(a), where the plaintiff alleged that the HMO was directly liable for a patient's death because it imposed financial disincentives on the treating physician that discouraged him from recommending additional treatment. *Lazorko,* 237 F.3d 242. Compare *Pryzbowski v. U.S. Healthcare, Inc.,* 245 F.3d 266 (3d Cir. 2001) (claims that HMO delayed approval for treatment by out-of-network physician were preempted because they challenged plan administration rather than the quality of care provided).

Utilization Review

In contrast, the Fifth Circuit has held that a utilization review determination by an independent company providing that service to a managed care organization involved a mixed question of medical evaluation of the patient's case and determination if coverage would be afforded. *Corcoran v. United Healthcare, Inc.*, 965 F.3d 1321 (5th Cir. 1992). *Corcoran* involved claims of the parents of an unborn child who died after the employee disability plan determined that hospitalization of the mother was not necessary. The plaintiffs alleged that Blue Cross wrongfully denied appropriate medical care, failed to adequately oversee the medical decisions of United Healthcare, and failed to provide United with the mother's complete medical background showing similar problems with past pregnancies. Holding that the plaintiffs' claims are preempted by ERISA, the court stated:

> We cannot fully agree with either United or the Corcorans. Ultimately, we conclude that United makes medical decisions—indeed, United gives medical advice—but it does so in the context of making a determination about the availability of benefits under the plan. Accordingly, we hold that the Louisiana tort action asserted by the Corcorans for the wrongful death of their child allegedly resulting from United's erroneous medical decision is preempted by ERISA.

Id. at 1331.

Benefit Eligibility

Like the Fifth Circuit in *Corcoran,* the Eighth Circuit held in *Kuhl v. Lincoln Nat'l Health Plan, Inc.,* 999 F.2d 298 (8th Cir. 1993), that a medical malpractice claim against an HMO for failure to authorize coverage for hospitalization was completely preempted by ERISA. The court found that the claim was one involving plan administration and the benefits to which the claimant was entitled. Therefore, under ERISA's civil enforcement provisions, the claim was completely preempted by federal law.

In *Elsesser v. Hosp. of the Philadelphia College of Osteopathic Medicine*, 802 F.Supp. 1286 (E.D.Pa. 1992), the district court ruled that allegations that the HMO withheld benefits were preempted because they involved the claimant's eligibility for certain benefits. However, the court also ruled that claims of HMO negligence in the selection and evaluation of its primary care physicians were not preempted.

In *PacifiCare of Oklahoma, Inc. v. Barrage*, 59 F.3d 151 (10th Cir. 1995), the court held that vicarious liability claims against an HMO for medical malpractice of a primary care physician, its ostensible agent, were not preempted because they did not involve the administration of Plan benefits, which would have triggered ERISA preemption. The court also found the plaintiff's claim that the HMO elected to directly provide medical treatment or services and that it held the treating physician out as its agent as not preempted.

ERISA's Savings Clause

In a very recent case, the U.S. Supreme Court considered whether the Illinois HMO Act, which requires that Welfare Plan participants and beneficiaries be provided with a means of independent physician review of HMO coverage denials, is preempted by ERISA. The Court held that this state law was "saved" from preemption by ERISA's Saving Clause because it regulated insurance. *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. ___, 122 S.Ct. 2151, 153 L.Ed.2d 375 (2002); *see also* 29 U.S.C. §514(b)(2)(A). Likewise, in *UNUM Life Ins. Co. of America v. Ward*, 526 U.S. 358, 119 S.Ct. 1380, 143 L.Ed. 2d 462 (1999), the Supreme Court held that California's notice-prejudice rule "regulate[d] insurance" within the meaning of ERISA's Saving Clause and, thus, escaped preemption. However, the Court also held that the California common law rule allowing a policyholder-employer to be deemed an agent of the insurer in administering group insurance policies was preempted by ERISA.

In *Roark v. Humana, Inc.*, ___ F.3d ___, 2002 WL 31084216 (5th Cir.), the Fifth Circuit held that claims brought under the state's medical malpractice statute challenging the HMO's mixed eligibility and treatment decisions were not completely preempted, but ERISA's civil enforcement provisions did completely preempt the plaintiffs' state court breach of contract claims against the HMO for its refusal to cover home nursing treatments. The court found that the answer to whether the HMO violated the plan's promise to provide "medically necessary" treatment turned on interpreting the plan's language, not on the application of an external, statutorily imposed standard of care. The "mixed eligibility and treatment decisions" involved the alleged improper cutting short of a hospital recovery stay and improper requirement that the patient try pain medications other than the prescribed one. The court found that these allegations did not challenge the plan administrator or plan interpretation. Rather, the plaintiffs asserted tort claims that were based on an external, statutorily imposed duty of care and were not preempted by ERISA.

Conclusion

The foregoing examples represent only a very small part of a host of cases involving claims by ERISA Plan participants and beneficiaries against managed care organizations and pension plans. Together, these cases illustrate the intricacies of ERISA and the difficulties with which the courts must struggle in determining whether a claim of negligence or medical malpractice, among others, by a Welfare Plan beneficiary or participant will be preempted by ERISA or allowed to go forward. Often, the distinctions drawn by the courts are tenuous at best, and could just as easily be interpreted another, totally different way. Overall, it remains to be seen whether Congress will adequately respond, or respond at all, to the Supreme Court's call for clarification or modification of ERISA's preemption clause and of the complete preemptive effect of ERISA's civil enforcement provisions. Unless and until there is a legislative response, it is likely that the confusion and diverse standards created by the courts will multiply as more plan claimants bring suit in state courts based on state laws in an effort to enlarge the remedies available to them.

Seminar

The Seminar Subcommittee has planned the Appellate Advocacy Committee's fourth seminar, which is scheduled for May 1–2, 2003, in Chicago. The program brochure is reprinted elsewhere in this newsletter. The impressive faculty includes Judge Danny Boggs of the United States Court of Appeals for the Sixth Circuit, and state supreme court justices Shirley Abrahamson (Wisconsin), Wallace Jefferson (Texas), and Alan Page (Minnesota). The Seminar Subcommittee is seeking persons interested in assisting with the seminar. Please contact program chair Dan Lindahl at dan.lindahl@bullivant.com or (503) 499-4614.

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Membership

Over the years, the Appellate Advocacy Committee has grown steadily, continuously adding to its ranks. During the past year, membership has reached its highest level to date. Two years ago, we numbered an even 250; last year, we grew to 271 members. Now, 345 members are listed on our membership roster. In the upcoming year, we look forward to continuing our growth, especially in view of the seminar in Chicago on May 1 and 2, 2003.

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Publications

It has been a busy year for our subcommittee. We have produced two issues of *Certworthy*, recruited authors for each month in 2003 for the Writers' Corner in *For The Defense*, and reserved a month in 2004 to produce the Committee Perspectives section of *For The Defense*. In early to mid-2003, we will begin recruiting authors for our Committee Perspectives section.

Most importantly, our subcommittee has begun work on an appellate manual for defense lawyers. Under the leadership of co-editors Scott Stolley, Mary Massaron Ross, Ray Ward, and Doug Collodel, we have selected chapter topics and authors. About two-thirds of the chapters have already been written. Among the planned 27 chapters are: Evaluation of the Appeal, Preservation of Error, Appellate Jurisdiction, Appellate Ethics, Writing Style, Oral Argument, Seeking Discretionary Review, Appealing *Daubert* Issues, and Technology in Appellate Practice. Look for publication of this manual in 2003.

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HELP WANTED

Fourth Circuit Editor to supply brilliant case summaries of interesting Fourth Circuit cases.If interested in serving, contact Ray Ward at Raymond.Ward@arlaw.com

Circuit Reports

First Circuit

Separate-Document Requirement

***White v. Fair*, 289 F.3d 1 (1st Cir. 2002)**

In 1971, Roy White was convicted of second-degree murder in Massachusetts state court. In 1985, after losing on direct appeal in state court, he petitioned a federal court for a writ of habeas corpus. In 1986, while his habeas petition was pending, he became a fugitive when he failed to return to prison from the then-authorized furlough program. In March 1987, the district court adopted the magistrate judge's report and recommendation that White's petition be dismissed with prejudice because he was a fugitive from justice. This was done in a handwritten note in the margin; the order was not sent out as a separate document as required by Fed.R.Civ.P. 58.

In July 1987, White was apprehended and returned to Massachusetts. Though White corresponded with the district court in 1990, it was not until April 1997 that he filed a motion for relief from the 1987 dismissal under Fed.R.Civ.P. 59 and 60. He argued that the district court had jurisdiction to review the 1987 dismissal because no final judgment had been entered. The district court denied White's motion for relief. The court determined that it lacked jurisdiction to hear the motion because White waived the separate-document requirement.

On appeal, the First Circuit refused to review the 1987 dismissal, following *Fiori v. Wash. County Cmty. Mental Health Ctr.*, 960 F.2d 229, 236 (1st Cir. 1992), which held that failure to take any action for three months waived the separate-document requirement. Although White argued that *Fiori* should not apply retroactively, the court noted that White continued to delay seeking review of the dismissal order for five years after *Fiori* was decided. The court also rejected the notion that waiver would not apply in habeas corpus cases, or that *Fiori* is inconsistent with the purpose of Rule 58 as articulated by the U.S. Supreme Court.

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Third Circuit

ADEA—Fact Issue

***Fakete v. Aetna, Inc.*, 2002 U.S.App.LEXIS 22156 (3d Cir. 2002)**

Shortly after a corporate merger, a long-term employee, who was three years away from retirement with a substantial pension, approached his new manager and inquired about his future with the new company. According to the employee, the manager responded, "the new management [which included the manager]—that it wouldn't be favorable to me because they are looking for younger single people that will work unlimited hours and that I wouldn't be happy there in the future." After that event, the manager began to accuse the employee for failing to explain absences, and threatened to place him on "probation" if he did not explain future absences, obtain the manager's approval before changing his travel plans, and provide the manager with a daily summary of the tasks he completed. Three months before the employee's pension would have vested, the manager fired him, charging that he violated the terms of the warning, falsified travel expense reports, and failed to reimburse the employer for personal phone calls charged to his company card.

The district court granted summary judgment to the employer on the employee's age discrimination claim. The district court saw the manager's comment as "a stray remark that did not directly reflect the decision making process of any particular employment decision." But the Third Circuit saw the remark differently and reversed the summary judgment. The court had little difficulty concluding that a reasonable jury could find, based on the manager's statement, that the employee's age was more likely than not a substantial factor in the manager's decision to fire him.

Summary Judgment Burden

***Ambrose v. Township of Robinson*, 303 F.3d 488 (3d Cir. 2002)**

Ambrose, a Robinson Township police sergeant, executed an affidavit in support of a fellow officer's wrongful discharge suit. The fellow officer produced the affidavit as part of a document production. Later, Ambrose was discovered entering the township's administrative office after business hours, when he should have been on duty. Ambrose explained that he was there to make photocopies of police records because the police copy machine made poor copies. He denied making copies of documents to aid his fellow officer.

Ambrose was suspended without pay, conditioned on a review by the Board of Commissioners. The Commissioners met and discussed Ambrose's actions on the same day that the township's manager received a letter from the solicitor's office, stating that the document production included certain documents, which apparently could only have been

obtained from the township's administrative offices. The letter did not refer to the affidavit. During the discussions, Ambrose was accused of copying documents for his fellow officer in aid of his lawsuit against the township. The Commissioners suspended Ambrose for 30 working days.

Ambrose sued the township on the ground that his suspension was in retaliation for his affidavit. The jury found in his favor and awarded him compensatory damages. The township appealed.

On appeal, the Third Circuit decided the case on a single ground: The district court should have dismissed the case because Ambrose failed to prove that the Commissioners knew of his affidavit when they decided to discipline him. While recognizing that the Commissioners' denying knowledge of the affidavit was not conclusive, the court stressed that the burden of proof was on the plaintiff, and that there was no evidence showing that the Commissioners knew of and acted on the affidavit. The Third Circuit rejected Ambrose's "temporal proximity" argument, holding that the receipt of the affidavit by the township's manager before the Commissioner's action did not establish that the Commissioners knew of the affidavit when they acted.

Mandamus

***Allied Signal Recovery Trust v. Allied Signal Inc.*, 298 F.3d 263 (3d Cir. 2002)**

The case originated in a Florida state court. When certain bankruptcy claims were added, the defendant removed the case to the Florida federal court. Because those bankruptcy claims appeared related to claims pending in the federal court in Delaware, the Florida federal court transferred the case to the Delaware federal court. The Delaware federal court, however, "remanded" the case to the Delaware state court. The defendant appealed. The plaintiff filed a mandamus petition and cross-appealed.

The Third Circuit held that it had no appellate jurisdiction in light of statutes that made remand orders nonappealable. But the court found that it had mandamus jurisdiction because the remand order was not a true remand and the statutes did not prevent the appellate court from correcting a lower court's abuse of its power. "Remand means 'send back.' It does not mean 'send elsewhere.'" The Third Circuit granted the petition for mandamus and vacated the district court's "remand" order. The Third Circuit also reminded the district court that it had all of the powers of the transferor court, including—if appropriate—remand to Florida state court.

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Fifth Circuit

Removal

***Bosky v. Kroger Texas, LP*, 288 F.3d 208 (5th Cir. 2002)**

When does the 30 days to remove a case from state court to federal court begin to run? The Fifth Circuit recently answered this question, distinguishing removal based on the initial pleading from removal based on a later pleading.

Removal based on the initial pleading is governed by the first paragraph of 28 U.S.C. §1446(b). Under this paragraph, the initial pleading must "set[] forth" a claim that is removable. The 30 days to remove begin running "from the defendant's receipt of the initial pleading only when that pleading affirmatively reveals on its face that the plaintiff is seeking damages in excess of the minimal jurisdictional amount." 288 F.3d at 210.

Removal based on a later pleading is governed by a different standard, one requiring "a greater level of certainty" that the case is removable. Such removals are governed by the second paragraph of 28 U.S.C. §1446(b), which governs cases that are not removable based on the initial pleading. Under that paragraph, the 30-day removal period starts when the defendant first receives a pleading or other paper "from which it may first be ascertained that the case is… removable." The Fifth Circuit identified "ascertained" as the key word in this provision, holding that the information supporting removal in a later pleading or paper must be "unequivocally clear and certain" to start the 30-day removal period. In so holding, the court followed the Tenth Circuit's lead in *DeBry v. Transamerica Corp.*, 601 F.2d 480 (10th Cir. 1979).

The Fifth Circuit noted that its reading of 28 U.S.C. §1446(b) would ease the burden on federal courts by reducing the number of "protective" removals (removals taken in ambiguous cases to avoid the risk of losing the right to removal by lapse of time).

Premature Appeal

***Swopes v. Columbian Chemicals Co.*, 281 F.3d 185 (5th Cir. 2002)**

In this case, the court held that it had appellate jurisdiction to review a partial summary judgment, even though the notice of appeal was filed before the district court designated the judgment as final under F.R.C.P. 54(b). In so holding, the court followed its own precedent in *St. Paul Mercury Insurance Co. v. Fair Grounds Corp.*, 123 F.3d 336 (5th Cir. 1997), holding that "a premature

notice of appeal is effective if Rule 54(b) certification is subsequently granted."

Notice of Appeal and FRAP 26(c)

***Ludgood v. Apex Marine Corp. Ship Mgmt.*, 311 F.3d 364 (5th Cir. 2002)**

In this case, the Fifth Circuit held that a notice of appeal must be filed within 30 days of entry of the judgment or order being appealed and that FRAP 26(c) does not apply to extend the 30-day period for filing the notice of appeal. The district court granted and entered on its docket a final summary judgment for Apex on October 17, 2001. Six days later, the court issued a "Memorandum Opinion and Order," justifying the summary judgment ruling. When Ludgood filed his notice of appeal on November 20, 2001, the Fifth Circuit dismissed the appeal as untimely, explaining that, even though the grounds for an appeal may not be known until the memorandum is filed, the date of the final judgment still triggers the 30-day period for a notice of appeal. The Fifth Circuit also stated that the three additional days given to parties to file after service by mail under FRAP 26(c) does not apply to a notice of appeal.

Jury Verdict

***Carr v. Wal-Mart Stores, Inc.*, No. 01-30342, 2002 WL 31520643 (5th Cir. Nov. 14, 2002)**

In this case, the Fifth Circuit addressed the effect of superfluous jury answers in a "falling merchandise" case. The jury found in response to Question No. 1 that Wal-Mart had not been negligent. Even though the instructions directed the jury to stop its deliberations, the jury nonetheless answered Question No. 2 and found that Wal-Mart had not caused any injury to the plaintiff. Although the trial court found the jury's negligence finding was against the great weight of the evidence and, thus, erroneous, the trial court regarded a new trial as unnecessary because of the jury's subsequent answer to the causation question. The Fifth Circuit disagreed, holding that "superfluous answers that are proffered in violation of the court's expressed instructions contained in the verdict form must be disregarded as irrelevant surplusage." The case was remanded for a new trial.

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Sixth Circuit

Waiver of Privilege

***Tennessee Laborers Health & Welfare Fund v. Columbia/HCA Healthcare Corp. (In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*), 293 F.3d 289 (6th Cir. 2002)**

The circuits remain deeply divided on whether a party waives the attorney-client privilege and work-product doctrine when it discloses privileged information to the government in the course of an ongoing investigation. In *Columbia/HCA Billing Practices*, a divided Sixth Circuit panel recently refused to adopt the "government investigation" exception to the waiver doctrine, explaining that the exception would impede the search for truth.

The Department of Justice began investigating Columbia/HCA in the mid-1990s for possible Medicare and Medicaid fraud. This prompted Columbia/HCA, at the direction of its attorneys, to conduct an internal audit of its billing practices. Eventually, Columbia/HCA began cooperating with the government. In exchange for the company's cooperation, the Department of Justice signed a stringent confidentiality agreement with the company, which led Columbia/HCA to disclose the internal audit to the government.

Columbia/HCA was later sued by several private entities that claimed they were over-billed for health-related services. These entities filed a motion to compel Columbia/HCA to produce the privileged documents that had been disclosed to the government. In response, Columbia/HCA argued that the "government investigation" doctrine protected the documents from disclosure. This doctrine, which has been recognized by the Eighth Circuit, allows parties to disclose documents to the government in the course of an investigation without waiving the attorney-client privilege or work-product doctrine. The doctrine is meant to encourage corporations to undertake internal investigations and to cooperate with ongoing government investigations.

The Sixth Circuit refused to adopt the exception because it would impede the truth-seeking process. The court explained that the private litigants stood in the same position as the government and were no less entitled to the information. The court also reasoned that the government should not be in the business of entering into confidentiality agreements that conceal illegal activities from the public domain.

In dissent, Judge Boggs questioned whether the court's holding would truly further the truth-seeking process, arguing that "[i]t is not the government's confidentiality agreement that shields the information from civil discovery by private parties, but instead the privilege itself. Without the exception, much otherwise disclosed material would stay completely in the dark, under the absolute cover of privilege. The exception aids the government in bringing violations of the law to light."

Post-Judgment Relief

***McCurry v. Adventist Health Sys./ Sunbelt, Inc.*, 298 F.3d 586 (6th Cir. 2002)**

The Sixth Circuit recently reiterated that attorney error—even if rising to the level of legal malpractice—is insufficient to sustain a trial court's grant of post-judgment relief under Rule 60(b).

McCurry started as a wrongful death medical malpractice suit against a hospital and the decedent's treating physicians. The suit was brought by the decedent's mother in federal court under its diversity jurisdiction. The defendants moved to dismiss the case, arguing that the mother lacked standing to bring the case under Tennessee's wrongful death statute, under which the proper plaintiff was the decedent's widow. The defendants also argued that the widow could not be joined without destroying diversity jurisdiction. The trial court agreed on both counts and dismissed the case.

The mother then hired a new attorney, who informed her that the statute of limitations had expired and that the case could no longer be brought by the widow (her daughter-in-law) in state court. This led the mother to file a motion for post-judgment relief under Rule 60(b), in which she asked the court to substitute or join the widow as a party in the action. In the motion, the mother acknowledged that this would destroy the court's diversity jurisdiction but also explained that granting the motion would cure the statute-of-limitations problem and allow the widow to file her case in state court. The trial court granted the motion for post-judgment relief under the catch-all provision of Rule 60(b)(6), joining the widow as a plaintiff in the suit so that she could file her wrongful death action in state court.

On appeal, the Sixth Circuit reversed, explaining that the former attorney's error in failing to initially join the widow was insufficient to support the trial court's grant of post-judgment relief. The court explained that attorney error and legal malpractice do not qualify as "mistake, inadvertence, surprise or excusable neglect" within the meaning of Rule 60(b)(1). As for the catch-all provision of Rule 60(b)(6), the court stated that the rule applies only in exceptional or extraordinary circumstances. According to the court, there was nothing extraordinary about the plaintiff's claims of attorney error and legal malpractice.

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Seventh Circuit

Arbitration

***McCaskill v. SCI Management Corporation, Inc.*, 285 F.3d 623 (7th Cir. 2002)**

The Seventh Circuit has recently ruled that a mandatory arbitration clause requiring each party to pay its own attorneys' fees on a Title VII claim is unenforceable. The plaintiff McCaskill sued her employer, SCI, alleging that she was terminated in violation of Title VII. SCI moved to dismiss her complaint and to compel arbitration, according to a mandatory arbitration agreement that McCaskill had signed, which covered all employment disputes. The agreement required each party to (1) pay its own costs and attorneys' fees regardless of the outcome, and (2) pay one half of the costs of arbitration. McCaskill argued that the agreement was unenforceable because it prevented the litigant from fully vindicating her Title VII rights, which include attorneys' fees if successful.

The court agreed. Judge Rovner reasoned that claims under federal statutes are appropriate for arbitration only as long as the litigant may effectively vindicate her statutory cause of action in the arbitral forum. Title VII provides that attorneys' fees *may* be awarded to a prevailing plaintiff, and the Seventh Circuit has previously ruled that a prevailing party *should* recover fees absent special circumstances rendering such an award unjust. The court noted the importance of such a rule in Title VII cases, as a plaintiff in a civil rights suit often acts not only for himself but also as a "private attorney general," and attorneys must be compensated to encourage representation in such actions. As a result, an arbitration agreement that requires each party to pay its own attorneys' fees denies a Title VII plaintiff a remedy that is "essential to fulfill the remedial and deterrent functions" of the statute, and is therefore unenforceable. The court did not reach plaintiff's arguments regarding the second prong of the agreement, requiring parties to split the cost of arbitration.

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Eighth Circuit

Preserving Objections

***Housing 21, L.L.C. v. Atlantic Home Builders Co.*, 289 F.3d 1050 (8th Cir. 2002)**

Housing 21, L.L.C. sued Atlantic Home Builders Company, a builder of manufactured and module houses, for breach of warranty. A jury awarded $435,000 in damages to Housing 21. Atlantic sought a new trial, contending that the district court erred in responding to a request from the jury asking for a list of Housing 21's investors. After the jury had started deliberations, it

sent a note to the court asking for the information. Upon receiving the note, the court afforded counsel for the parties an opportunity to suggest appropriate responses. The parties disagreed on how to handle the jury's request. Counsel for Atlantic argued that the information was simply irrelevant to the jury's deliberations. The court decided to provide a list of investors against Atlantic's objections. Counsel for Atlantic indicated that he would accept the court's response "subject to the record I made earlier."

On appeal, Housing 21 contended that Atlantic's objection to the district court's response was insufficient to preserve the claim of error. Noting that Rule 51 does not require a party to employ the "utmost formality" in making an objection to avoid a waiver, the Eighth Circuit held that the objection was preserved on this record. Quoting Rule 51 of the Federal Rules of Civil Procedure, the court held "all that is required is that the objector 'stat[e] distinctly the matter objected to and the grounds of the objection.'" The court felt that Atlantic's actions clearly indicated that it objected to providing an answer to the jury's request "on the grounds that a response to the question would be irrelevant and potentially prejudicial."

Directed Verdict

Bowen v. Celotex Corp., 292 F.3d 565 (8th Cir. 2002)

Bowen, an employee of Celotex Corp., was fired for refusing to obey a direct order from his supervisor. He sued Celotex, alleging race discrimination in violation of Title VII of the 1964 Civil Rights Act. The case was tried in district court, without a jury. The district court issued findings of fact and conclusions of law, and, citing Fed.R.Civ.P. 52(a), entered a judgment for Celotex, citing Bowen's "failure to carry his productive burdens."

Bowen appealed, challenging the district court's finding that he failed to make a *prima facie* case. The Eighth Circuit affirmed, in the process expressing "surpris[e] to find the parties and the [district court] still addressing the question whether [Bowen] made out a *prima facie* case," after the case had been fully tried and submitted for a verdict. If a plaintiff truly fails to make a *prima facie* case in a bench trial, the case cannot be submitted for a verdict in the first place.

Instead, the district court must enter judgment on partial findings for the defendant under Rule 52(c). The district court's memorandum opinion addressed only Bowen's failure to carry his burden of proof, an indication that that the district court erred in letting the case be submitted for a verdict.

Despite this irregularity, the Eighth Circuit chose to construe the district court's findings of fact and conclusions of law under Rule 52(a) as a Rule 52(c) judgment on partial findings. The court found that this construction would not prejudice Bowen's rights and would accord with the district court's intentions.

Appellate Jurisdiction

Hayden & Assocs. v. ATY Bldg. Systems, Inc., 289 F.3d 530 (8th Cir. 2002)

Hayden & Associates, Inc. and Cumberland Casualty and Surety Company entered into a financing agreement that assigned Cumberland a portion of any recovery Hayden may receive in a contemplated suit against ATY Building Systems, Inc. Hayden later sued ATY in state court. ATY removed the case to federal court, counterclaimed against Hayden, and third-partied Cumberland. About a year later, the parties settled, ATY deposited $110,000 into the court registry, and the case was dismissed with prejudice.

A dispute then arose between Hayden and Cumberland over how to divide the settlement proceeds. Hayden filed a motion in district court to enforce the financing agreement. But because the financing agreement was not part of the district court's final order and was not included in any of the parties' claims against each other, the district court held that it did not have jurisdiction to enforce it. Hayden appealed.

The Eighth Circuit, reviewing the matter *de novo*, upheld the district court's decision. Citing the Supreme Court's decision in *Kokkonen v. Guardian Life Insurance Corp. of America*, the Eighth Circuit explained that the "enforcement of a settlement agreement by the court with jurisdiction over the underlying dispute was appropriate only where the agreement 'had been made part of the order of dismissal….'" 511 U.S. 375, 381 (1994). This can be accomplished in two ways: (1) the court's dismissal order may incorporate the agreement, or (2) the court may explicitly retain jurisdiction over the agreement. The Eighth Circuit found that neither of these events had occurred. Though the dismissal order stated that the parties had settled, "mere mention of a settlement does not incorporate a settlement agreement into a court order." Nor did the district court explicitly retain jurisdiction over the financing agreement.

Civil Rights

Moran v. Clarke, 296 F.3d 638 (8th Cir. 2001) (*en banc*)

The case started with the alleged beating of a teenager while in custody. The

officers who arrested the teenager thought that he was a burglar. They later learned that he was mentally impaired, had Bell's Palsy, and thus was unable to tell them that he lived in the apartment where he was arrested. The police chief acknowledged that a mistake had been made and promised publicly to punish the wrongdoers. The resulting investigation focused on Moran, a police sergeant. Criminal charges were brought against Moran, but the jury acquitted him. The Bureau of Professional Standards brought administrative charges against Moran. The Board of Police Commissioners dismissed all charges but one: Moran's failure to properly exercise his duties as a police sergeant. The Board concluded that, while it could not tell how, when, or by whom the teenager had been beaten, it was certain that some beating occurred after he had been subdued, while Moran was in charge, and that Moran failed to discharge his duties by failing to prevent the beating. As punishment, the Board enforced an earlier, lengthy suspension without pay and demoted Moran.

Several months later, the Department meted out suspensions of one to five days to various officers, related to the same incident, for failure to report misconduct, false reporting, and improper performance of duty. Moran sued the Board and various police officials and officers under 42 U.S.C. §1983, alleging violation of his substantive due process rights. He also alleged a state law malicious prosecution claim. After Moran rested his case, the defendants moved for judgment as a matter of law. The trial court granted defendant's motion. Moran appealed the adverse judgment.

The Eighth Circuit reversed and remanded, holding that the district court erred in granting defendant's motion for judgment as a matter of law. The court found that Moran had met his burden of proving both that the Board's conduct violated a fundamental right and that its conduct was conscience-shocking. The court explained that whether a substantive due process right exists is a question of law, but whether the plaintiff has presented sufficient evidence to support a claimed violation of a substantive due process right is a question for the fact finder. In the court's view, a reasonable jury could have found in favor of either party based on the evidence presented. Thus a motion for judgment as a matter of law was inappropriate.

Remittitur

***Ross v. Kansas City Power & Light Co.*, 293 F.3d 1041 (8th Cir. 2002)**

In *Ross v. Kansas City Power & Light Co.*, the Eighth Circuit weighed several factors to determine the reasonableness of plaintiff's punitive damage award. Citing a mandatory duty to correct excessive awards, the court reduced the award and refused plaintiff's request for a new trial on damages.

Ross sued his employer, Kansas City Power & Light Co., claiming racial harassment, failure to promote, and retaliation. The district court granted KCPLC's summary judgment motion on the harassment and retaliation claims but left the failure-to-promote claims for a jury. At trial, the district court denied KCPLC's motion for judgment as a matter of law and submitted five of Ross' claims to a jury. The jury returned verdicts in favor of KCPLC on three of the claims and in favor of Ross on the remaining two claims, awarding Ross a total of $16,000 in actual damages and $1.5 million in punitive damages. Following post-trial motions, the district court reduced the punitive damages to $320,000 and set attorney fees and costs.

KCPLC appealed, arguing that judgment as a matter of law should have been granted before the issue was submitted to the jury because Ross was not as qualified as the other applicants who applied for the same positions. Ross cross-appealed, arguing that the jury's damages award should be reinstated or that a new trial be held on the issue of damages. Ross also sought an increase in attorneys' fees and costs, and conditionally appealed the district court's partial summary judgment (to be considered only if the jury verdict in his favor were reversed).

The Eighth Circuit affirmed the jury verdict on Ross' first successful claim, finding that the jury was entitled to believe Ross' evidence of pretext. But the court reversed the jury's decision on Ross' second successful claim, and directed the district court to enter judgment as a matter of law in favor of KCPLC. Holding that an employer, not a federal court, is in the best position to identify the most strongly qualified applicant, the court held that an employer "is properly entitled to [judgment as a matter of law] if the record conclusively reveals some other, nondiscriminatory reason for the employer's decision." *Ross*, at 1047.

The court affirmed the district court's reduction of Ross' punitive damages award, and reduced it further. The appellate court found that the 20:1 punitive-to-compensatory ratio was too high. Applying *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996), the appellate court reduced the punitive damage award to $60,000, resulting in a 10:1 ratio.

Ross argued that he was entitled to the option of a new trial on damages—the normal procedure when a district

court orders remittitur of compensatory damages. But the Eighth Circuit disagreed. The court reasoned that the reduction in punitive damages was "not actually a remittitur, but instead a reduction of the excessive punitive damages award in conformity with constitutional limits." *Ross*, at 1049.

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Ninth Circuit

The Final-Judgment Rule

***Lovell v. Chandler*, 303 F.3d 1039 (9th Cir. 2002)**
***Wallis v. Princess Cruises, Inc.*, 306 F.3d 827 (9th Cir. 2002)**
***Adonican v. City of Los Angeles*, 297 F.3d 1106 (9th Cir. 2002)**
***Andersen v. United States*, 298 F.3d 804 (9th Cir. 2002)**
***Miller v. Marriott Int'l, Inc.*, 300 F.3d 1061 (9th Cir. 2002)**

The Ninth Circuit recently reviewed five cases appealing what arguably were non-final orders, determined that it had jurisdiction to hear only two of them, and offered interesting insights into how it analyzes finality when determining jurisdiction.

In the case with the most detailed discussion, *Lovell v. Chandler*, plaintiffs sued the State of Hawaii, alleging that the state violated the ADA by denying them health insurance benefits. After the plaintiffs won partial summary judgment on liability, the district court certified a plaintiff class of all other persons who would have been eligible for the benefits. The court certified the class retroactively for liability for compensatory damages, and prospectively to determine liability for punitive damages. But the district court did not certify the class to determine the amount of compensatory damages in each individual case; instead, the court directed class members to file individual actions to determine their proper compensatory awards. After two of these individual actions concluded, the state appealed "in an abundance of caution," while simultaneously asserting that the appellate court had no jurisdiction to hear the appeal. The court disagreed and affirmed on the merits.

The state first argued that the court did not have jurisdiction under 28 U.S.C. §1291, which confers appellate jurisdiction only over "final decisions," and claimed that the judgments were not final because the lower court had not resolved the issue of punitive damages, citing *Arizona State Carpenters Pension Trust Fund v. Miller*, 938 F.2d 1038 (9th Cir. 1991). The state also noted that the appellate court was being asked to review a partial summary judgment, to do so without Rule 54(b) certification, and to consider two other claims never ruled on below—all further signs of a lack of finality.

Not impressed by the state's arguments or its own earlier holding in *Miller*, the court held that it had jurisdiction. The *Lovell* court noted that the appeals arose from actions in which no punitive damages were being sought, in contrast to *Miller*, in which the compensatory and punitive damage counts were "inextricably intertwined." Finding that no issues remained unresolved in the individual actions, the *Lovell* court held the awards of compensatory damages to be final, even without Rule 54(b) certification. The court brushed off the fact that it would have to review the merits of the partial summary judgment in the class action to decide the current appeals, commenting that the ruling could be viewed merely as one of the "earlier, non-final orders and rulings which produced the judgment," and thus reviewable.

The court then turned to a factor that apparently weighed heavily in its analysis: the conviction that, "[f]rom a practical standpoint, denying appellate jurisdiction in these cases would needlessly interfere with efficient judicial administration," as there were more than 300 individual compensatory damages actions arising from this single class action then pending.

Finally, the state argued that the judgments appealed from were not final because the trial court had not ruled on the plaintiffs' additional claims for injunctive and declaratory relief. But the Ninth Circuit deemed these other claims to have been abandoned, and therefore not an obstacle to appellate jurisdiction.

This practical approach, finding jurisdiction in an area where the court has decided interlocutory relief is needed, is seen again in *Wallis v. Princess Cruises*. In this matter, the widow of a passenger who fell from a cruise ship and drowned brought a wrongful death action. The cruise line won a partial summary judgment that sharply limited its liability to an amount set forth in the passage contract. Plaintiff appealed.

In admiralty cases, under 28 U.S.C. §1292(a)(3), a court of appeal has jurisdiction over interlocutory decrees "determining the rights and liabilities of the parties…." The cruise line, relying on authorities from the Third, Fourth, and Fifth Circuits, argued that this statute barred review, as its liability for the death had not been determined. The court disagreed, explaining that it views §1292(a)(3) as an exception to the final-judgment rule, and that the other circuits had read it much too narrowly. *Id.* at 832, 834. The court

found that it had jurisdiction where, as here, "only the validity and applicability of a provision limiting liability has been determined," a finding that will, "as a practical matter, usually end the case." *Id.* at 834.

A far more skeptical view of a partial summary judgment is seen in *Adonican v. City of Los Angeles*. The parties wanted early review, and agreed that plaintiff would voluntarily dismiss her remaining claims with an option to refile after the appeal, win or lose. The district court, unaware of this plan, dismissed the case without prejudice, and plaintiff appealed. Noting that courts examine the conduct of both the trial judge and the parties in determining finality, the court found that the parties had attempted to "usurp the trial court's role" and to "manufacture finality in the partial summary judgment order...." *Adonican*, 297 F.3d at 1108. The court dismissed for lack of jurisdiction but advised plaintiff how to proceed on remand to preserve her right of appeal after all issues were finally adjudicated.

In *Andersen v. United States*, another panel also suspected a motion being appealed was not what it seemed to be. A group of tax protesters sued the IRS for unconstitutional search and seizure of the group's property under a warrant. The protesters appealed the denial of a preliminary injunction, "one of the few kinds of appealable interlocutory orders." *Andersen*, 298 F.3d at 807. Although styled as an action for injunction, the motion actually sought return of property, relief governed by Federal Rule of Criminal Procedure 41(c). Denials of Rule 41(c) motions are generally nonappealable. *Id.* Holding that "the substance of the motion, not its form, controls its disposition," the court dismissed the appeal. *Id.*

The fifth appeal, *Miller v. Marriott*, was dismissed for lack of finality arising from confusion among the parties and the district court. The sequence of events was this: (1) The district court entered an order dismissing the plaintiffs' claim but without signing a separate judgment to that effect. (2) The district court entered another order, awarding attorneys' fees to the defendant. (3) The plaintiffs filed two notices of appeal, one for each of the preceding orders. (4) The plaintiffs filed three motions for reconsideration under Federal Rule of Civil Procedure 60(b). (5) The district court ruled that it did not have jurisdiction to dispose of the Rule 60(b) motions, absent remand from the Ninth Circuit, because the plaintiffs' appeals had divested it of jurisdiction.

Despite this last ruling by the district court, and the pleas of both parties that the Ninth Circuit decide the appeals, the Ninth Circuit held that it did not have jurisdiction. The court found that the Rule 60(b) motions were timely under Federal Rule of Appellate Procedure 4(a)(4), and that there could be no final judgment to appeal until the lower court had ruled on the merits of those motions.

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Eleventh Circuit

Appellate Jurisdiction

***Sierra Club v. Meiburg*, 296 F.3d 1021 (11th Cir. 2002)**

This case continues the Eleventh Circuit's recent case law defining the contours of its appellate jurisdiction over district court orders related to institutional consent decrees. The jurisdictional question arises under 28 U.S.C. §1292(a)(1), which gives the court appellate jurisdiction over interlocutory orders "granting, continuing, [and] modifying" injunctions. In *Birmingham Fire Fighters Ass'n 117 v. Jefferson County*, 280 F.3d 1289, 1292-93 (11th Cir. 2002), the court held it lacks jurisdiction over district court orders that merely interpret the underlying consent decree without changing the legal relationship among the parties. In the *Sierra Club* case, the court held that the district court's order was reviewable under §1292(a)(1) because that order imposed a new obligation on the EPA (to prepare implementation plans for pollution standards under the Clean Water Act) that was not part of the original consent decree. 296 F.3d at 1032. Because the district court's change in the parties' obligation was "blatantly or obviously wrong," the court held it had jurisdiction to review the resulting modification of the consent decree. *Id.*

Vacated Opinions

***United States v. Sigma Int'l, Inc.*, 300 F.3d 1278 (11th Cir. 2002) (*en banc*)**

The opinion in this complex criminal case was released by the *en banc* court after the parties settled the underlying dispute. The Assistant United States Attorney filed a motion with the court for a name-clearing hearing based on a number of unfavorable statements that the court had made about him in earlier panel opinions. The court denied the attorney's motion, and, in the process, expressed its opinion about the precedential value of vacated panel opinions, even when the *en banc* court never reconsiders the merits of the dispute. The court explained that the prior panel opinions had been vacated and thus carry no precedential value: "Both opinions remain vacated, and are officially gone. They have no legal effect whatever. They are void. None of the statements made in either of

them has any remaining force and cannot be considered to express the view of this Court." *Id.* at 1280.

Excessive Verdict

***Mason v. Ford Motor Co.*, 307 F.3d 1271 (11th Cir. 2002)**

The court in this case affirmed a $9 million jury verdict in a wrongful death product liability action governed by Georgia law. The opinion is significant for two reasons. First, the court refused to address the appellant's argument that the jury's verdict was inconsistent because trial counsel failed to object to the general verdict before the jury was discharged. *Id.* at 1274-76. Second, the court held that in a diversity action "we look to state law to assess whether the verdict is excessive; but federal law applies to our review of the district court's decision to order a new trial on the issue of excessiveness." *Id.* at 1276. This holding suggests that state statutory and common law standards governing punitive damages awards apply in federal court when the case arises in diversity.

Standard of Review

***Kelliher v. Veneman*, ___ F.3d ___, 2002 WL 31513310 (11th Cir. Nov. 13, 2002)**

In this federal employment discrimination case, the court established the standard of review governing appeals from the Merit Systems Protection Board to a district court under 5 U.S.C. §7703(b)(2). In such "mixed" cases where both discrimination and nondiscrimination claims are presented to the Board, the court held that the district court reviews the discrimination claims *de novo* but reviews the nondiscrimination claims under the deferential "arbitrary and capricious" standard established by 5 U.S.C. §7703(c).

Limitations

***Franze v. Equitable Assurance*, 296 F.3d 1250 (11th Cir. 2002)**

***City of Hialeah, Florida v. Rojas*, ___ F.3d ___, 2002 WL 31487602 (11th Cir. Nov. 8, 2002)**

These two decisions indicate that the Eleventh Circuit will decertify a class action if it determines that the named class representative's claims are time-barred.

Franze was a class action attacking insurance fraud in the sale of variable life insurance policies under federal securities law. The court concluded that the claims raised by the two representative class members were barred by the one-year statute of limitations governing securities fraud claims. 296 F.3d at 1254. Consequently, the named plaintiffs could not satisfy Rule 23(a)'s threshold requirements for class certification. Citing its recent decisions in *Piazza v. Ebsco Industries, Inc.*, 273 F.3d 1341 (11th Cir. 2001), and *Prado-Steiman v. Bush*, 221 F.3d 1266 (11th Cir. 2000), the court in *Franze* stated that "[w]ithout individual standing to raise a legal claim, a named representative does not have the requisite typicality to raise the same claim on behalf of the class." 296 F.3d at 1254. The court thus held that the district court erred in certifying the class because the named plaintiffs' claims were untimely, disqualifying them from asserting those claims on behalf of the class. *Id.*

The court reached the same result in *Rojas* in the context of a class action challenging city employment practices under Title VII and 42 U.S.C. §1983. Because the named plaintiffs' claims were untimely under the statute of limitations governing Title VII and §1983, the court decertified the class. *Rojas*, 2002 WL 31487602, at *3-*5.

Bankruptcy Appeals

***Chrysler Fin Corp. v. Powe*, ___ F.3d ___, 2002 WL 31567145 (11th Cir. Nov. 19, 2002)**

This case involved a class action brought by bankruptcy debtors to challenge attorneys' fees routinely charged by creditors under the Bankruptcy Code. The bankruptcy court certified a class action, and the creditors petitioned the Eleventh Circuit for permission to appeal under Rule 23(f). The court *sua sponte* questioned whether it, or the district court, had jurisdiction to review the bankruptcy court's certification decision in the first instance. The court held that Rule 23(f) does not permit parties to appeal a bankruptcy court's class certification decision directly to the court of appeals; instead, the party challenging the bankruptcy court's interlocutory order must petition the district court for permission to appeal under 28 U.S.C. §158(a). *Id.* at *3. As a result, the court dismissed the creditors' Rule 23(f) petitions. *Id.* at *4.

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D.C. Circuit

Privilege

***FTC v. GlaxoSmithKline*, 294 F.3d 141 (D.C.Cir. 2002)**

In a ruling that should help the business community combat assertions that attorney-client privileges associated with company documents are waived by disclosure of privileged documents to employees and others doing work for the company, the D.C. Circuit held that the district court should not have enforced an FTC subpoena to GlaxoSmithKline ("Glaxo") for documents concerning the drug Paxil.

The FTC sought the documents as part of its probe into whether Glaxo illegally attempted to thwart competition from manufacturers of generic versions of Paxil. Glaxo claimed many of the requested documents were protected from disclosure by various privileges. The FTC argued that Glaxo waived any privilege on these documents by disclosing them to Glaxo employees, consultants, and other third parties. The district court agreed with the FTC, rejected Glaxo's privilege claims, and ordered production of the disputed documents.

The D.C. Circuit reversed, finding (among other things) that the district court abused its discretion in concluding that Glaxo's wide dissemination of the documents precluded Glaxo's assertion that the documents had been kept confidential.

The D.C. Circuit held that the district court applied the correct standard: whether the documents were distributed on a "need to know" basis or to employees who were "authorized to speak or act" for the company. But the district court should not have required Glaxo to explain why each recipient received copies of certain documents. The task the district court demanded of Glaxo was both "Herculean" and "wholly unnecessary," given that a court should not presume that any business would include in a restricted circulation list a person with no reason to have access to the confidential document.

The court held that disclosure of a document to an employee or a consultant supports an inference "that the information was deemed necessary for the employees' or contractors' work." Further, courts should not review the business judgment of corporate officials who disclose documents to "specific individuals whose corporate duties relate generally to the contents of the documents" and who are able to provide affidavits in support of challenged disclosure decisions.

The court refused to distinguish between disclosure to Glaxo employees and disclosure to outside consultants retained by Glaxo. Glaxo showed by affidavit that its corporate counsel worked with these consultants in the same manner as they did with full-time employees to develop litigation and legal strategies. The court found "no reason to distinguish between a person on the corporation's payroll and a consultant hired by the corporation if each acts for the corporation and possesses the information needed by the attorneys in rendering legal advice."

Interlocutory Review

***In re: Veneman*, 2002 WL 3141427 (D.C.Cir. Oct. 29, 2002)**

The last issue of *Certworthy* surveyed the D.C. Circuit's recent decision announcing its criteria for deciding whether to grant interlocutory review of a class-certification order under F.R.C.P. 23(f). *In re: Lorazepam and Clorazepate Antitrust Litigation*, 289 F.3d 98 (D.C.Cir. 2002). In *Veneman*, the first decision applying *Lorazepam*, the court held that even when a petition for review raises legal issues that are fundamental but unsettled, interlocutory review is not warranted if critical questions required to resolve the issue were not fully briefed, and the court concludes that the issue will not evade appellate review.

Native American farmers and ranchers sued the Department of Agriculture, alleging discrimination in the administration of various farm credit and benefit programs, and seeking both money damages and equitable relief. The district court certified a class of plaintiffs who had filed discrimination complaints during a certain period but limited the class to pursuit of equitable relief. The Department argued that the district court lacked authority to certify only the plaintiffs' equitable claims, while leaving the money-damages claims "in limbo."

The Department petitioned for interlocutory review under F.R.C.P. 23(f), seeking an answer to this question: In a case involving requests for both monetary and equitable relief, may a district court certify a class for equitable relief only, without first determining whether plaintiffs' monetary claims predominate over their equitable claims?

The court denied the Department's petition for interlocutory review. The court agreed that the question posed by the Department is fundamental and had not been answered directly by any circuit court. But the court found that two important questions implicated in this case had not been fully explored. The first was how class certification would affect the due process rights of absent class members to have their own day in court. The second was whether the parties are bound to the judgment. Because these questions were not explored by the parties and were not clearly answered by U.S. Supreme Court case law, the D.C. Circuit opted not to grant interlocutory review.

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Federal Circuit

Interest

***Leider v. United States*, 301 F.3d 1290 (Fed.Cir. 2002)**

An unsecured creditor of Chapter 11 debtors did not initially receive his distributive share from the proceeds of the bankruptcy estate. He later petitioned the bankruptcy court for payment of his

share and received it but only the principal, not interest. The reason: The government had not invested the creditors' money, so the money had generated no interest to pay to the creditor. The creditor sued the United States, claiming that the government's failure to pay interest on his share constituted a taking of property under the Fifth Amendment. The district court dismissed the creditor's claim, and the Federal Circuit affirmed.

The circuit court found that while a creditor has a property right to his or her distributive share of the funds of a bankruptcy estate, the creditor does not have a property right to interest never earned on the unclaimed funds, and further that the government had no fiduciary obligation to invest the creditors' funds to generate interest. The court noted that the statute under which the subject funds were deposited "in the name and to the credit of [the] court" imposed no express duty on the government to earn interest on the deposited funds, as a fiduciary, a trustee, or otherwise.

Declaratory Judgment

***Vanguard Research, Inc. v. Peat, Inc.*, 304 F.3d 1249 (Fed.Cir. 2002)**

In *Vanguard*, the Federal Circuit clarified that a party's reasonable apprehension of litigation by a patent holder for infringement can serve as the basis for subject matter jurisdiction under the Declaratory Judgment Act, 28 U.S.C. §2201, even when the patent holder denies any such intent.

Vanguard Research brought a declaratory judgment action against Peat, Inc., a competitor that held a patent for a high temperature thermal destruction and recovery waste processing system ("TDR technology"), in which Vanguard asserted noninfringement, invalidity, and unenforceability of the TDR patent. Peat developed the TDR technology, which Vanguard marketed for Peat. The marketing relationship deteriorated, leading to litigation in many courts throughout the country.

When Vanguard sued for declaratory judgment, Peat moved to dismiss the suit. Peat argued that it had not brought a patent infringement claim against Vanguard and "still has not indicated any intention of doing so." Vanguard protested that Peat's actions raised a reasonable apprehension that Peat would eventually sue for infringement. Peat had already sought to enjoin Vanguard from production by suing Vanguard on other grounds. Peat had also written Vanguard a letter saying that Vanguard no longer had the right to market Peat's TDR technology under any name or to use Peat's intellectual property. And Peat had repeatedly contacted the United States Army and Congress, implying to them that Vanguard was using Peat's technology without Peat's permission.

The district court agreed with Peat and dismissed the declaratory judgment action, but the Federal Circuit reversed. The court noted that reasonableness of a party's apprehension is judged using an objective standard. Although the best evidence of a reasonable apprehension of suit is an express threat of litigation, such a threat is not required to invoke the court's declaratory judgment jurisdiction. Despite Peat's statement that it did not intend to sue Vanguard for patent infringement, a patentee's present intentions do not control whether a case or controversy exists. The appropriate inquiry asks whether Vanguard had a reasonable apprehension that Peat would sue it for patent infringement in the future. By filing the earlier lawsuit and informing Vanguard's clients that Vanguard was using the Peat technology without a license, Peat had shown "a willingness to protect that technology," and filing a lawsuit for patent infringement would be just another logical step toward protecting its technology.

Attorneys' Fees

***Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371 (Fed.Cir. 2002)**

In this case, the Federal Circuit reversed the award of attorneys' fees by the United States Court of Federal Claims to Brickwood Contractors, finding that Brickwood did not qualify as a prevailing party, even though its lawsuit was the "catalyst" that caused the government to change the behavior that Brickwood challenged.

The principal issue in this case was the applicability of the Supreme Court's recent decision in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), to the fee-shifting provisions of the Equal Access to Justice Act (the "EAJA"), 28 U.S.C. §2412, which require a plaintiff to be a "prevailing party" to recover attorney fees. Before *Buckhannon*, the majority of federal appellate courts had embraced the "catalyst theory," which granted prevailing-party status to a plaintiff who did not obtain a judicial victory if the plaintiff achieved a desired result "because the lawsuit brought about a voluntary change in the defendant's conduct." 532 U.S. at 601. In *Buckhannon*, the Supreme Court rejected the catalyst theory in determining whether one is a prevailing party under federal fee-shifting statutes. The *Buckhannon* Court held that under the American Rule, fees cannot be awarded to any party absent explicit statutory authority. The Court went on to explain

that only "enforceable judgments on the merits and court-ordered consent decrees create the material alteration of the legal relationship of the parties necessary to permit an award of attorney's fees." *Id.* at 604 (internal quotations omitted).

Before the Supreme Court's decision in *Buckhannon*, the Court of Federal Claims ("CFC") applied the catalyst theory to award attorney fees to Brickwood. After *Buckhannon* was decided, the government filed a Rule 60(b) motion for relief from the court's prior judgment awarding fees to Brickwood. The CFC denied the government's motion, distinguishing *Buckhannon* on grounds that it did not apply to the EAJA, and even if it did, its was limited to its facts: a purely voluntary change by the legislature not prompted by a lawsuit. The CFC further found that even if *Buckhannon* applied to the EAJA and to the facts of Brickwood, the CFC's statements at a prior hearing that it was favorably inclined toward the plaintiff's position met the requirements of *Buckhannon*.

The Federal Circuit reversed, rejecting each of the CFC's alternative theories as inconsistent with *Buckhannon* and unsupported by the statutory language of the EAJA. Of particular significance to DRI members, the Federal Circuit acknowledged criticism that its decision might inhibit settlements based on the defendant's voluntary change of conduct but reasoned that the Supreme Court had rejected that public policy consideration.

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Good writers are sticklers for continuity.
— John R. Trimble

Not by wrath does one kill but by laughter.
— Nietzsche

WHO SHOULD ATTEND

- Appellate Specialists
- In-House Counsel Who Supervise Appeals
- Civil Trial Lawyers
- Judges and Law Professors
- Appellate Court Clerks

INTRODUCTION

Appellate litigation is a specialized practice area requiring knowledge and skills different from trial court litigation. The successful appellate practitioner understands, and takes advantage of, those differences.

At DRI's fourth appellate advocacy seminar, the distinguished faculty of judges and appellate practitioners will explore the craft of appellate advocacy through presentations emphasizing topics essential to effective appellate advocacy, including: persuasive written and oral advocacy, when and how to use amicus curiae, how to obtain interlocutory review, and successfully litigating in courts of discretionary jurisdiction. In addition, the seminar will address the business of appellate litigation with a panel discussion focusing on techniques for building and marketing an appellate practice.

WHAT YOU WILL LEARN

- Advice from a panel of state and federal judges regarding persuasive appellate advocacy
- Strategies for successfully challenging punitive damages
- Tips from a Texas Supreme Court Justice for holding the court's attention
- Keys to obtaining review in courts of discretionary jurisdiction
- Balancing zealous representation and ethical considerations
- Proven methods to build and market your appellate practice

SCHEDULE

WEDNESDAY, APRIL 30, 2003

6:00 p.m. Registration and Cocktail Reception

THURSDAY, MAY 1, 2003

7:30 a.m. Registration and Continental Breakfast

8:30 a.m. Welcome and Introduction
Michael B. King, *Lane Powell Spears Lubersky LLP*, Seattle, Washington
R. Daniel Lindahl, *Bullivant Houser Bailey PC*, Portland, Oregon

8:45 a.m. Attracting and Holding the Court's Attention: A Judge's Perspective on Effective Appellate Advocacy
Persuasive appellate advocacy requires both making a good first impression and then keeping the court's attention as you explain all the reasons it should rule in your favor. Texas Supreme Court Justice Wallace Jefferson explains the right and wrong ways to get the court's attention and how to ensure the lasting impression is a good one.
Hon. Wallace B. Jefferson, *Supreme Court of Texas*, Austin, Texas

9:45 a.m. Successfully Challenging Punitive Damage Awards
Defendants in virtually every type of case face the threat of arbitrary and excessive punitive damage awards. The Supreme Court of the United States is again confronting the constitutional issues posed by punitive damages, and other appellate courts around the country are grappling with similar issues.
Mr. Boutrous discusses how to maximize the chances of persuading an appellate court to reverse or substantially reduce a punitive damage award.
Theodore J. Boutrous, Jr., *Gibson, Dunn & Crutcher LLP*, Los Angeles, California

10:45 a.m. Break

11:00 a.m. The Appellate Lawyer's Paradox: Providing Ethical *and* Zealous Representation
Appellate advocacy presents a wide array of ethical considerations, including advising the client, screening conflicts of interest, exercising candor toward the tribunal, and avoiding frivolous appeals while providing zealous representation of the client within the bounds of the law. Mr. Clay discusses these and other ethical dilemmas confronting the appellate lawyer.
Richard H.C. Clay, *Woodward, Hobson & Fulton LLP*, Louisville, Kentucky

12:00 p.m. Lunch (provided)
Join us for an informal session of networking with judges, speakers, and other attendees as we discuss current issues in appellate advocacy.

1:30 p.m. Amicus Curiae: The Keys to Writing Persuasive Amicus Briefs and Successfully Recruiting Amicus Support
Ms. Foggan will address everything you've ever wanted to know about amici curiae—except how to pronounce the name! Does amicus curiae really mean "friend of the court"? What are the possible purposes of amicus curiae participation? When should amici be sought out by a party? How does one find amicus support? What makes for an effective amicus submission? And how influential are amicus briefs anyway?
Laura A. Foggan, *Wiley, Rein & Fielding LLP*, Washington, D.C.

2:30 p.m. 30 Appellate Tips in 30 Minutes
In this fast-paced and lively presentation, Mr. Simpson provides a wealth of ideas for improving your appellate briefs and oral arguments. The tips will span the spectrum from little known tricks for pushing the limits of briefing deadlines to creating electronic briefs. Whether you are just out of law school or an experienced appellate litigator, you will go home with several creative and practical suggestions that will help your practice.
Andrew C. Simpson, *Andrew C. Simpson P.C.*, Christiansted, Virgin Islands

3:00 p.m. Break

3:15 p.m. How to Obtain Interlocutory Review
Sometimes the trial court's most important decisions are unappealable. From class certification rulings to decisions on jurisdiction, privilege, immunity, and timeliness, interlocutory orders often change the stakes of litigation. Mr. Smith suggests the best ways to obtain interlocutory review via Rule 23(f), statutory certification, and extraordinary writs.
Scott Burnett Smith, *Bradley Arant Rose & White LLP,* Birmingham, Alabama

4:15 p.m. Meeting of the Appellate Advocacy Committee

6:00 p.m. Cocktail Reception

7:30 p.m. Dine Arounds
Sign up at either cocktail reception to dine with other seminar attendees and speakers at some of Chicago's best restaurants.

FRIDAY, MAY 2, 2003

8:00 a.m. Late Registration and Continental Breakfast

8:30 p.m. Successfully Seeking and Opposing Review in Courts of Discretionary Jurisdiction
Courts of discretionary jurisdiction present special and unique challenges because they hear only the cases they choose to review. Mr. Sutton explains strategies for persuading the court to grant your request for review and deny that of your opponent.
Jeffrey S. Sutton, *Jones, Day, Reavis & Pogue*, Columbus, Ohio

9:30 a.m. How to Successfully Build and Market an Appellate Practice
Why should a client hire appellate counsel to handle an appeal and when should they be hired? What is the relationship between appellate counsel and trial counsel? How is appellate practice a specialty and what are the advantages for the client to hire an appellate specialist to handle an appeal? What do clients look for when seeking appellate counsel? How does an appel-

late specialist find clients? A panel of appellate practitioners and clients who hire appellate lawyers will discuss these and other issues, and provide invaluable guidance for how to build your appellate practice.

Theodore J. Boutrous, Jr., *Gibson, Dunn & Crutcher LLP*, Los Angeles, California
Laura A. Foggan, *Wiley, Rein & Fielding LLP*, Washington, D.C.
Lara Levitan, *Abbott Laboratories,* Abbott Park, Illinois
Kenneth Mauro, *Mauro, Goldberg & Lilling LLP*, Great Neck, New York
Elizabeth Sacksteder, *The Hartford Financial Services Group*, Hartford, Connecticut
Geneace Williams, *McDonald's Corporation*, Oak Brook, Illinois

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11:30 a.m. Lunch (on your own)

1:00 p.m. Moot Court Oral Argument Demonstration

Effective oral argument can help to communicate your message to the appellate court, answer the court's questions, and clarify the court's understanding of the issues. In this demonstration, two experienced oral advocates show how it's done by presenting a mock oral argument before a distinguished panel of state and federal judges.

Oral Advocates:

David M. Axelrad, *Horvitz & Levy LLP*, Encino, California
Susan Ford Robertson, *Ford, Parshall & Baker*, Columbia, Missouri

Panel:

Hon. Shirley J. Abrahamson*, Supreme Court of Wisconsin*, Madison, Wisconsin
Hon. Danny J. Boggs, *U.S. Court of Appeals for the Sixth Circuit*, Louisville, Kentucky
Hon. Alan C. Page, *Supreme Court of Minnesota*, St. Paul, Minnesota

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2:00 p.m. Break

2:15 p.m. Judicial Panel Critique of Oral Argument and Q-and-A with Seminar Attendees

The panel of judges will critique the mock oral argument, then engage in a lively question-and-answer session with the audience, with the judges answering questions and offering opinions concerning all facets of appellate advocacy.

Hon. Shirley J. Abrahamson*, Supreme Court of Wisconsin*, Madison, Wisconsin
Hon. Danny J. Boggs, *U.S. Court of Appeals for the Sixth Circuit*, Louisville, Kentucky
Hon. Alan C. Page, *Supreme Court of Minnesota*, St. Paul, Minnesota

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4:00 p.m. Adjourn